DCN 1597

Memorandum to Sheila Cheston, General Counsel
From: Jeff Patterson, Assistant Counsel
Date: June 1, 1993

This memorandum discusses two federal statutes, the Rehabilitation Act of 1973 and the Americans with Disability Act of 1990, which prohibit discrimination against handicapped individuals, and their potential application to the Defense Base Closure and Realignment Commission ("Commission").

I. REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973[1] was enacted to ensure that federal executive agencies, federal contractors and recipients of federal funds do not discriminate against handicapped persons. Section 794(a) of the Act states that a handicapped individual shall not, based solely on his or her handicap, be excluded from participation in, denied benefits of, or subjected to discrimination pursuant to any program or activity receiving federal financial assistance or conducted by any executive agency.

A. Applicability to the Commission[2]

According to its language, the Act's provisions are applicable to the Commission if the Commission's work is found to be a program or activity (1) that receives federal financial assistance; or (2) conducted by an executive agency.[3]

(i) "Program or Activity"

The first step in ascertaining whether the Act is applicable to the Commission is to determine if its operations are a "program or activity." The Civil Rights Restoration Act of 1987[4] amended the Act by defining "program or activity" as the operations of (i) instrumentalities of a state or of a local government; (ii) postsecondary institutions; (iii) business entities; or (iv) any entity formed by a combination of two or more of those listed in

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[1] 20 U.S.C. §§701 *et seq.* (West Supp. 1993).

[2] There is no provision in the Defense Base Closure and Realignment Act of 1990, P.L. 101-510, exempting the Commission from the provisions of 20 U.S.C. §794(a) or making it applicable.

[3] Id. at §794(a).

[4] 20 U.S.C. §1687 (1993).

(i) through (iii), which receives federal funding.[5] The Commission does not fall within any of these four categories and thus cannot be classified as a program or activity that receives federal funding.

Courts appear reluctant to expand this definition, applying instead a literal interpretation of the statute.[6] Accordingly,

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[5] §794(b) states in its entirety:
For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;
(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--
(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance. 29 U.S.C. §794(b).

[6] See Schroeder v. City of Chicago, 715 F.Supp. 222, 225-26 (N.D.Ill. 1989)(the court denied expanding the definition of "program or activity" to include an entire city, stating that 'nothing in the amendment's legislative history suggest that Congress contemplated classifying an entire municipality like the City of Chicago as a "program or activity" subject to [§794] of the Rehabilitation Act.'), Williams v. Meese, et al., 926 F.2d 994, 997 (10th Cir. 1991)(plaintiff, incarcerated in a federal penitentiary, was denied relief under the Rehabilitation Act because 'the Federal Bureau of Prisons does not fit the definition of "program or activities"' supplied by §794(b)), Johnston v. Capt. Horn,

even if the Commission qualifies as either a recipient of "federal financial assistance" or as an "executive agency" as used by the statute, its operations must still qualify as a "program or activity" in order for the Act's provisions to apply. Therefore, based on the preceding discussion, the Commission's operations, including the holding of hearings, employing of staff,[7] and operating a library available to the public, would not be considered a "program or activity" pursuant to the Act.

(ii) "Federal Financial Assistance"

To reiterate, one way to come within the mandate of §794 is to operate a program or activity that receives federal financial assistance. Whereas the Act fails to provide a definition for "federal financial assistance," federal courts have broadly construed the term to encompass assistance of any kind, whether it be direct or indirect.[8] The Supreme Court, however, has limited its meaning to those who actually "receive" such assistance, as opposed to those who merely benefit from it.[9] Furthermore,

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Commander Puget Sound Naval Shipyard, et al., 875 F.2d 1415, 1420-21 (9th Cir. 1989)(denying coverage of §794 to federal employers or employees, as the statutory definition of "program or activities" does not refer to these parties).

[7] As an aside, while employment is not within the breadth of §794, §791 involves the consideration of employment of individuals with disabilities. Section 791 creates a private cause of action for a federal employee discriminated against by a federal employer because of his or her handicap. Specifically, §791(b) states that "[e]ach department, agency, and instrumentality . . . in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality." 29 U.S.C. §791(b). See Johnston v. Capt. Horne, Commander Puget Sound Naval Shipyard, et al., 875 F.2d at 1421 ('If Postal Service employees, mentioned specifically in §794, may not sue, it follows that federal employees may not'), Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985)([§791] is exclusive remedy for federal employees). Whereas §791 is not within the scope of this memorandum, no further discussion of this provision will be made.

[8] Independent Housing Services of San Francisco v. Fillmore Center Associates, No. C 91-1220 RFP (D. Calif. Oct. 16, 1991) (Lexis 14960), and Arline v. School Board of Nassau County, 772 F.2d 759, 762 (11th Cir. 1985), cert. granted and limited on other ground, 475 U.S. 1118 (1986).

[9] Department of Transportation v. Paralyzed Veterans, 477 U.S. 597 (1986)(holding that commercial airlines are not recipients of federal financial assistance under [§794], but merely 'beneficiaries' of funding granted to airports).

Congress sought to impose §794 coverage as a condition of the recipient's agreement to accept federal funds.[10] The Tenth Circuit has also contributed to the development of this definition by holding that an entity receives such assistance when it receives a subsidy, as opposed to compensation for goods and services received, even if the compensation is in excess of the fair market value of the goods and services.[11]

Because the Commission's operating funds are authorized and appropriated by the federal government, these resources could be classified as "federal financial assistance," as they are a direct subsidy. As additional support for this notion, Mr. Paul Koffsky, Attorney, Office of General Counsel, Department of Defense, informally stated that in his view, §794(a) would apply to the Commission because "the Commission receives federal funding." However, this argument can be countered because the Commission was not given the opportunity to accept or reject these funds, being a creature of legislation, and with it the obligations imposed by §794.

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[10] Id. at 605. This contractual arrangement imposes §794's obligations upon those who are in a position to accept or reject them as part of the decision to accept federal funds. Id. See Glanz v. Beth Israel Corporation, 756 F.Supp. 632 (D.Mass. 1990)(agreeing with the reasoning of the Fifth Circuit in United States v. Baylor Univ. Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985), and holding that the receipt of Medicare or Medicaid payments by a hospital constituted 'receiving federal financial assistance'), Arline at 762 (finding that since impact aid--aid which is provided to school systems whose populations have been substantially enlarged by the attendance of federal employees' children, but which have reduced tax revenues due to the presence of federally-owned property in the district--does not fall within a specific exception to the Act, 'it must be defined as "federal financial assistance" in order to give effect to the broad legislative intent expressed in [§794]'), Nolley v. County of Erie, 776 F.Supp. 715, 742-43 (W.D.N.Y. 1991)(declaring that because federal funds received by the county did not exceed the fair market value of the cost to detain federal prisoners, it did not qualify as federal financial assistance).

[11] DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990). Mass v. Martin Marietta Corp., 805 F.Supp. 1530, 1542 (D.Colo. 1992), upheld DeVargas as being the applicable rule, noting the "result is consistent with the definition of 'federal financial assistance' used in federal regulations" which specifically excludes procurement contracts (citing 14 C.F.R. §1251.102(f)(1992)(NASA regulation); 32 C.F.R. §56.3(b)(1991)(DoD regulation)).

(iii) "Executive Agencies"

Title 5 of the U.S. Code[12] defines "executive agency" as an executive department, a government corporation or an independent establishment.[13] Whereas the Rehabilitation Act as a whole does not explicitly incorporate the definitions of Title 5, §794a (Remedies and Attorney Fees) adopts the procedures of Title VII of the Civil Rights Act of 1964[14] for the remedies, procedures and rights to be followed for complaints brought under §791 of the Act (Employment of Handicapped Individuals), that in turn incorporates the definition of executive agencies found in 5 U.S.C. 102 into its statutory language.

Although a tenuous connection, it could be argued that the Rehabilitation Act incorporates the definitions supplied by Title 5, specifically that of "executive agency." Coupled with Congress' intent to provide the statute with a broad reach,[15] it's arguable

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[12] Title 5 is entitled 'Government Organization and Employees.'

[13] 5 U.S.C. §105 (1977). An independent establishment is defined as an establishment of the executive branch which is not an executive or military department, government corporation, or part of another independent establishment. 5 U.S.C. §104 (1977).

[14] Specifically, 42 U.S.C. 2000e-16 (Section 717, Employment by Federal Government).

[15] Whereas the Act as originally enacted was not clear on its application to the federal government, it was amended in 1978 to explicitly extend its coverage to executive agencies. See Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 n.13 (11th Cir. 1982).

While the 1978 amendments also expanded the remedies of handicapped individuals, its legislative history illustrates Congress' intentions to enlarge, not reduce, the reach of the Act. For example, Congressman Jeffords proclaimed "[t]his amendment removes [the exemption for the federal government] and applied [§794] to the Federal Government . . . and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H13901 (daily ed., May 16, 1978). Furthermore, Senator Stafford exclaimed that "The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide those individuals with greater opportunities to maximize their potential." 124 Cong.Rec. S30311 (daily ed., Sept. 20, 1978). Court interpretations further support this view. See John and Jane Doe, et al. v. Devine, Blue Cross/Blue Shield Association and Aetna Life Insurance Company, 545 F.Supp. 576, 585 (D.D.C. 1982)(quoting Doe v. Colautti, 454 F.Supp. 621, 629, aff'd 592 F.2d 704 (3d Cir. 1979)), Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 (11th Cir. 1982).

that the Commission is an executive agency, as it is an independent establishment of the executive branch.

B. Office of Coordination and Review, Department of Justice

To alleviate all questions regarding the applicability of the Act to the Commission, the Commission could formally request from the Office of Coordination and Review,[16] Civil Rights Division, Department of Justice, a legal analysis, according to Dan Searing, Attorney-Advisor, with that office.

Mr. Searing informally suggested that the Commission continue including in its "notice of hearing" a statement requesting anyone requiring special accommodations to contact its office prior to the hearing, as well as ensuring the facilities where its hearings take place are handicap accessible. He also suggested that the Commission contact his office asking for a legal analysis <u>only after</u> the Commission has received a complaint from someone who feels they have been discriminated against on the basis of their handicap.[17]

Therefore, according to Mr. Searing, the Commission should promulgate regulations only upon such determination by the DoJ as a result of their legal analysis or upon notification by the DoJ based on their periodic review of small agencies and departments.

C. Obligations Imposed by the Act

Upon a determination that the Rehabilitation Act applies to a specific "program or activity," §794(a) further requires each agency to promulgate regulations implementing the purpose of the statute. Whereas one would presume that this would result in a multitude of varied and conflicting provisions, it has not, as most agencies have generally duplicated the Equal Employment Opportunity Commission's regulations.[18]

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[16] The Office of Coordination and Review is the department of the DoJ which has been delegated, inter alia, the responsibility for coordinating the implementation and enforcement of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). The Attorney General was originally charged with this responsibility pursuant to Executive Order 12250 (1980).

[17] The basis of Mr. Searings suggestion to wait until after a complaint has been received to issue regulations is his belief that the Commissions 1995 mandate would have expired by the time the regulations would become effective.

[18] <u>Overton v. Reilly</u>, 977 F.2d 1990, 1193-94 (7th Cir. 1992). The EEOC's regulations are found at 29 CFR Ch.XIV, Subpart G (§§1613.701-.709)(1991)(copy attached).

Assuming for the benefit of analysis that the DoD's regulations are typical of those promulgated by most agencies,[19] the Commission's hearings would be required to be accessible to handicapped persons,[20] with reasonable accommodations[21] being made to known physical or mental handicaps of an individual.[22] The Commission would be excepted from this requirement if it could establish that the requested accommodation would impose an undue hardship on the operation of its program.[23]

In issuing regulations, Mr. Searing of the DoJ stated that the Commission could do so in the form of a "joint resolution" in which several small agencies and departments promulgate regulations together in an effort to save time and resources.[24] The Office of Coordination and Review would organize such efforts.

D. Recommendation

Whereas an argument could be made both for and against the application of the Rehabilitation Act to the Commission, it may be in the best legal interest of the Commission to formally request

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[19] 32 CFR Part 56. A copy of DoD's regulations and internal directive are attached.

[20] 32 CFR §56.8(c)(2) states that each program or activity shall operate in such a way that, when viewed in its entirety, is readily accessible to and usable by handicapped persons.

[21] 32 CFR §56.8(d)(2) states that reasonable accommodation includes "(i) making facilities . . . readily accessible to and usable by handicapped persons; (ii) . . . the provision of readers or certified sign-language interpreters; and similar actions." The same language is found in EEOC's regulations at 29 CFR §1613.704(b).

The determination of whether an accommodation is reasonable is fact-specific and requires the court to perform individualized examinations to ensure that the justifications "reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives . . . ." Arline, 772 F.2d at 765. For example, in Wonder v. Department of Energy, 35 M.S.P.R. 209 (1987), the Merit Systems Protection Board stated that "where the ability of a qualified handicapped individual to understand and communicate . . . with regard to proceedings before the Board is impaired, the Board is obligate to provide an interpreter" pursuant to §794. Id.

[22] 32 CFR §56.8(d).

[23] Id.

[24] The agencies and departments involved would utilize a prototype prepared by the Department of Justice pursuant to Executive Order 12250 and initially issued to executive agencies. See n.18.

from the Department of Justice a legal analysis to decide this issue. The DoJ's determination would be conclusive and permit the Commission, if required, to begin promulgating regulations. In the alternative, if the Commission is not required to issue regulations, the issue will be permanently resolved. This approach may be preferred to that of waiting for a complaint before asking for review, because the issue will be decided and no further time will be expended on its regard. Furthermore, if compliance with the Act is required, it is to the advantage of the Commission to do so as quickly as possible rather than incur any further risk of litigation.

II. THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990[25], whose mission is to eliminate discrimination against individuals with disabilities, is not applicable to the federal government.[26] Accordingly, the statute's provisions have no affect on the Commission.

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[25] 42 U.S.C. §§12101 *et seq.* (1993).

[26] See 42 U.S.C. §§ 12111(5), 12131(1).

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[26] See 42 U.S.C. §§ 12111(5), 12131(1).

U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

April 20, 1994

90-8-6-219

Mary Ann Hook, Esq.
Acting General Counsel
Defense Base Closure and Realignment Commission
1700 N. Moore St., Room 1425
Arlington, VA 22209

Re: Sierra Club v. Babbitt, No. MO-91-CV-069 (W.D. Tex.)

Dear Ms. Hook:

The Justice Department is sending this letter to advise you and several other federal agencies of a significant recent development in this Endangered Species Act litigation, which concerns regulation of water withdrawals from the Edwards Aquifer in south-central Texas. Until now, that litigation has been directed only at the Secretary of the Interior and the U.S. Fish and Wildlife Service (FWS).

By way of background, following a four-day trial in November 1992, the district court entered a Judgment and detailed Findings of Fact and Conclusions of Law against the FWS on February 1, 1993, finding that FWS had failed to implement a recovery plan to protect several endangered and threatened species that depend on adequate supplies of water from the aquifer. While the case was on appeal, FWS agreed to a settlement with the plaintiffs, which resulted in the district court's Amended Judgment and Amended Findings of Fact and Conclusions of Law dated May 26, 1993. The Fifth Circuit then dismissed the remaining appeals of the defendant-intervenors (the State of Texas, the City of San Antonio, and various pumpers), Sierra Club v. Babbitt, 995 F.2d 771 (5th Cir. 1993), concluding that they were not affected by the terms of the Judgment and lacked standing to appeal. The district court's Amended Judgment stated that he would invite the plaintiffs to seek further relief.

As of last Friday, the scope and complexion of this case changed considerably in a way that affects your agency. At a status conference on April 15, 1994, the plaintiff Sierra Club moved to amend its Complaint by filing claims against five federal agencies [the Environmental Protection Agency (EPA), the Department of Defense (DOD), the Defense Base Closure and Realignment Commission (DBCRC), the Department of Agriculture (USDA), and the Department of Transportation (DOT)].

The Sierra Club's Amended and Supplemental Complaint alleges that FWS has violated sections 4, 7, and 9 of ESA, 16 U.S.C. §§ 1533, 1536, 1538, by permitting water users to withdraw excessive amounts of water from the Edwards Underground Water Aquifer in south-central Texas. In addition, the Sierra Club alleges that EPA, DOD, DBCRC, USDA, and DOT have violated ESA section 7 by failing to consult with FWS on the impacts of their federally authorized, funded, and implemented actions and that, as a result, these agencies have committed an unauthorized "take" of endangered and threatened species. The Sierra Club also raises similar "take" claims against a state agency, the Texas Natural Resource Conservation Commission, as well as the City of San Antonio. Finally, the plaintiff raises a Superfund claim against EPA and San Antonio, alleging that excessive withdrawals have led to intrusion of toxic hydrogen sulfide into the underground aquifer, which is San Antonio's sole source of drinking water.

The court has given us until Friday, April 29, to respond to the plaintiff's Motion to Amend the Complaint. While we intend to oppose the motion on the grounds that final judgment has been entered in the prior phase of the litigation against FWS, there is no question that the court (Senior Federal Judge Bunton) will grant the plaintiff's motion. In remarks at the April 15 status conference, the court expressed its frustration that so little progress has been achieved in protecting the aquifer and the ESA-listed species in the past three years. Based upon his prior handling of this case, we must advise you candidly that we anticipate that Judge Bunton will do virtually whatever the plaintiffs ask.

We need your input quickly in preparing our response to the motion to amend and thereafter in preparing an answer to the amended complaint and developing a litigation strategy. Please contact me at telephone (202/272-4463), FAX (202/724-6941), or overnight mail at the following address:

Charles R. Shockey
Wildlife & Marine Resources Section
Environment & Natural Resources Division
U.S. Department of Justice
601 Pennsylvania Ave., N.W., Room 5000
Washington, D.C. 20004

Thank you for your assistance. I suspect that we are in for a very difficult challenge in responding to this litigation.

Very truly yours,

Charles R. Shockey

Charles R. Shockey

Enclosures

MAJ Ives
/ourrept

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837

REPLY TO
ATTENTION OF

DAJA-EL

22 April 1994

MEMORANDUM THRU

ASSISTANT JUDGE ADVOCATE GENERAL FOR CIVIL LAW & LITIGATION

ASSISTANT JUDGE ADVOCATE GENERAL

FOR THE JUDGE ADVOCATE GENERAL

SUBJECT: Edwards Aquifer Litigation - Notice of Citizen Suit Against the Department of the Army

1. Background.

a. In the case of Sierra Club v. Lujan (now Sierra Club v. Babbitt), the plaintiffs allege that the Fish and Wildlife Service (FWS) failed to develop adequate recovery plans to protect several endangered species dependant upon the Comal Springs and San Marcos Springs because the plans did not account for the reduction in springflow caused by withdrawals from the Edwards Aquifer. On 1 February 1993, the U.S. District Court for the Western District of Texas agreed with the plaintiffs and ordered the FWS to determine the minimum springflow which would avoid both a taking of and jeopardy to the endangered Fountain Darter, the Texas Blind Salamander and Texas Wild Rice.

b. In May 1993, the Texas legislature passed comprehensive legislation to regulate the entire aquifer. The legislation created the Edwards Aquifer Authority which would have regulated withdrawals, charged fees, and raised funds through assessments to obtain alternate water supplies. The legislation appeared to impose adequate water conservation authority within the region to resolve the ESA issues. The Department of Justice's (DoJ) Civil Rights Division, however, opined that the legislation's appointment of members of the Edwards Aquifer Authority, instead of election of members, violated the Voting Rights Act of 1965. The Governor of Texas and state water officials attempted to negotiate a settlement with DoJ but the negotiations failed. The State of Texas has sued the federal government over the issue.

c. As a result of the state's failure to regulate Edwards aquifer pumping, the plaintiffs moved that the District Court appoint a Edwards Aquifer "water monitor." On 24 February 1994, the Court appointed a water monitor and ordered that the United States and other defendants pay the monitor. Negotiations over

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the monitor's duties and compensation broke down. The parties tried, but failed to resolve their differences in a 15 April 1994 conference with the trial court.

2. On 15 April 1994, the Sierra Club and a Sierra Club member served notice of suit on the Department of the Army; thirty-nine other federal agencies; the City of San Antonio, Texas; the Texas Natural Resources Conservation Commission; and other significant water users. The sixty-day notice is required by the ESA prior to initiation of a citizen suit. The notice alleges violations of the ESA, to include failure to consult, failure to implement recovery plans, and failure to curb pumping activities that could lead to jeopardy or taking of endangered species.

3. The Fish and Wildlife Service is currently the federal defendant in the case of Sierra Club v. Babbitt. The Army is not a party to that litigation. The plaintiffs want to add to the suit other federal parties, such as, DoD, the Army, the Air Force, and the Base Realignment and Closure Commission. In addition to the sixty-day notice letter, the plaintiff has also filed with the court a Motion for Leave to File an Amended and Supplemental Complaint which will detail the relief sought as well as make the Army a defendant. The Department of Justice (DoJ) must respond to the motion by 29 April 1994. The Department of Justice is expected to oppose the motion and argue additional parties cannot be added until the 60 day notice period expires.

4. The Plaintiffs' Requests for Relief.

a. The plaintiffs, in the Motion to Amend the Complaint, want the court to direct the water monitor to prepare an emergency withdrawal reduction plan for the aquifer which would specify the reductions and required conservation, reuse, and alternative supply measures necessary to ensure adequate spring flow in the Comal Springs and San Marcos Springs sufficient to protect the endangered species.

b. The plaintiff wants the noticed federal parties to immediately form an Edwards Interagency Task Force to consult and plan under the ESA, CERCLA (the plaintiff makes allegations of hydrogen sulfide pollution in the aquifer) and other statutes, as appropriate, to avoid jeopardy to the species and protect the water quality of the Edwards Aquifer. The Task Force would have to consider limits to federal pumping and closure and relocation of San Antonio's military bases.

c. The plaintiffs also want a ruling that the federal

defendants and the City of San Antonio are in violation of the ESA §9 prohibition against "taking" an endangered species. The plaintiffs single out the military's use of aquifer water to irrigate lawns and golf courses and submit non-essential uses at San Antonio military bases could be carried out with no disruption of essential public health or safety and little economic impact.

d. The plaintiffs did not request an injunction, but have threatened to ask the court to order an end to withdrawals and regulate pumping if the defendants fail to comply and make progress.

5. Impact and Involvement of Fort Sam Houston.

a. In March 1993, Fort Sam Houston requested the Fish and Wildlife Service's (FWS) advice on our duty to consult after the February 1993 District Court order. In a May 1993 meeting between the FWS and Fort Sam Houston staff, the FWS would not agree that Fort Sam Houston's pumping had "no effect" or "does not adversely effect" the listed species dependant upon spring flows. At the time the FWS favored one joint consultation involving all the federal agencies in the San Antonio area. The FWS advised Fort Sam Houston to wait for the Texas legislature to act before initiating formal §7 ESA consultation.

b. The Texas legislation required that all Edwards Aquifer users file use permits by 1 March 1994. Even though the legislation was challenged in the Voting Rights Act context, Fort Sam Houston complied with water data reporting process in the legislation and filed the required historical use data.

c. The litigation's impact on Fort Sam Houston's water supply cannot be determined until the minimum spring flow and safe yield requirements are established either by the Court, FWS, or the water monitor if the plaintiffs succeed. However, the impact could be substantial if the state or the court does not adopt an effective water conservation scheme that spreads the burden equally within the federal and private sectors. If not, the federal agencies would bear the brunt of the reductions because they have the primary responsibility to conserve endangered species under ESA §7.

6. This office will work the issues with the Army General Counsel's Office, Fort Sam Houston SJA, the U.S. Air Force, and

SUBJECT: Edwards Aquifer Litigation Notice of Citizen Suit Against the Department of the Army

the Department of Justice. POCs for this office are LTC Mark S. Graham and MAJ Craig Teller.

WILLIAM J. MOGOWAN
Colonel, JA
Chief, Environmental Law
Division

CF:
BG Brown
COL Donnelly
Mr. Peter Murphy
COL Barnes

Memo from
FRANK A. CIRILLO, JR., P.E. 5/3

Mary Ann cc Ben, Bob, Ed, Alex

Reference the Snail Darter Suite:— The attached DBCRC Sprendsheet gives an indication of the San Antonio 1993 +/-

— I include the questionaire sections for Water Source for:

Base	Base Wells or Community	Ground or Surface
BROOKS	C	G
Kelly	B	G
LACKLAND	B	G *see note
RANDOLPH	B	G

1993 DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION
Estimated Economic and Personnel Effects of Determinations
By State

Unit ID Code	Installation Name	DOD Recommend.	DBCRC Action	Military Personnel	Civilian Personnel	Total Personnel	Cost of Action	Savings 1994-1999	Annual Savings	Net Present Value (NPV)
A-48188	CORPUS CHRISTI ARMY DEPOT, TX	NONE	RECEIVE	0	700	700	0.00	0.00	0.00	[illegible]
A-48515	RED RIVER ARMY DEPOT, TX	RECEIVE	RECEIVE	0	613	613	0.00	0.00	0.00	[illegible]
D-	DEF DIST DEPOT RED RIVER, TX	NONE	RECEIVE	1	215	216	15.90	0.00	0.00	[illegible]
D-	DISA LSBA-IPC SAN ANTONIO, TX	REALIGN	REALIGN	0	27	27	0.00	0.00	0.00	0.00
D-	DISA-AFMPC RANDOLPH AFB, TX	DISESTBLSH	DISESTBLSH	-62	-1	-63	0.00	0.00	0.00	0.00
D-	DISA-CPSC SAN ANTONIO, TX	DISESTBLSH	DISESTBLSH	-25	-15	-40	0.00	0.00	0.00	0.00
D-	DISA-NAVDAF CORPUS CHRISTI, TX	DISESTBLSH	DISESTBLSH	0	0	0	0.00	0.00	0.00	0.00
F-BJHZ	BERGSTROM AFB, TX	REDIRECT	NONE	0	0		0.00	0.00	0.00	0.00
F-DDPF	CARSWELL AFB, TX	REDIRECT	REDIRECT	0	0		0.30	1.80	0.00	0.00
F-FNWZ	DYESS AFB, TX	REDIRECT	REDIRECT	-23	0	-23	0.00	0.00	0.00	0.00
F-MBPB	KELLY AFB, TX	RECEIVE	RECEIVE	0	15	15	0.00	0.00	0.00	0.00
F-MPLS	LACKLAND AFB, TX	RECEIVE	RECEIVE	129	22	151	0.00	0.00	0.00	0.00
F-VNVP	SHEPPARD AFB, TX	REDIRECT	REDIRECT	-135	-15	-150	0.00	0.00	0.00	0.00
N-DDPF	CARSWELL AFB, TX	RECEIVE	RECEIVE	1487	1493	2980	0.00	0.00	0.00	0.00
N-	MC RESERVE FORT WORTH, TX	RECEIVE	RECEIVE	11	0	11	0.00	0.00	0.00	0.00
N-62257	N/MRC ABILENE, TX	CLOSE	CLOSE	-17	0	-17	0.20	0.01	0.09	0.51
N-00216	NAS, CORPUS CHRISTI, TX	NONE	RECEIVE	143	19	162	0.00	0.00	0.00	0.00
N-00215	NAS, DALLAS, TX	CLOSE	CLOSE	-1112	-263	-1375	136.46	-113.54	5.21	-77.86
N-68891	NAVAL STATION INGLESIDE, TX	NONE	RECEIVE	598	7	605	0.00	0.00	0.00	0.00
N-63485	NRF MIDLAND, TX	CLOSE	CLOSE	-6	0	-6	0.01	0.70	0.17	1.56
Net Totals for TX				989	2817	3806	152.87	-111.03	5.47	-75.79
A-49575	TOOELE ARMY DEPOT, UT	REALIGN	REALIGN	-16	-1942	-1958	73.70	107.20	51.00	387.20
D-	DEF DIST DEPOT TOOELE, UT	CLOSE	CLOSE	-1	-230	-231	23.70	-19.20	5.60	20.00
D-	DISA LSBA-IPC OGDEN (HILL AFB), UT	REALIGN	REALIGN	-96	-53	-149	0.00	0.00	0.00	0.00
D-	DISA-IPC OGDEN, UT	DISESTBLSH	DISESTBLSH	1	-114	-113	0.00	0.00	0.00	0.00
F-KRSM	HILL AFB, UT	RECEIVE	RECEIVE	420	244	664	0.00	0.00	0.00	0.00
N-62124	NRC OGDEN, UT	CLOSE	CLOSE	-12	-1	-13	0.04	2.16	0.48	4.61
Net Totals for UT				296	-2096	-1800	97.44	90.16	57.08	411.81

[VIII.5.H] H. What is the annual utilization capacity?

[VIII.5.I] I. What is the present utilization rate?

[VIII.5.J] J. Are there any known noise sensitive areas associated with the range?
[VIII.5.J(1)] (1) If yes, describe:

[VIII.5.K] K. Are there any known civilian/commercial encroachment associated with the range property?
[VIII.5.K(1)] (1) If yes, describe:

[VIII.5.L] L. What is the status of hazardous material/waste/ordnance disposal?

[VIII.5.M] M. What is the status of any Memorandum of Understanding, Letters of Agreement associated with the range?

VIII.6 UTILITIES - WATER

[VIII.6.A] A. Is the water treatment system operated by the Base or by the local Community? C
[VIII.6.A(1)] (1) When was the system constructed? 1943

[VIII.6.B] B. What is the source of the water supply? G
[VIII.6.B(1)] (1) Specify: THE EDWARDS AQUIFER

[VIII.6.C] C. What is the capacity of the water supply system? 1,520,000 GAL/DAY

[VIII.6.D] D. Does the base supply water to the local community? N

[VIII.6.E] E. If the water treatment system is operated by the local community, what is the daily average demand of the base? 352,000 GAL/DAY

2/2

Brooks AFB
29 January 1993

[VIII.6.F] F. Are there any other constraints to the base water system:
[VIII.6.F(1)] (1) Quality? N
[VIII.6.F(2)] (2) Quantity? Y
[VIII.6.F(3)] (3) Seasonal shortages? Y
[VIII.6.F(4)] (4) Capacity? N
[VIII.6.F(5)] (5) Storage? N

[VIII.6.G] G. Are regional water supplies adequate? AT PRESENT, THE REGIONAL WATER SUPPLY APPEARS TO BE ADEQUATE. HOWEVER, FUTURE WATER DEMANDS MAY REQUIRE THE LOCATION OF SUPPLEMENTAL SOURCES OF WATER.

VIII.7 UTILITIES - WASTEWATER

[VIII.7.A] A. Is the base wastewater treatment system Base operated or operated by the local Community? C
[VIII.7.A(1)] (1) What is the capacity of the system:
[VIII.7.A(1a)] (a) Maximum - 157,000,000 GAL/DAY
[VIII.7.A(1b)] (b) Minimum - 0

[VIII.7.A(2)] (2) If community operated, what does the base contribute? 230,000-416,667 GAL/DAY
[VIII.7.A(3)] (3) When was the system constructed? 1943-1986

VIII.7 UTILITIES - WASTEWATER (cont)

Kelly 1/1

[VIII.5.M] M. What is the status of any Memorandum of Understanding, Letters of Agreement associated with the range?

VIII.6 UTILITIES - *WATER*

[VIII.6.A] A. Is the water treatment system operated by the Base or by the local Community? **B***
[VIII.6.A(1)] (1) When was the system constructed? **1940**

[VIII.6.B] B. What is the source of the water supply? **G**
[VIII.6.B(1)] (1) Specify: **EDWARDS UNDERGROUND AQUIFER**

[VIII.6.C] C. What is the capacity of the water supply system? **5,500,000 GAL/DAY**

[VIII.6.D] D. Does the base supply water to the local community? **N**

[VIII.6.E] E. If the water treatment system is operated by the local community, what is the daily average demand of the base?

[VIII.6.F] F. Are there any other constraints to the base water system:
[VIII.6.F(1)] (1) Quality? **N**
[VIII.6.F(2)] (2) Quantity? **N**
[VIII.6.F(3)] (3) Seasonal shortages? **Y**
[VIII.6.F(4)] (4) Capacity? **N**
[VIII.6.F(5)] (5) Storage? **N**

[VIII.6.G] G. Are regional water supplies adequate? **NO**

LACKLAND
1/1

VIII.6 UTILITIES - *WATER*

[VIII.6.A] A. Is the water treatment system operated by the **B**ase or by the local Community? **B**

[VIII.6.A(1)] (1) When was the system constructed? **1940**

[VIII.6.B] B. What is the source of the water supply? **G**

[VIII.6.B(1)] (1) Specify:

[VIII.6.C] C. What is the capacity of the water supply system? **15,141,600 GD**

[VIII.6.D] D. Does the base supply water to the local community? **N**

[VIII.6.E] E. If the water treatment system is operated by the local community, what is the daily average demand of the base?

[VIII.6.F] F. Are there any other constraints to the base water system:

[VIII.6.F(1)] (1) Quality? **N**

[VIII.6.F(2)] (2) Quantity? **N**

[VIII.6.F(3)] (3) Seasonal shortages? **Y**

[VIII.6.F(4)] (4) Capacity? **N**

[VIII.6.F(5)] (5) Storage? **N**

[VIII.6.G] G. Are regional water supplies adequate? **N, THIS ISSUE HAS BECOME A MAJOR CONCERN FOR THE USERS OF THE EDWARDS AQUIFER. CURRENTLY THE TEXAS WATER COMMISSION IS SEEKING CONTROL OF THE AQUIFER, THUS**

Randolph 1/2

[VIII.5.E] E. Does the range have any electronic warfare capability?
[VIII.5.E(1)] (1) If yes, describe. What are the associated restrictions?

[VIII.5.F] F. Does the range have any live ordnance capability?
[VIII.5.F(1)] (1) If yes, describe. What are the associated restrictions?

[VIII.5.G] G. Does the range have any special weapons capability?
[VIII.5.G(1)] (1) If yes, describe. What are the associated restrictions?

[VIII.5.H] H. What is the annual utilization capacity?

[VIII.5.I] I. What is the present utilization rate?

[VIII.5.J] J. Are there any known noise sensitive areas associated with the range?
[VIII.5.J(1)] (1) If yes, describe:

[VIII.5.K] K. Are there any known civilian/commercial encroachment associated with the range property?
[VIII.5.K(1)] (1) If yes, describe:

[VIII.5.L] L. What is the status of hazardous material/waste/ordnance disposal?

[VIII.5.M] M. What is the status of any Memorandum of Understanding, Letters of Agreement associated with the range?

VIII.6 UTILITIES - *WATER*

[VIII.6.A] A. Is the water treatment system operated by the **B**ase or by the local Community? **B**
[VIII.6.A(1)] (1) When was the system constructed? **1929**

RND
Randolph

Randolph 2/2

[VIII.6.B] B. What is the source of the water supply? **G**
[VIII.6.B(1)] (1) Specify:

[VIII.6.C] C. What is the capacity of the water supply system? **6,696,000 GAL/DAY**

[VIII.6.D] D. Does the base supply water to the local community? **N**

[VIII.6.E] E. If the water treatment system is operated by the local community, what is the daily average demand of the base?

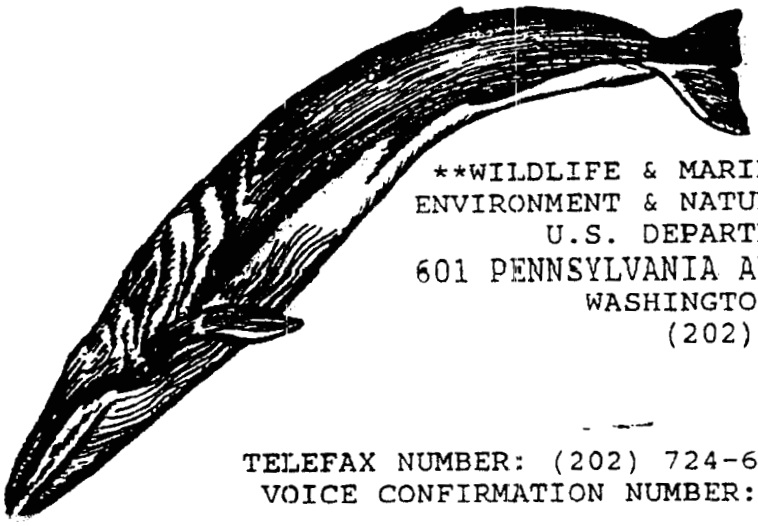
[VIII.6.F] F. Are there any other constraints to the base water system:
[VIII.6.F(1)] (1) Quality? **N**
[VIII.6.F(2)] (2) Quantity? **N**
[VIII.6.F(3)] (3) Seasonal shortages? **N**
[VIII.6.F(4)] (4) Capacity? **N**
[VIII.6.F(5)] (5) Storage? **N**

[VIII.6.G] G. Are regional water supplies adequate? **YES**

VIII.7 UTILITIES - *WASTEWATER*

[VIII.7.A] A. Is the base wastewater treatment system **B**ase operated or operated by the local Community? **C**
[VIII.7.A(1)] (1) What is the capacity of the system:
[VIII.7.A(1a)] (a) Maximum - **6,200,000 GAL/DAY**
[VIII.7.A(1b)] (b) Minimum - **UNKNOWN**

[VIII.7.A(2)] (2) If community operated, what does the base contribute? **600,000 GAL/DAY**



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

SIERRA CLUB, Plaintiff, and GUADALUPE-BLANCO RIVER AUTHORITY, Plaintiff-Intervenor, v. BRUCE BABBITT, et al., Defendants, and DANNY McFADIN, et al., Defendant-Intervenors.	CIVIL ACTION NO. MO-91-CA-069

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS THE SIERRA CLUB AND CLARK HUBBS FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT

I. INTRODUCTION

Federal defendants, Secretary of the Interior Bruce Babbitt and the United States Fish and Wildlife Service (FWS), oppose the plaintiff Sierra Club's[1] motion to file an amended and supplemental complaint. Plaintiff submits its motion pursuant to Fed. R. Civ. P. 15 and pursuant to the Judgment, Amended Judgment, and the court's subsequent orders. Pl. Mot. at 1-2. Unlike Rule 15, however, their motion draws no distinction, nor does the revised complaint, between "amended" and "supplemental" pleadings.

Under Rule 15(a), a party may amend a pleading after a responsive pleading has been served only with leave of the court. Although plaintiff correctly notes that, under Rule 15(a), leave

[1] Notwithstanding the presumptive caption, Clark Hubbs is not a plaintiff and may not file any motion with the court unless and until such time as he is made a plaintiff by court order.

to amend "shall be freely given when justice so requires," the presumption in favor of liberal amendment of pleadings no longer applies in the present context where the case has proceeded to post-trial, post-judgment, and post-appeal context. This is especially true because nearly a full year has passed.

Under Rule 15(d), the court may permit a party to serve a "supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). The same presumption favoring liberal amendments does not exist in Rule 15(d) for subsequent events.

In reality, the plaintiff seeks neither to amend nor to supplement its pleadings, but instead attempts to bring an entirely new and different lawsuit under the guise of the existing Endangered Species Act (ESA) litigation. Under these circumstances, the motion should be denied, as the plaintiff must pursue its new claims by bringing a new action against the newly-identified defendants on the newly-pleaded causes of action under the ESA or other federal statutes listed in its pleading.

II. DISCUSSION

As this court has ruled, and as the Fifth Circuit has agreed, absent agreement of the parties, a plaintiff requires the court's permission to amend its complaint. Bilmar Drilling, Inc. v. IFG Leasing Co., 795 F.2d 1194, 1199 (5th Cir. 1986). That permission should be denied when plaintiff waited ten months before attempting to bring in a new claim, especially when

discovery had terminated and the case was set for trial. Id. The district court properly exercised its discretion under Rule 15(a) to deny a late-filed amended complaint. Id.; accord, Pope v. MCI Telecommunications Corp., 937 F.2d 258, 263 (5th Cir. 1991)(upholding denial after discovery one week before trial).

The general rule that leave to amend should be freely granted, Foman v. Davis, 371 U.S. 178 (1962), "will not be extended without limit when a rule 15 motion is brought after a claim has been fully litigated on the merits through appeal." Matter of Beverly Hills Bancorp., 752 F.2d 1334, 1338 (9th Cir. 1984). As the Ninth Circuit held, the litigation must reach finality, and permitting amendment "would not enhance finality, but instead would encourage seriatim judgments in the same basic dispute, as a plaintiff continues to put forth new theories of recovery. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 332-33, 91 S.Ct. 795, 803-04, 28 L.Ed.2d 77 (1971)." Id.

The same result is required here. Plaintiff is raising issues under the ESA that certainly could have been brought through timely amendments to its complaint prior to trial. Many of these issues were raised in the initial 1989 notice of intent to sue letters under the ESA. There is no excuse for waiting until after trial, judgment, and appeal to bring these old allegations into the litigation.

By waiting after trial to supplement pleadings, plaintiff has engaged in undue delay and seriously prejudiced the interests

of the government agencies that it seeks to add as defendants. See Cranberg v. Consumers Union of U.S., Inc., 756 F.2d 382, 392 (5th Cir. 1985). That undue prejudice is sufficient grounds to deny plaintiff's motion, where the court of appeals found that the "motion did not seek to conform the pleadings to the proof. In substance, his proposed amendment would raise a new cause of action." Id. That holding applies with far greater force here, where plaintiff not only waited until after trial, but delayed until the entry of judgment, amended judgment, and appeal. Accord, Davis v. United States, 961 F.2d 53, 57 (5th Cir. 1991)(court properly considered prejudice to government in deciding to deny amended pleading); Carbalan v. Vaughn, 760 F.2d 662, 665 (5th Cir. 1985)(upholding denial of motion to amend raised during trial); Trinity Carton Co. v. Falstaff Brewing Corp., 767 F.2d 184, 195 (5th Cir., 1985)(denial appropriate where movant was aware of facts and could have raised before judgment); Matter of Texas Extrusion Corp., 844 F.2d 1142, 1158 (5th Cir. 1988). This concern applies to both the Sierra Club's new ESA claims and to the Comprehensive Environmental Response, Compensation and Liability Act (Superfund) claim regarding the alleged "release" of hydrogen sulfide into the aquifer, a topic on which plaintiffs introduced evidence at trial.

Similarly, the Fifth Circuit has upheld denial of motions to amend pleadings filed after the entry of summary judgment. See Mitsubishi Aircraft Intern., Inc. v. Brady, 780 F.2d 1199, 1201 (5th Cir. 1986); Overseas Inns S.A. P.A. v. United States, 911

F.2d 1146, 1151 (5th Cir. 1990); NL Industries, Inc. v. GHR Energy Corp., 940 F.2d 957, 964 (5th Cir. 1991). The court of appeals also has upheld denial of such motions where plaintiffs' engaged in "unduly burdensome and 'eleventh hour' tactics," McLean v. International Harvester Co., 817 F.2d 1214, 1224 (5th Cir. 1987). The same considerations apply with greater force here, where plaintiff waited not just until the "eleventh hour," but until the entire day was done -- trial, judgment, and appeal.

The plaintiffs attempt to add a new plaintiff (Clark Hubbs), five new federal defendants (Department of Defense, Defense Base Closure and Realignment Commission, Environmental Protection Agency, Department of Transportation, Department of Agriculture), several new ESA theories and causes of action (section 4 listing decisions, designation of critical habitat, development and implementation of recovery plans, section 7 consultation, duty to avoid jeopardy, renewed section 9 take claims), and at least one new federal law (Superfund). Without question, many difficult new jurisdictional issues and defenses will be presented by this major shift in the players, theories, and laws in question if the amended and supplement complaint is allowed.

In short, the new case that plaintiff seeks to prosecute bears little resemblance to the case that it previously brought to judgment. Plaintiff certainly can pursue whatever claims it wishes to, but the appropriate forum is through a new lawsuit, not a major overhaul of a case that has been tried, decided, and appealed.

If the court does permit the plaintiff to amend and supplement its complaint, the defendants should be permitted the 60-day period to file an answer or responsive pleading, as allowed under Fed. R. Civ. P. 12(a)(3), not the ten-day period that applies to amended complaints. This is absolutely essential because plaintiffs, without prior notice, have attempted to bring major new claims against federal agencies that have not been a party to, or in many cases, even aware of, this litigation.

III. CONCLUSION

The court should deny the plaintiff's motion to amend and/or supplement its complaint.

Respectfully submitted,

LOIS J. SCHIFFER
Acting Assistant Attorney General

JAMES H. DeATLEY
United States Attorney

ELLEN LOCKWOOD
Assistant U.S. Attorney

Charles R. Shockey

JAMES C. KILBOURNE, Attorney
CHARLES R. SHOCKEY, Attorney
D.C. Bar No. 914879
Wildlife & Marine Resources Section
Environment & Natural Resources Div.
U.S. Department of Justice
Benjamin Franklin Station
P.O. Box 7369
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(202) 272-4463

Dated: April 28, 1994

< CONFIRMATION REPORT >

05-02-1994(MON) 10:34

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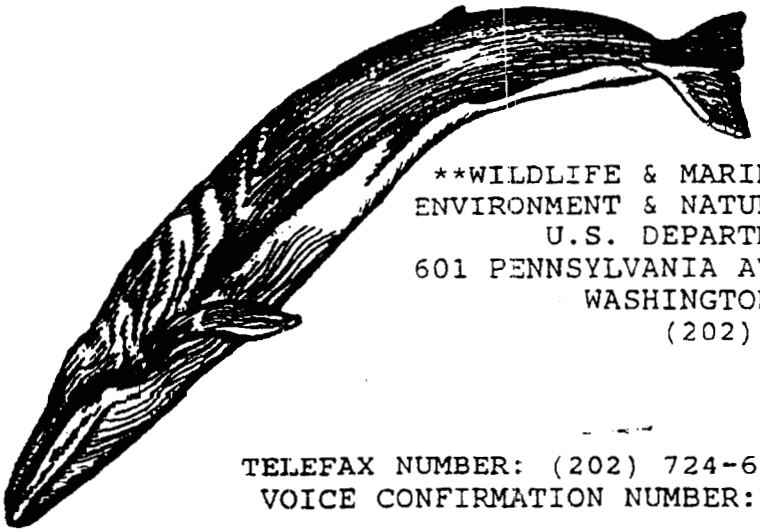

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Note

From Charlie Shockey, Department of Justice, (202) 272-4463

To Alan Palisoul, Department of the Interior
Stuart Shelton, United States Department of Agriculture
Mike Donnelly, Department of Defense
Maj. Gary Brewer, Department of the Army
Mary Ann Hook, Defense Base Closure & Realignm't Comm'n
Tom Marshall, Environmental Protection Agency
Paul Smith, Department of Transportation

Date May 4, 1994

Re Edwards Aquifer Litigation - Coordination Meeting

I've spoken with each of you during the past week about the plaintiff's April 15, 1994, motion to amend and supplement their complaint. We filed a response opposing that motion on April 29. I expect a ruling from Judge Bunton shortly.

Assuming that he grants the motion, each of your agencies would become a named defendant (or, in Interior's case, the subject of new ESA claims) in the Sierra Club v. Babbitt litigation. Ordinarily, we should be allowed 60 days to respond to the new or claims and 10 days to respond to amended claims, once proper service of the amended/supplemental complaint has been effected on your agencies. Judge Bunton, however, often sets deadlines without regard to the Federal Rules of Civil Procedure. He could decide that the plaintiff's claims of an imminent "emergency" compel a faster response in this case.

I would like to schedule a meeting for this Friday morning, May 6, from 10:30 to noon to discuss the new claims and our options for responding. The meeting would be held in the DOJ Wildlife Section conference room at 601 Pennsylvania Ave., N.W., Room 5000. Please let me know, today if possible, whether you or someone from your office could attend. Thank you.

cc: Anne Almy, DOJ
Eileen McDonough, DOJ
Jim Kilbourne, DOJ
Tim Vollmann, DOI/Albuquerque

< CONFIRMATION REPORT >

05-04-1994(WED) 11:40

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				2	0°01'40"		

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 21, 1994

LETTERS WERE SENT TO ALL LIST ATTACHED:

Dear :

Several aquatic federally-listed as endangered or threatened species in Texas depend upon the San Marcos Springs in Hays County, and Comal Springs, in Comal County for their existence. Spring flows directly depend upon the southern portion of the Edwards Underground Aquifer, which is recharged by surface runoff. The aquifer also serves as the primary water source for over a million people in central Texas. The southern Edwards Aquifer region is composed of the following counties: Edwards, Real, Kerr, Bandera, Kendall, Blanco, Hays, Comal, Bexar, Medina, Uvalde, and Kinney. The relatively thin recharge area that runs approximately east-west through the latter six counties is particularly sensitive.

The drainage and recharge area of the aquifer has been negatively impacted by human population growth and associated urbanization in terms of both the quantity and quality of the subsurface water. The increase in surface area of impermeable surfaces such as buildings, streets, and parking lots have reduced the area and contact time available for infiltration of water into the aquifer. Additionally, the recharge area of the aquifer is overlain with relatively thin soils and Edwards limestone with zones of high porosity, which do not significantly filter the water as it flows through the aquifer. Thus, increased urbanization also increases the risk of contamination of the aquifer's water supply.

Urbanization has not only reduced the amount of water entering the aquifer, but it has also resulted in an increased demand for clean water for municipal, industrial, and agricultural purposes. The combination of a reduced effective recharge area, and especially, an increased rate of water withdrawal, can cause a decrease in the discharges at Comal and San Marcos Springs. The U.S. Fish and Wildlife Service has determined that the current level of water withdrawal from the Edwards Aquifer may affect federally-listed, aquatic species during periods when flows at Comal Springs drop below 200 cfs and when flows at San Marcos Springs drop below 100 cfs.

E.S. ACT

Section 7(a)(1) of the Endangered Species Act of 1973, as amended (Act), states that all Federal agencies shall utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered and threatened species. Furthermore, section 7(a)(2) of the Act requires that each Federal agency shall consult with the U.S. Fish and Wildlife Service to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species.

DoD through implementation

Currently, there is no State of Texas law in effect that regulates the withdrawal of groundwater from the aquifer. The role of Federal agencies in administering their programs consistent with the conservation of listed species and their habitats associated with the Edwards aquifer under these circumstances becomes even more consequential.

Since the issues surrounding the recharge and withdrawal of Edwards Aquifer water are wide-ranging and both biologically and politically complex, I believe that a comprehensive strategy needs to be developed to ensure that the Edwards Aquifer continues to support both the human users as well as the animal and plant species that depend upon the aquifer for their survival. The U.S. Fish and Wildlife Service wishes to convene all Federal agencies that:

- are currently using the aquifer water;
- are planning to use the aquifer water;
- are planning to increase their use of the aquifer water;
- have any discretionary role in funding, carrying out, or authorizing actions that facilitate increased use of the aquifer water, either directly or indirectly; — MAYBE - but not legally -
- are planning to construct facilities that reduce the amount of recharge to the aquifer; or,
- have any discretionary role in actions that facilitate the construction projects that may reduce the amount of recharge to the aquifer.

Consultation with the U.S. Fish and Wildlife Service is prescribed for any Federal agency whose actions may affect the water quantity and quality in Comal and San Marcos Springs and, therefore, may affect the federally-listed species that depend upon those springs.

We encourage your participation in working with other Federal agencies to develop a joint approach to this complex issue. We are planning a July 14, 1994, meeting in Austin, Texas (see enclosure) to briefly (1) discuss the hydrogeology of the Edwards Aquifer; to further characterize (2) activities that the U.S. Fish and Wildlife Service believes may influence the water quantity and quality at Comal and San Marcos Springs; (2) to listen to agency officials describe their programs and their best understanding of the effects of these programs on the Edwards Aquifer; (3) to provide a forum in which we can answer any questions that you may have regarding how

Meeting purpose

your activities may affect spring flows; and to ultimately provide a starting point in developing a comprehensive strategy to attempt to maintain spring flows at levels that would not jeopardize the existence of any federally-listed species. This will likely lead to a combined formal section 7 consultation with the U.S. Fish and Wildlife Service, which will be further discussed at the meeting.

Please indicate your willingness to participate by **JUNE 30, 1994.** We look forward to working with you on this very important issue. If you have any questions regarding this proposed meeting, please contact Richard Szlemp in the Austin Field Office at (512) 482-5436.

Sincerely,

/s/ Sam Hamilton

Sam Hamilton
State Administrator

Enclosure

(512) 482-5442

RSVP by Thurs. 6/30

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14th Street & Independence Ave. S.W.
Washington, DC 20250

Secretary
U.S. Department of Commerce
14th St.& Constitution Ave., N.W.
Washington, DC 20230

Secretary
Department of Defense
The Pentagon
Washington, DC 20301

U.S. Department of the Air Force
Secretary of the Air Force
The Pentagon
Washington, DC 20330

U.S. Department of the Army
Secretary of the Army
The Pentagon
Washington, DC 20310

U.S. Department of the Navy
Secretary of the Navy
The Pentagon
Washington, DC 20350

U.S. Department of Education
Secretary
400 Maryland Avenue, S.W.
Washington, DC 20202

U.S. Department of Energy
Secretary
Forrestal Building
1000 Independence Avenue, S.W.
Washington, DC 20585

U.S. Department of Health and Human Services
Secretary
200 Independence Avenue, S.W.
Washington, DC 20201

U.S. Department of Housing and Urban Development
Secretary
451 Seventh Street, S.W.
Washington, DC 20410

U.S. Department of the Interior
Secretary
1849 C Street, N.W., Room 6217
Washington, DC 20240

U.S. Department of Justice
Attorney General
10th Street and Constitution Ave., N.W.
Washington, DC 20530

U.S. Department of Labor
Secretary
200 Constitution Avenue, N.W.
Washington, DC 20210

U.S. Department of State
Secretary
2201 C Street, N.W.
Washington, DC 20520

U.S. Department of Transportation
Secretary
400 Seventh Street, S.W.
Washington, DC 20590

U.S. Department of the Treasury
Secretary
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

U.S. Department of Veterans Affairs
Secretary
810 Vermont Avenue, N.W.
Washington, DC 20420

Environmental Protection Agency
Administrator
401 M Street, S.W.
Washington, DC 20460

Farm Credit Administration
Chairman
1501 Farm Credit Drive
McLean, VA 22102

Farmers Home Administration
Administrator
14th & Independence Avenue, S.W.
Washington, DC 20250

Federal Communications Commission
Chairman
1919 M Street, N.W.
Washington, DC 20554

Federal Deposit Insurance Corporation
Chairman
550 Seventeenth Street, N.W.
Washington, DC 20429

Federal Emergency Management Agency
Director
Federal Center Plaza
500 C Street, S.W.
Washington, DC 20472

Federal Home Loan Mortgage Corp.
Chairman
8200 Jones Branch Drive
McLean, VA 22101

Federal Housing Finance
1777 F Street, NW
Washington, DC 20006

Federal Housing Finance Board
Managing Director
1700 G Street, N.W.
Washington, DC 20552

Federal Labor Relations Authority
Chairman
500 C Street, S.W.
Washington, DC 20424

Federal Trade Commission
Chairman
6th Street & Pennsylvania Avenue, N.W.
Washington, DC 20580

General Services Administration
Administrator
18th and F Streets, N.W.
Washington, DC 20405

Interstate Commerce Commission
12th & Constitution Avenue, NW
Washington, DC 20423

International Development Cooperation Agency
Director
320 20th Street NW
Washington, DC 20523

International Trade Commission
Chairman
500 E Street, S.W.
Washington, DC 20436

National Labor Relations Board
Chairman
1099 14th Street, NW
Washington, DC 20570

Office of Thrift Supervision
Director
1700 G Street, N.W.
Washington, DC 20552

U.S. Postal Service
Postmaster General
475 L'Enfant Plaza West, S.W.
Washington, DC 20260

Resolution Trust Corporation Oversight Board
Chairman
801 17th Street N.W.
Washington, DC 20434

Securities and Exchange Commission
Chairman
450 Fifth Street, N.W.
Washington, DC 20549

Selective Service System
1515 Wilson Blvd.
Arlington, VA 22209-2425

Lt. Colonel Philip M. Jones, Jr.
Director, Directorate of Engineering
and Housing
Department of the Army
Headquarters, Fifth USA & Fort Sam
Houston
Fort Sam Houston, TX 78234-5000

Small Business Administration
Administrator
409 3rd Street, S.W.
Washington, DC 20416

USDA - Soil Conservation Service
101 S. Main Street
Temple, TX 76501-7682

Department of the Army
Corps of Engineers
1114 Commerce Street
Dallas, TX 75242

Environmental Protection Agency
Regional Office, Region VI
1445 Ross Avenue
Dallas, TX 75202

Federal Communication Commission
9330 LBJ Freeway, Suite 1170
Dallas, TX 75243

Federal Labor Relations Authority
525 Griffin Street, Room 926
Dallas, TX 76202

Federal Trade Commission
100 North Central Expressway, Suite 500
Dallas, TX 75201

General Services Administration
1114 Commerce Street, Room B-7
Dallas, TX 75242

General Services Administration
819 Taylor Street
Ft. Worth, TX 76102

General Services Administration
300 E. 8th Street, Room G-100
Austin, TX 78701

Department of the Interior
Minerals Management Service
8303 Elmbrook Drive, Suite 110
Dallas, TX 75247

Department of Labor
525 Griffin Street
Dallas, TX 75202

Small Business Administration
8625 King George Drive, Bldg. C
Dallas, TX 75235

Farmers Home Administration
101 South Main, Suite 102
Temple, TX 76501

Agricultural Stabilization
& Conservation Service
2405 Texas Avenue So., 2nd Fl
College Station, TX 77841

Interstate Commerce Commission
411 West 7th Street, Suite 510
Ft. Worth, TX 76102

National Labor Relations Board
819 Taylor Street, Room 8A24
Ft. Worth, TX 76102

Department of Commerce
611 E. 6th Street, Room 201
Austin, TX 78701

Bureau of Reclamation
300 E. 8th Street, Room 801
Federal Building
Austin, TX 78701

Department of Housing
and Urban Development
1600 Throckmorton
Ft. Worth, TX 76102

Small Business Administration
819 Taylor Street
Ft. Worth, TX 76192

Department of Transportation
Federal Highway Administration
819 Taylor Street, Room 8A00
Ft. Worth, TX 76102

Department of Transportation
Federal Highway Administration
300 E. 8th Street, Room 826
Austin, TX 78701

U.S. Defense Base Closure and
Realignment Commission
Rosslyn Metro Center Bldg.
1700 North Moore Street
Arlington, VA 22209

Department of the Air Force
Lackland Air Force Base
2240 Walker Avenue
Lackland, Texas 78236-5637

National Park Service
LJJ National Historic Park
Ranch Road #1
Stonewall, Texas 78745

Department of Housing and
Urban Development
800 Dolorosa
San Antonio, Texas 78207

Richard Hawkinson
U.S. Geological Survey
8011 Cameron Road
Austin, Texas 78753-6700

William Sewell
San Marcos National Fish Hatchery
and Technology Center
500 East McCarty Lane
San Marcos, Texas 78666

Rural Electrification Administration
USDA - 14th & Independence Avenue, SW
Washington, DC 20250

United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

June 29, 1994

Please refer to this number when responding 940705-1

U.S. Defense Base Closure and
Realignment Commission
Rosslyn Metro Center Bldg.
1700 North Moore Street
Arlington, VA 22209

Dear Sir:

This is in regards to the July 14, 1994, meeting in Austin, Texas being hosted by the U.S. Fish and Wildlife Service to discuss Federal actions within the Edwards Aquifer that may require consultation under section 7 of the Endangered Species Act of 1973, as amended.

The meeting will be held on the University of Texas-Austin campus in Room 2.102 of the Thompson Conference Center located on the corner of 26th Street and East Campus Drive. Ample parking is available immediately east and southeast of the conference center. The meeting will begin at 8:30am and last until about 4:00pm with an hour-and-a-half break for lunch. We request that a representative of each Federal agency be prepared to provide a brief (five minute) summary of their agency's present and future planned activities within south-central Texas in order to furnish a perspective on the relative magnitude of Federal involvement in this portion of the State.

A block of rooms are being held until July 8th at the Austin Holiday Inn-Town Lake. For reservations, please call (512) 472-8211 or 1-800-HOLIDAY and mention the "U.S. Fish and Wildlife Service" to obtain the rates of $55 for single rooms or $65 for doubles.

This assemblage of Federal agencies is meant to promote a better understanding of the Edwards Aquifer and the federally-listed endangered or threatened species that depend upon it for their survival, as well as to serve as a beginning point for developing a cooperative, multi-agency approach to plan for long-term sustainability of our limited water resources.

A tentative agenda and location map are enclosed. We look forward to working with you in addressing this most complex and very important issue.

Sincerely,

Sam D. Hamilton

Sam D. Hamilton
State Administrator

Enclosure

TENTATIVE AGENDA

Edwards Aquifer Meeting to Discuss
Endangered Species Act Implications for Federal Agencies
July 14, 1994

8:30AM -WELCOME
Sam Hamilton, State Administrator, U.S. Fish and Wildlife Service

8:40AM -HYDROGEOLOGY OF THE EDWARDS AQUIFER
George Ozuna, Hydrologist, U.S. Geological Survey

8:55AM -AQUIFER DEPENDENT FEDERALLY-LISTED SPECIES
Alisa Shull, Biologist, U.S. Fish and Wildlife Service

9:10AM -SECTION 7 OF THE ENDANGERED SPECIES ACT
Richard Szlemp, Biologist, U.S. Fish and Wildlife Service

9:50AM -BREAK

10:10AM -SECTION 7 DISCUSSION CONTINUED

10:50AM -FEDERAL AGENCY PRESENTATIONS

11:30AM -LUNCH

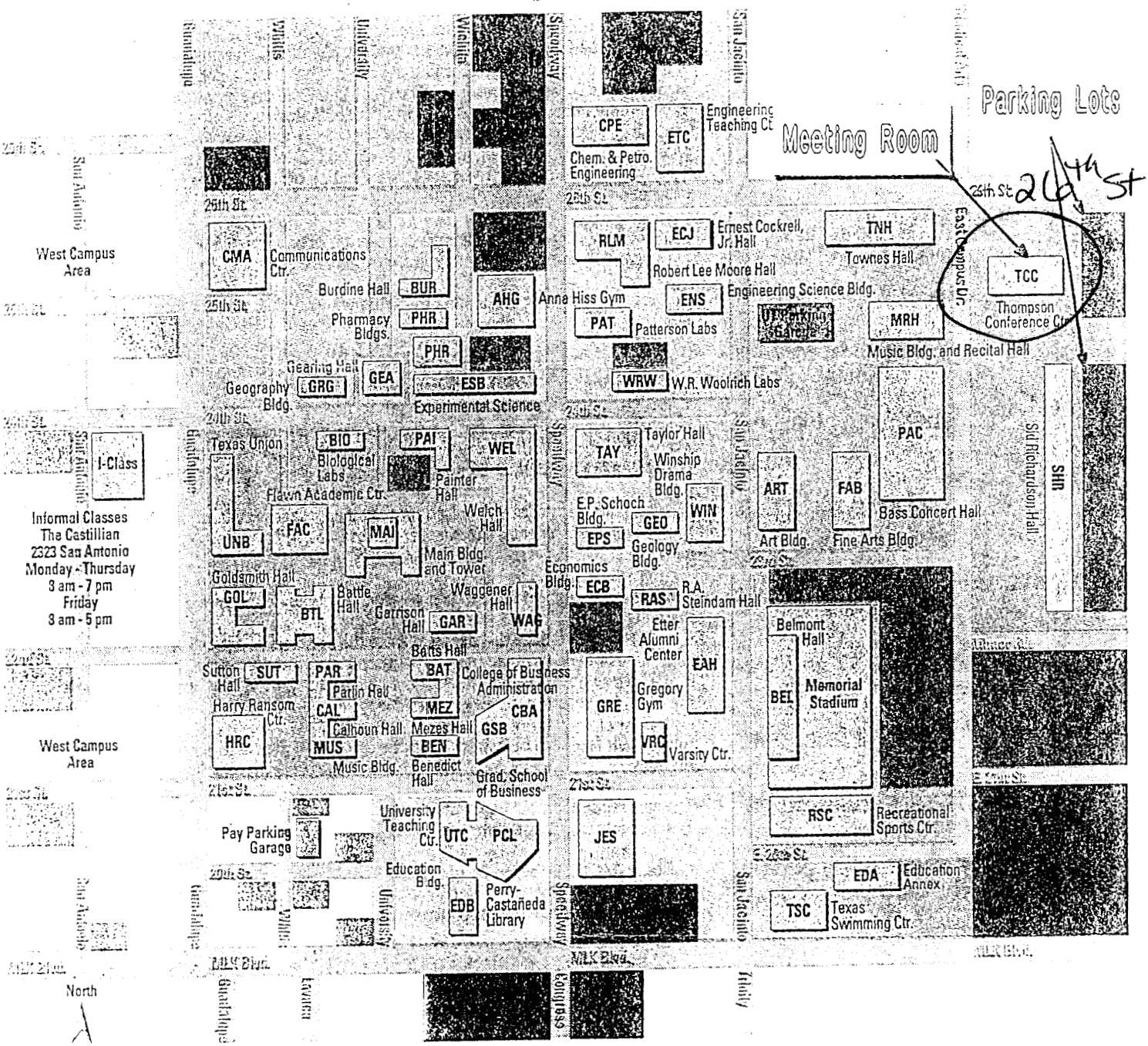
1:00PM -OPEN DISCUSSION, Q&A'S

3:45PM -CLOSING REMARKS ON FUTURE CONSULTATION PLANNING

4:00PM -ADJOURN!

Parking Map

University of Texas



= UT campus

= UT campus buildings

= Park & Lock's are usually available. Rates: about $3.00 for an evening. NEVER park without paying. If you use bills, be sure to push the bills all the way into the slot.

= UT Parking Garage is more convenient than it looks. Rates: $1 per hour, 4 hours maximum.

= UT Parking Lots available for general use after 5 pm. READ THE SIGNS. Some campus spaces are restricted at all times. You will be ticketed if you park in a restricted space.

= State Employee Parking Lots available for general use after 5 pm.

We know that parking around the University is difficult, especially for people unfamiliar with the area. It is possible to park if you know where to look, are methodical in your search, and plan to spend at least 20 minutes looking. You may find a space in less than 20 minutes, but if you allow this much time, plus 10 minutes to walk to class, you can be reasonably sure of getting to class on time.

This map shows the most commonly available parking spaces. If you hate driving around and searching, we recommend **Park & Lock's**. Almost all of the campus walkways and surrounding city streets are well lit and bustling with people on weekday evenings, but it's always safer to walk with a friend.

On campus, **Speedway** and **San Jacinto Streets** and **East Campus Drive** usually have diagonal parking spaces available in the evenings. **Whitis** has limited parallel parking. **24th Street** has both parallel and diagonal parking spaces. **20th** and **21st Streets** have very limited parking.

The streets of **West Campus** are worth a try, except on Monday nights. Watch for one-way streets, driveways, dumpsters, etc. Patience and the ability to parallel park are the key elements of success. Parking meters on **Guadalupe** are free in the evenings and on weekends. **San Antonio Street** is not a good place to park.

DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

Suite 1425
1700 North Moore Street
Arlington, Virginia 22209

FAX COVER SHEET

DATE: July 1

TO: R. Szlemp

FAX #:

FROM: M. Hook

NUMBER OF PAGES (including cover): 2

CONTENTS: RSVP

IF YOU HAVE TROUBLE RECEIVING THIS FAX PLEASE CALL 703-696-0504.

PLEASE NOTE: YOU MAY USE THIS FORM OR, IF YOU PREFER, PROVIDE YOUR OWN WRITTEN OR VERBAL RESPONSE.

Yes, I would be interested in participating in the meeting for Federal agencies involved in activities that may affect spring flows from the Edwards Aquifer. I, or a representative(s) would be able to attend this 1-day meeting.

Frank Cirillo and Mary Hook

Defense **ADDRESS:** Defense Base Closure and Realignment Commission
1700 N. Moore St. 1425
~~Arlington, VA 22209~~

CONTACT PERSON: Mary Ann Hook, General Counsel
TELEPHONE: ~~703-696-0504~~

SPECIFIC TOPICS THAT YOU WOULD LIKE DISCUSSED OR QUESTIONS THAT YOU MAY HAVE REGARDING YOUR POTENTIAL INVOLVEMENT IN WATER CONSERVATION ISSUES ASSOCIATED WITH THE EDWARDS AQUIFER:

We are attending merely to listen and observe.

Endangered Species Act Section 7 Consultation Requirements and Implications for Federal Agencies that may influence the Edwards Aquifer

July 14, 1994

8:30AM -WELCOME
Sam Hamilton, State Administrator, U.S. Fish and Wildlife Service

8:40AM -HYDROGEOLOGY OF THE EDWARDS AQUIFER
George Ozuna, Hydrologist, U.S. Geological Survey

8:55AM -AQUIFER DEPENDENT FEDERALLY-LISTED SPECIES
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10:10AM -SECTION 7 DISCUSSION CONTINUED

10:50AM -FEDERAL AGENCY PRESENTATIONS

11:30AM -LUNCH

- ID projects
- affect H_2O

1:00PM -OPEN DISCUSSION, Q&A'S

3:00PM -FUTURE CONSULTATION PLANNING:

-Preparation for next meeting, ~~September 29, 1994~~ Oct 20
-Determination of "may affect" by Federal agencies
-Determination of format for consultation
-Designation of "lead agency"
-Scope of biological assessment

4:00PM -ADJOURN!

INFORMATION SHEET

Edwards Aquifer Meeting with Federal Agencies to Discuss the Section 7 Consultation Process under the Endangered Species Act

July 14, 1994

at the University of Texas Thompson Conference Center Austin, Texas

PURPOSE OF THE MEETING:

- to bring together the Federal Agencies that fund, authorize, or carry out activities within the Edwards Aquifer region in order to collectively discuss the inter-agency guidelines for section 7 consultation under the Endangered Species Act;

- to identify the importance of Edwards Aquifer ground and surface waters to federally-listed species and their respective designated critical habitats, and to explore the prospects that Federal agencies may have to assure the survival and recovery of those listed species;

- to briefly describe the current understanding of the hydrology of the Edwards Aquifer to those Federal agencies unfamiliar with the varied and complex nature of groundwater systems;

- to begin the process of assessing the options that Federal agencies may have in sustaining the level of recharge into the aquifer, as well as to underscore the relative importance of Federal agencies' roles in contributing to the conservation and efficient use of Edwards Aquifer water such that an adequate supply of water is available to all who depend upon it;

- to provide a starting point for Federal agencies to assess their effects on the Edwards Aquifer, to provide a medium to address how to minimize any adverse impacts Federal agencies may have on federally-listed species that are dependent upon the Edwards Aquifer, and to set in motion the process by which a unified group of Federal agencies can enter into formal section 7 consultation with the U.S. Fish and Wildlife Service in order to address any adverse impacts that remain to federally-listed species.

BACKGROUND PAPER
ON
SAN ANTONIO WATER ISSUES

- **Edwards Aquifer is sole source of water for a six county region of South Central Texas - San Antonio is in that region**

  -- Four Air Force Bases are also within that region (Brooks, Kelly, Lackland and Randolph)

  -- Three of the four pump water from the aquifer; Brooks only, purchases its water from San Antonio Water Systems (SAWS), the municipal water utility, which pumps from the aquifer for a number of other clients as well

  -- Also included within San Antonio is one Army post; Fort Sam Houston. It also pumps water from the Aquifer

- **Texas has "right of capture" ground water law; no restrictions on pumping**

- **Edwards Underground Water District (EUWD), was created by Texas legislature in 1959 (following "drought of record" which spanned nearly a decade - late 1940s through 1957)**

  -- Original EUWD mandate - conserve, protect and increase aquifer recharge; no power to register/meter wells, limit pumping.

  -- Original EUWD board - elected representatives from five of the six counties over the aquifer.

  -- In 1987, following another, shorter (1984) drought, City of San Antonio/EUWD jointly sponsored legislation expanding EUWD's mandate to include development of a Drought Management Plan to avoid "mining" the aquifer (i.e. withdrawing more than is recharged)

  -- EUWD developed a plan with pumping limits - attempted to implement (1987-88).

  -- After considerable conflict between agricultural/municipal users, the two western (agricultural) counties withdrew from the EUWD (Jan 89)

    --- the agricultural pumpers objected to restrictions when their traditional use was unlimited

    --- San Antonio and other cities/water purveyors in the remaining counties developed water conservation and drought management ordinances/rules to comply with EUWD's plan

- **Sierra Club filed notice (1989) with Interior Department, alleging violation of the Endangered Species Act (ESA) citing failure to limit pumping from the aquifer, thereby endangering species in Comal/San Marcos springs - formal lawsuit followed (1991) against Secretary of Interior, Manuel Lujan, and Fish And Wildlife Service (FWS)**

-- After several continuances designed to allow local authorities to resolve the problem, Federal District Court (Midland, Texas) ruled if the state failed to implement a water management plan FWS must initiate action to protect species under the ESA (i.e. consultation)

-- During 1993 session, Texas legislature passed a water management plan (SB 1477) which included pumping restrictions

-- Legislation was challenged under voting rights act - it replaced an elected (three county) aquifer management board with an appointed (five county) board. Legislation is still in limbo

-- Federal District Court appointed a monitor (Jan 94) to develop an aquifer management plan by 1 Aug 94

-- FWS scheduled a meeting of all federal activities (14 Jul 94) to discuss the situation

- **Military Water Working Group (MWWG) was conceived and informally implemented during 1986/87; officially established in 1988 for two reasons**

  -- Provided for a dialog on water issues between all San Antonio military installations regardless of service/command

  -- Gave local people (City, County, State) a central point of contact for San Antonio water matters

    --- Representatives from all 5 installations

    --- Engineering, Legal & Public Affairs Offices

  -- MWWG worked with installations/EUWD to develop water conservation/drought management plans

    --- Each San Antonio installation has one

    --- Patterned after EUWD and/or City of San Antonio plans (minor variances)

    --- All are multi-staged

    --- All meet or exceed local guidelines

- **MWWG working together on strategy for future actions**

  -- Each San Antonio base/MAJCOM/service will be represented at 14 Jul FWS meeting in Austin

  -- All installations communicating between each other and service level to coordinate preparations for meeting and follow-on activities

- **Military efforts to conserve water include**
  - -- Leak detection surveys completed at all bases
  - -- Reuse water projects underway/planned
    - --- Randolph working with Cibolo Creek Municipal Authority (CCMA)
      - ---- Return of final treated waste water from base (base owns rights under terms of sewage contract with CCMA))
      - ---- Will be used for golf course irrigation
      - ---- Estimated completion date - spring 1995
    - --- Kelly land disposal permit for final treated industrial plant water
      - ---- Being used for golf course irrigation
      - ---- Also looking into use for cooling towers
  - -- Fort Sam Houston in discussion with San Antonio Water System (SAWS) on reuse water for golf course/national cemetery
  - -- Brooks in good position to use SAWS reuse water with minimal distribution system reconfiguration
  - -- Lackland considering use of excess Kelly reuse water - requires major infrastructure changes
- **Military cooperation with community on water issues - past and present**
  - -- Participation on Chamber of Commerce water committees (1986 - present)
    - --- Water Resources Committee
    - --- Water Use Committee
    - --- Water planning committee
  - -- San Antonio 2050 Water Resources Committee (Dec 93 - May 94)
  - -- Trans-Texas Water Program Advisory Committee (1990 - present)
  - -- San Antonio Target 90 Water Resources Committee (1986 - 1990)
  - -- South Central Texas Water Resources Council Technical Review Panel (1992)
  - -- Observer - Greater San Antonio Area Citizen's Committee on Water (Aug 91 - Mar 92)

- **Representative Tejeda likely will address inquiries to Senator Gramm from Mr Edmond R. McCarthy, Jr regarding military use of water from Medina Lake (copies of correspondence were provided Mr Tejeda's office)**

  -- Mr Tejeda's district includes Randolph AFB, the east side of Kelly AFB, and Fort Sam Houston

  -- Original inquiry targeted Lackland, Kelly, Brooks AFBs and Medina Annex - Fort Sam Houston was added to the most recent inquiry.

  -- Medina Lake water is available through Bexar Metropolitan Water District (BexarMet) agreement with Bexar-Medina-Atascosa Counties Water control and Improvement District (WCID) No. 1 (BMA)

  -- In 1991, (a dry period), BexarMet entered a 20 year take-or-pay contract with BMA for excess Medina Lake water - presumably speculating on a market demand for non-aquifer irrigation water - 1992 brought a record high water level; the potential market disappeared

- **On 22 Oct 93, Mr McCarthy wrote Senator Gramm on behalf of BMA/BexarMet, proposing Air Force bases convert to Medina Lake water for irrigation**

  -- The letter explained no infrastructure was in place to deliver water to the installations.

  -- The "ongoing aquifer crisis" was referred to, and used as part of the argument for Air Force conversion to Medina Lake water

  -- Response to Senator Gramm (HQ AFCESA/EN input 22 Nov 93, SAF/LLP ltr, 8 Dec 93) stated Air Force was working toward a comprehensive solution to water problems, and Medina Lake water would be considered as possible source

- **Mr McCarthy again inquired (3 Feb 94), this time directly to SAF/LLP, stating willingness to work with MWWG and referring to a newspaper article linking pending pumping limitations to possible base closures**

  -- HQ AETC/CE responded (per SAF/LLP request) clarifying MWWG function (technical) and explaining we could not use the water without a delivery system in place

  -- We specifically stated "...Our understanding is that no pipeline is in place to move water from Medina Lake; if this is incorrect, please let us know."

  -- To date we've received no correction from Mr McCarthy; therefore, we assume the distribution system is still non-existent

- **Late on 7 Jul 94 we received a telefaxed copy of a letter from Mr McCarthy, asking for a meeting to discuss the Medina Lake Water - we plan to meet with him next week**

- **Current situation**

  -- To our knowledge, BMA/BexarMet still has no physical plant or distribution system

  -- We cannot use the BMA/BexarMet water without a way to transport it

  -- We do not normally fund construction of utility systems to provide a second source of a utility we already have in place

  -- Completed and/or underway projects already reduce pumping for San Antonio installations, using essentially the same quality water BMA/BexarMet proposes

  -- No economy is involved, since all installations except Brooks pump water at a cost well below what BMA would have to charge

HQ AETC/CEOE/Judi Austen/DSN 487-2774/doc 0930M

< CONFIRMATION REPORT >

07-15-1994(FRI) 11:24

[RECEIVE]

NO.	DATE	TIME	DESTINATION	PG.	DURATION	MODE	RESULT
10286	7-15	11:11	210 652 3597	6	0°12'40"	FINE.E	OK
				6	0°12'40"		

ANALYSIS OF GENERAL COMPLIANCE

CRITERION 8

THE ENVIRONMENTAL IMPACT

DESCRIPTION: Pursuant to Public Law 101-510, as amended, on May 5, 1992, the Department of Defense (DOD) issued guidance with selection criteria for the 1993 base closure and realignment recommendations. This guidance includes criterion 8, the environment impact. On December 4, 1992, DOD issued further guidance on how the environmental impact should be considered for closing, realigning, and receiving locations. The December 4, 1992 guidance requires a summary statement and status on seven environmental attributes for each installation affected by the closure/realignment action, including receiving installations. These seven environmental attributes are:

- Threatened or Endangered Species
- Wetlands
- Historical or Archeological sites
- Pollution Control
- Hazardous Materials/Wastes
- Land Use and Airspace Implications
- Programmed Environmental Costs/Cost Avoidances

ANALYSIS: General compliance with these procedures is analyzed for each Service as follows:

Army: The Army compiled Installation Environmental Baseline Summaries for each Army installation eligible for closure or realignment. The Total Army Basing Study (TABS) also provided supplemental information in response to questions from the Defense Base Closure and Realignment Commission (DBCRC). The Army's installation summaries directly address six of the seven environmental attributes in DOD's guidance. Under the seventh attribute, Programmed Environmental Costs/Cost Avoidances, the Installation Summaries do not consistently follow DOD's guidance. In some cases the Installation Summaries only provide restoration costs. This is inconsistent with DOD's December 4, 1992 guidance, which directs the Services not to use restoration costs in the cost of closure calculations. However, the supplemental information provided by TABS to the DBCRC certifies that environmental compliance costs were determined to evaluate the impact of programmed cost/cost avoidances for all recommended actions. This supplemental information documents that program costs for receiving installations were evaluated.

The Army's Analyses and Recommendations Report (Volume III) summarized the environmental impact on closing and realigning installations, and appropriately addressed six of the seven attributes. Again, the evaluation of Programmed Environmental

Costs/Cost Avoidances was clarified by the supplemental information provided by the TABS to the DBCRC.

Navy: The Navy compiled summaries of environmental conditions for each installation eligible for closure or realignment. The Navy considered Criterion 8 in detail for installations that were recommended for closure or realignment after a review of the Military Value Criteria (Criteria 1 through 4). The Navy's "Summary of Environmental Consequences" is included in their Analyses and Recommendations Report (Volume IV). For closing and realigning bases, the Navy evaluated each installation with respect to the seven environmental attributes laid out in DOD's December 4, 1992 guidance. Summaries of environmental impacts at receiving bases are also included. These summaries on receiving bases generally address six of the seven environmental attributes, but do not specifically address Programmed Environmental Costs/Cost Avoidances. The Navy addressed the attribute of environmental costs at receiving installations in their Cost of Base Realignment Action (COBRA) model. The costs necessary to comply with environmental requirements due to new functions at these receiving bases are documented in the COBRA reports.

other services look / report receivers?

Air Force: The Air Force completed base-specific questionnaires on environmental issues for each Air Force installation eligible for closure or realignment. These questionnaires address all recommended closing, realigning and receiving bases. Documentation was provided on six of the seven environmental attributes. These questionnaires did not directly address the attribute of Programmed Environmental Costs/Cost Avoidances. Several questions are included under the title of "Environmental Cleanup/Compliance Costs." However, estimated costs were provided only on environmental restoration costs, and DOD's guidance specifically notes that restoration costs are not to be considered in the cost of closure. The Air Force's environmental analysis was summarized in their Analyses and Recommendations Report (Volume V). This documented the status of all environmental attributes except Programmed Environmental Costs/Cost Avoidances.

The results of the Air Force's Cost of Base Realignment Action (COBRA) Model runs were consulted in an attempt to determine whether Programmed Environmental Costs/Cost Avoidances were considered. Financial Summary reports indicate that environmental costs were entered as zero for all bases impacted by major actions. The possibility that environmental costs were merged with Military Construction costs in the COBRA model was reviewed. It was learned that Military Construction costs considered the cost of constructing mission-related facilities, such as base housing, on receiving installations. Military Construction costs also include the impacts on the capacity of utilities at receiving installations. Utility costs can include water supply and sewage treatment capacity. These were the only environmentally-related costs that were considered, however these only address receiving

costs

bases, and no specific environmental compliance costs as described in the December 4, 1992 DOD guidance were included.

Defense Agencies: Two Defense Agencies are impacted by the 1993 Realignments and Closures, the Defense Logistics Agency, and the Defense Information Systems Agency. However, only the Defense Logistics Agency (DLA) is involved in installation closures or realignments with environmental impact. DLA completed installation-specific questionnaires that address the seven environmental attributes for all facilities where DLA has host responsibilities. At other DLA facilities, they are the tenant, and the property owner (e.g. Tooele Army Depot) addressed the environmental criterion. In DLA's Detailed Analysis Report (part of Volume VI), DLA considered Criterion 8 for installations recommended for closure or realignment based on DLA's Military Value Criteria. All seven environmental attributes were addressed in DLA's analyses. Consideration was given to closing, realigning, and receiving installations.

why not DISA?

dito? cnt 2?

DIFFERENCES IN APPROACH ACROSS THE SERVICES

The Services used different perspectives in considering the relationship between closure decisions and the seven environmental attributes from DOD's guidance. When the Army made its recommendations on closure or realignment in Volume III, the analyses addressed the environmental impact on closure. (i.e. How does a wetland impact the decision to close?) Both the Navy and Defense Logistics Agency considered the impact of closure or realignment on the environmental attribute. (i.e., Will closure impact a wetland?) The Air Force's perspective was to consider the impact of the environmental attributes on the continued military mission of the installation. (i.e. How does a wetland impact the future military mission at the base?)

CONCLUSIONS

DOD's December 4, 1992 guidance on evaluating the environmental impact of closure and realignment is sufficiently general and flexible to allow the Services to apply varied perspectives to the environmental attributes. All Services have addressed most of the considerations required by the DOD guidance. The documentation provided by the Army, Navy and DLA, including the supplemental information from the Army's TABS, addresses the seven environmental attributes pursuant to DOD's guidance. Therefore the Army, Navy and DLA are in general compliance with DOD's guidance on Criterion 8 pursuant to Public Law 101-510, as amended.

based on ESA?

The Air Force did not demonstrate that their decision-making considered the environmental attribute of Programmed Environmental Costs/Cost Avoidances pursuant to DOD's December 4, 1992 guidance. Since the Air Force properly addressed the remaining six attributes, and because it is very unlikely that the decisions made

by the Air Force would be different had they fully followed DOD's guidance, it can be concluded that the Air Force is in general compliance with the requirements to evaluate Criterion 8.

COMPLIANCE WITH DOD DIRECTION ON CRITERIA VIII

12/4/92 Memo from Colin McMillen lists seven environmental "attributes":

1. Threatened or Endangered Species
2. Wetlands
3. Historical or Archeological Sites
4. Pollution Control
5. Hazardous Materials/Waste
6. Land Use and Airspace Implications
7. Programmed Environmental Costs/Cost Avoidances

order B import?

There is apparently no guidance on how these attributes are considered. The 12/4 memo states that the status of the attributes should be discussed. It appears that the services are evaluating how continued and/or expanded military operations are influenced by these attributes.

- AIR FORCE ANALYSIS AND RECOMMENDATIONS (VOL. V)

Volume V summarizes the impacts of attributes 1, 2, 3 on future operations.

Pollution Control is not explicitly addressed. There is discussion of Air Quality in noting whether the base is located in an attainment area. The quality and quantity of Water supplies is also discussed.

Hazardous Materials/Waste are discussed by results of surveys on asbestos and radon, along with a discussion of future capacity for the disposal of solid waste. The presence of soil contamination and its impact on operations was evaluated.

Attributes 6 and 7 are not addressed. The 12/4 memo directs land value estimates to be adjusted due to contamination problems. It appears that this has not been done.

Volume V also rates the presence of "Prime and unique farmlands," and "Mineral and Energy Resources."

- AIR FORCE BASE QUESTIONNAIRES

The base-specific questionnaires provide details on the attributes summarized in Volume V. Questions on the attributes not discussed in Volume V. (6, 7) are additionally included. The focus on these questions on Attribute 6 is on how base activities interface with local land use or airspace constraints.

The only environmental costs (#7) discussed in the questionnaire are restoration costs. Questions under the <u>title</u> of "Environmental Cleanup/Compliance Costs" also ask about the status of permits and ground water contamination, but do not seek costs on

these activities. It is unclear how new environmental costs (e.g for receiving bases) or cost avoidances (for closing bases) could be determined from this information.

Under Attributes 4 and 5, the questionnaires provide more details on the status of pollution control (wastewater treatment, drinking water treatment) and the presence of hazardous materials/waste.

RESTORATION COSTS

The 12/4 memo states that "environmental restoration costs at closing bases are not to be considered in the cost of closure calculations." The apparent rationale was noted by Chairman Courter during the 3/22 Environmental Hearing when he noted that bases that disregard environmental protection (thus requiring elevated cleanup costs) should not be rewarded by remaining open. Ms. Munsell of the Navy noted that cleanup costs are "a wash" if a base is closing or remaining open. While this could theoretically be true in rare circumstances, in most cases there will be additional <u>incremental</u> costs associated with the restoration of closing bases. At least three factors lead to these incremental costs:

1. As Commissioner Levitt noted on 3/22, distinct future uses of closing bases may lead to more stringent cleanup requirements. This has been supported by experiences at Norton AFB (San Bernadino, CA) and Hunter's Point Naval Annex (San Francisco, CA) where cleanup objectives are impacted by future use considerations. Incremental cleanup costs will be incurred for these bases that would not be incurred if the bases remain open. The current estimated cleanup at McClellan AFB is $1.1 <u>Billion</u> (not $1.1 <u>Million</u> as stated by Mr. Vest on 3/22) were this base to remain open. The Air Force has estimated that if the base closes, the cleanup costs could reach $10 Billion due to the residential surroundings.

2. The Community Environmental Response and Facilitation Act (CERFA) requires that uncontaminated property at closing bases be identified to facilitate reuse. This results in incremental costs that are not incurred by non-closing bases.

3. The FY-92 Defense Authorization Act established deadlines for the completion of Remedial Investigation/Feasibility (RI/FS) work at Round I and Round II closing bases on the Superfund NPL. The impact of these mandated deadlines is that work must be accelerated, resulting in incremental short-term costs.

The 12/4 memo also notes that when environmental restoration is required, that this will be "a potential limitation on near-term community reuse of the installation." It would apparently be appropriate to consider this under Criteria VI (Economic Impact on Communities). The Air Force's Volume V report notes comparative cleanup durations in their Criteria VI summary.

P. M. SCHENKKAN
727 East 26th Street
Austin, Texas 78705
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Re: Edwards Underground River/Aquifer

Greetings:

We have previously notified you pursuant to the citizen suit provision of the Endangered Species Act that your agency is in violation of Section 7 of the Endangered Species Act. Your agency authorizes, funds or carries out activities that jeopardize endangered and threatened species dependent on water from the Edwards Underground River or Aquifer ("the Edwards"), but has not consulted with the U.S. Fish & Wildlife Service concerning such activities. Your agency has authorities it could use in carrying out programs for the conservation of these species, but has not used those authorities. We have notified you of our intent to sue to correct these violations.

We have learned that on June 21, 1994, Sam Hamilton, State Administrator of the U.S. Fish & Wildlife Service in Austin, Texas, wrote you concerning these matters. As we understand it, he invited and encouraged your agency to participate in a July 14, 1994 meeting to discuss these matters. We understand that the U.S. Fish & Wildlife Service intends this meeting as the first step in a "combined formal Section 7 consultation" of all relevant federal agencies with the U.S. Fish & Wildlife Service concerning protection of the Edwards.

The Sierra Club and Clark Hubbs hope you will take this meeting seriously, and begin the formal Section 7 process on the Edwards on July 14.

Sincerely,

P.M. Schenkkan
Attorney for the Sierra Club
and Clark Hubbs

cc: Sam Hamilton

50 CFR Sect 402

requirements as defined by the Paperwork Reduction Act. The analyses under Executive Order 12291, the Regulatory Flexibility Act, and NEPA are available to the public at the Office of Endangered Species, U.S. Fish and Wildlife Service, at the address listed above.

List of Subjects in 50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Regulation Promulgation

Accordingly, the Service revises 50 CFR Part 402 to read as follows:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

Subpart A—General

Sec.
402.01 Scope.
402.02 Definitions.
402.03 Applicability.
402.04 Counterpart regulations.
402.05 Emergencies.
402.06 Coordination with other environmental reviews.
402.07 Designation of lead agency.
402.08 Designation of non-Federal representative.
402.09 Irreversible or irretrievable commitment of resources.

Subpart B—Consultation Procedures

402.10 Conference on proposed species or proposed critical habitat.
402.11 Early consultation.
402.12 Biological assessment.
402.13 Informal consultation.
402.14 Formal consultation.
402.15 Responsibilities of Federal agency following issuance of a biological opinion.
402.16 Reinitiation of formal consultation.

Authority: 16 U.S.C. 1531 *et seq.*

Subpart A—General

§ 402.01 Scope.

(a) This Part interprets and implements sections 7(a)–(d) [16 U.S.C. 1536(a)–(d)] of the Endangered Species Act of 1973, as amended ("Act"). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants ("listed species") and habitat of such species that has been designated as critical ("critical habitat"). Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR Parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR Part 451, and regulations governing the exemption process are found at 50 CFR Parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR Part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

§ 402.02 Definitions.

"Act" means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

"Action" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

"Action area" means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

"Applicant" refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

"Biological assessment" refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

"Biological opinion" is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

"Conference" is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

"Conservation recommendations" are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

"Critical habitat" refers to an area designated as critical habitat listed in 50 CFR Parts 17 or 226.

"Cumulative effects" are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

"Designated non-Federal representative" refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

"Director" refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

"Early consultation" is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

"Effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

"Formal consultation" is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

"Incidental take" refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

"Informal consultation" is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

"Jeopardize the continued existence of" means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

"Listed species" means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

"Major construction activity" is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

"Preliminary biological opinion" refers to an opinion issued as a result of early consultation.

"Proposed critical habitat" means habitat proposed in the **Federal Register** to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

"Proposed species" means any species of fish, wildlife, or plant that is proposed in the **Federal Register** to be listed under section 4 of the Act.

"Reasonable and prudent alternatives" refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

"Reasonable and prudent measures" refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

"Recovery" means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

"Service" means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

§402.03 Applicability.

Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.

§402.04 Counterpart regulations.

The consultation procedures set forth in this Part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service. Such counterpart regulations shall be published in the **Federal Register** in proposed form and shall be subject to public comment for at least 60 days before final rules are published.

§402.05 Emergencies.

(a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)–(d) of the Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.

(b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

§402.06 Coordination with other environmental reviews.

(a) Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*, implemented at 40 CFR Parts 1500–1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 *et seq.*). Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its

obligations to comply with the procedures set forth in this Part or the substantive requirements of section 7. The Service will attempt to provide a coordinated review and analysis of all environmental requirements.

(b) Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes.

§ 402.07 Designation of lead agency.

When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The Director shall be notified of the designation in writing by the lead agency.

§ 402.08 Designation of non-Federal representative.

A Federal agency may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment by giving written notice to the Director of such designation. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and Federal agency must agree on the choice of the designated non-Federal representative. If a biological assessment is prepared by the designated non-Federal representative, the Federal agency shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the biological assessment. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

§ 402.09 Irreversible or irretrievable commitment of resources.

After initiation or reinitiation of consultation required under section 7(a)(2) of the Act, the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied. This provision does not apply to the conference requirement for proposed species or proposed critical habitat under section 7(a)(4) of the Act.

Subpart B—Consultation Procedures

§ 402.10 Conference on proposed species or proposed critical habitat.

(a) Each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts at an early stage in the planning process.

(b) The Federal agency shall initiate the conference with the Director. The Service may request a conference if, after a review of available information, it determines that a conference is required for a particular action.

(c) A conference between a Federal agency and the Service shall consist of informal discussions concerning an action that is likely to jeopardize the continued existence of the proposed species or result in the destruction or adverse modification of the proposed critical habitat at issue. Applicants may be involved in these informal discussions to the greatest extent practicable. During the conference, the Service will make advisory recommendations, if any, on ways to minimize or avoid adverse effects. If the proposed species is subsequently listed or the proposed critical habitat is designated prior to completion of the action, the Federal agency must review the action to determine whether formal consultation is required.

(d) If requested by the Federal agency and deemed appropriate by the Service, the conference may be conducted in accordance with the procedures for formal consultation in § 402.14. An opinion issued at the conclusion of the conference may be adopted as the biological opinion when the species is listed or critical habitat is designated, but only if no significant new information is developed (including that developed during the rulemaking process on the proposed listing or critical habitat designation) and no significant changes to the Federal action are made that would alter the content of the opinion. An incidental take statement provided with a conference opinion does not become effective unless the Service adopts the opinion once the listing is final.

(e) The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency and to any applicant. The style and magnitude of this document will vary with the complexity of the conference. If formal consultation also is required for a particular action, then the Service will provide the results of the conference with the biological opinion.

§ 402.11 Early consultation.

(a) *Purpose.* Early consultation is designed to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions and occurs prior to the filing of an application for a Federal permit or license. Although early consultation is conducted between the Service and the Federal agency, the prospective applicant should be involved throughout the consultation process.

(b) *Request by prospective applicant.* If a prospective applicant has reason to believe that the prospective action may affect listed species or critical habitat, it may request the Federal agency to enter into early consultation with the Service. The prospective applicant must certify in writing to the Federal agency that (1) it has a definitive proposal outlining the action and its effects and (2) it intends to implement its proposal, if authorized.

(c) *Initiation of early consultation.* If the Federal agency receives the prospective applicant's certification in paragraph (b) of this section, then the Federal agency shall initiate early consultation with the Service. This request shall be in writing and contain the information outlined in § 402.14(c) and, if the action is a major construction activity, the biological assessment as outlined in § 402.12.

(d) *Procedures and responsibilities.* The procedures and responsibilities for early consultation are the same as outlined in § 402.14(c)–(j) for formal consultation, except that all references to the "applicant" shall be treated as the "prospective applicant" and all references to the "biological opinion" or the "opinion" shall be treated as the "preliminary biological opinion" for the purpose of this section.

(e) *Preliminary biological opinion.* The contents and conclusions of a preliminary biological opinion are the same as for a biological opinion issued after formal consultation except that the incidental take statement provided with a preliminary biological opinion does not constitute authority to take listed species.

(f) *Confirmation of preliminary biological opinion as final biological opinion.* A preliminary biological opinion may be confirmed as a

biological opinion issued after formal consultation if the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the early consultation. A written request for confirmation of the preliminary biological opinion should be submitted after the prospective applicant applies to the Federal agency for a permit or license but prior to the issuance of such permit or license. Within 45 days of receipt of the Federal agency's request, the Service shall either: (1) confirm that the preliminary biological opinion stands as a final biological opinion; or (2) if the findings noted above cannot be made, request that the Federal agency initiate formal consultation.

§402.12 Biological assessments.

(a) *Purpose.* A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.

(b) *Preparation requirement.* (1) The procedures of this section are required for Federal actions that are "major construction activities"; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(a)(2) of the Act, may prepare a biological assessment under the supervision of the Federal agency and in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared.

(2) The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(c) *Request for information.* The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(d) *Director's response.* Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director will provide a list of candidate species that may be present in the action area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

(1) If the Director advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required. If only proposed species or proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under §402.10, but preparation of a biological assessment is not required unless the proposed listing and/or designation becomes final.

(2) If a listed species or critical habitat may be present in the action area, the Director will provide a species list or concur with the species list provided. The Director also will provide available information (or references thereto) regarding these species and critical habitat, and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

(e) *Verification of current accuracy of species list.* If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun.

(f) *Contents.* The contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. The following may be considered for inclusion:

(1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally.

(2) The views of recognized experts on the species at issue.

(3) A review of the literature and other information.

(4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(5) An analysis of alternate actions considered by the Federal agency for the proposed action.

(g) *Incorporation by reference.* If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and Part 17 of this Title (with respect to species under the jurisdiction of the FWS) or Parts 220, 222, and 227 of this Title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non- Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall

submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under §402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under §402.14 or §402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under §402.12 or as a result of informal consultation with the Service under §402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under §402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with §402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to §402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion

using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking of the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under (ii) above; and

(iv) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45(FWS) and 222.23(d)(NMFS).

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

§402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR Part 451.

§402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Dated: December 12, 1985.

William P. Horn,

Assistant Secretary for Fish and Wildlife and Parks.

Dated: January 30, 1986.

William G. Gordon,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

[FR Doc. 86-10566 Filed 6-86; 8:45 am]

BILLING CODE 4310-55, 3510-22-M

ENDANGERED SPECIES ACT OF 1973

As Amended through the

100th Congress

U.S. Fish and Wildlife Service
U.S. Department of the Interior
Washington, D.C. 20240
1988

ENDANGERED SPECIES ACT OF 1973*

FINDINGS, PURPOSES, AND POLICY

SEC. 2. (a) FINDINGS.—The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) PURPOSES.—The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve

*As amended by P.L. 94-325, June 30, 1976; P.L. 94-359, July 12, 1976; P.L. 95-212, December 19, 1977; P.L. 95-632, November 10, 1978; P.L. 96-159, December 28, 1979; P.L. 97-304, October 13, 1982; P.L. 98-327, June 25, 1984; and P.L. 100-478, October 7, 1988.

the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) POLICY.—(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

DEFINITIONS

SEC. 3. For the purposes of this Act—

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "commercial activity" means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibitions of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve," "conserving," and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 7, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 7(a) to such agency action.

(12) "The term person means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, muncipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States."

(13) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(14) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective

agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) OPINION OF SECRETARY.—(1)(A) Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency;

(B) in the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)—

(i) if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth—

(I) the reasons why a longer period is required;

(II) the information that is required to complete the consultation; and

(III) the estimated date on which consultation will be completed; or

(ii) if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

(2) Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

(B) Consultation under subsection (a)(3), and an opinion based by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsec-

tion (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

(4) If after consultation under subsection (a)(2) of this section, the Secretary concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

(C) if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that—

(i) specifies the impact of such incidental taking on the species,

(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

(iii) in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

(iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

(c) Biological Assessment.—(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with

the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

(d) Limitation on Commitment of Resources.—After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2).

(e)(1) Establishment of Committee.—There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this action for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency. Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under section 5703 of title 5 of the United States Code

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transac-

tion of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act, the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3)(G) of this subsection, be eligible to cast a vote on behalf of any member.

(f) REGULATIONS.—Not later than 90 days after the date of enactment of the Endangered Species Act Amendments of 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include but not be limited to—

(1) a description of the consultation process carried out pursuant to subsection (a)(2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a)(2) of this section.

(g) APPLICATION FOR EXEMPTION AND REPORT TO THE COMMITTEE.—(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2), the Secretary's opinion under subsection (b) indicates that the agency action would violate subsection (a)(2). An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f), not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary—

(A) determine that the Federal agency concerned and the exemption applicant have—

(i) carried out the consultation responsibilities described in subsection (a) in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2);

(ii) conducted any biological assessment required by subsection (c); and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irre-

trievable commitment of resources prohibited by subsection (d); or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A) (i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of title 5, United States Code.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3)(A) (i), (ii) and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with sections 554, 555, and 556 (other than subsection (b) (1) and (2) thereof) of title 5, United States Code, and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing—

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species of the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with sections 554, 555, and 556 (other than subsection (b)(3) of section 556) of title 5, United States Code.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

(h) EXEMPTION.—(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5). The Committee shall grant an exemption from the requirements of subsection (a)(2) for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g)(4), and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d); and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by Committee under this subsection shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action—

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless—

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a)(2) or was not identified in any biological assessment conducted under subsection (c), and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

(i) REVIEW BY SECRETARY OF STATE.—Notwithstanding any other provision of this Act, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

(j) Notwithstanding any other provision of this Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

(k) SPECIAL PROVISIONS.—An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.): *Provided,* That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

(l) COMMITTEE ORDERS.—(1) If the Committee determines under subsection (h) that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

(m) NOTICE.—The 60-day notice requirement of section 11(g) of this Act shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a)(2) of this section.

(n) JUDICIAL REVIEW.—Any person, as defined by section 3(13) of this Act, may obtain judicial review, under chapter 7 of title 5 of the United States Code, of any decision of the Endangered Species Committee under subsection (h) in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in section 2112, of title 28,

United States Code. Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

(o) EXEMPTION AS PROVIDING EXCEPTION ON TAKING OF ENDANGERED SPECIES.—Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section—

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

(p) EXEMPTIONS IN PRESIDENTIALLY DECLARED DISASTER AREAS.—In any area which has been declared by the President to be a major disaster area under the Disaster Relief Act of 1974, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 401 or 402 of the Disaster Relief Act of 1974, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

Endangered Species Act Section 7 Consultation Requirements and Implications for Federal Agencies that may influence the Edwards Aquifer

July 14, 1994

8:30AM -WELCOME
Sam Hamilton, State Administrator, U.S. Fish and Wildlife Service

8:40AM -HYDROGEOLOGY OF THE EDWARDS AQUIFER
George Ozuna, Hydrologist, U.S. Geological Survey

8:55AM -AQUIFER DEPENDENT FEDERALLY-LISTED SPECIES
Alisa Shull, Biologist, U.S. Fish and Wildlife Service

9:10AM -SECTION 7 OF THE ENDANGERED SPECIES ACT
Richard Szlemp, Biologist, U.S. Fish and Wildlife Service

9:50AM -BREAK

10:10AM -SECTION 7 DISCUSSION CONTINUED

10:50AM -FEDERAL AGENCY PRESENTATIONS

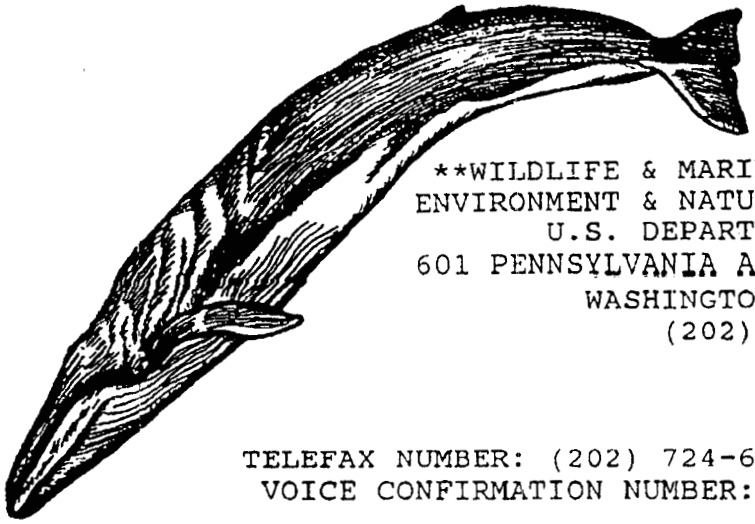
11:30AM -LUNCH

1:00PM -OPEN DISCUSSION, Q&A'S

3:00PM -FUTURE CONSULTATION PLANNING:

-Preparation for next meeting, September 29, 1994
- -Determination of "may affect" by Federal agencies
- -Determination of format for consultation
- -Designation of "lead agency"
- -Scope of biological assessment

4:00PM -ADJOURN!



WILDLIFE & MARINE RESOURCES SECTION
ENVIRONMENT & NATURAL RESOURCES DIVISION
U.S. DEPARTMENT OF JUSTICE
601 PENNSYLVANIA AVENUE N.W.- SUITE 5000
WASHINGTON, D.C. 20004
(202) 272-4421

TELEFAX NUMBER: (202) 724-6941 (COMMERCIAL) OR FTS 724-6941
VOICE CONFIRMATION NUMBER: (202) 272-4421 OR FTS 272-4421

TELEFAX TRANSMISSION RECORD

DATE: 4/20, 1994

TO: MARY ANN HOOK
PLEASE PRINT NAME

DEF. BASE CLOSURE + REALIGNMENT COMM'N
ORGANIZATION

703/696-0550
TELEFAX NUMBER

VOICE CONFIRMATION NUMBER

NUMBER OF PAGES 3 (INCLUDING THE COVER PAGE)

FROM: CHARLIE SHOCKEY
PLEASE PRINT NAME

(202) 272-4463 or (202) 272-4421
TELEPHONE NUMBER

COMMENTS: Because you have the Complaint, I'm not sending another copy.

U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

April 20, 1994

90-8-6-219

Mary Ann Hook, Esq.
Acting General Counsel
Defense Base Closure and Realignment Commission
1700 N. Moore St., Room 1425
Arlington, VA 22209

Re: Sierra Club v. Babbitt, No. MO-91-CV-069 (W.D. Tex.)

Dear Ms. Hook:

The Justice Department is sending this letter to advise you and several other federal agencies of a significant recent development in this Endangered Species Act litigation, which concerns regulation of water withdrawals from the Edwards Aquifer in south-central Texas. Until now, that litigation has been directed only at the Secretary of the Interior and the U.S. Fish and Wildlife Service (FWS).

By way of background, following a four-day trial in November 1992, the district court entered a Judgment and detailed Findings of Fact and Conclusions of Law against the FWS on February 1, 1993, finding that FWS had failed to implement a recovery plan to protect several endangered and threatened species that depend on adequate supplies of water from the aquifer. While the case was on appeal, FWS agreed to a settlement with the plaintiffs, which resulted in the district court's Amended Judgment and Amended Findings of Fact and Conclusions of Law dated May 26, 1993. The Fifth Circuit then dismissed the remaining appeals of the defendant-intervenors (the State of Texas, the City of San Antonio, and various pumpers), Sierra Club v. Babbitt, 995 F.2d 771 (5th Cir. 1993), concluding that they were not affected by the terms of the Judgment and lacked standing to appeal. The district court's Amended Judgment stated that he would invite the plaintiffs to seek further relief.

As of last Friday, the scope and complexion of this case changed considerably in a way that affects your agency. At a status conference on April 15, 1994, the plaintiff Sierra Club moved to amend its Complaint by filing claims against five federal agencies [the Environmental Protection Agency (EPA), the Department of Defense (DOD), the Defense Base Closure and Realignment Commission (DBCRC), the Department of Agriculture (USDA), and the Department of Transportation (DOT)].

The Sierra Club's Amended and Supplemental Complaint alleges that FWS has violated sections 4, 7, and 9 of ESA, 16 U.S.C. §§ 1533, 1536, 1538, by permitting water users to withdraw excessive amounts of water from the Edwards Underground Water Aquifer in south-central Texas. In addition, the Sierra Club alleges that EPA, DOD, DBCRC, USDA, and DOT have violated ESA section 7 by failing to consult with FWS on the impacts of their federally authorized, funded, and implemented actions and that, as a result, these agencies have committed an unauthorized "take" of endangered and threatened species. The Sierra Club also raises similar "take" claims against a state agency, the Texas Natural Resource Conservation Commission, as well as the City of San Antonio. Finally, the plaintiff raises a Superfund claim against EPA and San Antonio, alleging that excessive withdrawals have led to intrusion of toxic hydrogen sulfide into the underground aquifer, which is San Antonio's sole source of drinking water.

The court has given us until Friday, April 29, to respond to the plaintiff's Motion to Amend the Complaint. While we intend to oppose the motion on the grounds that final judgment has been entered in the prior phase of the litigation against FWS, there is no question that the court (Senior Federal Judge Bunton) will grant the plaintiff's motion. In remarks at the April 15 status conference, the court expressed its frustration that so little progress has been achieved in protecting the aquifer and the ESA-listed species in the past three years. Based upon his prior handling of this case, we must advise you candidly that we anticipate that Judge Bunton will do virtually whatever the plaintiffs ask.

We need your input quickly in preparing our response to the motion to amend and thereafter in preparing an answer to the amended complaint and developing a litigation strategy. Please contact me at telephone (202/272-4463), FAX (202/724-6941), or overnight mail at the following address:

Charles R. Shockey
Wildlife & Marine Resources Section
Environment & Natural Resources Division
U.S. Department of Justice
601 Pennsylvania Ave., N.W., Room 5000
Washington, D.C. 20004

Thank you for your assistance. I suspect that we are in for a very difficult challenge in responding to this litigation.

Very truly yours,

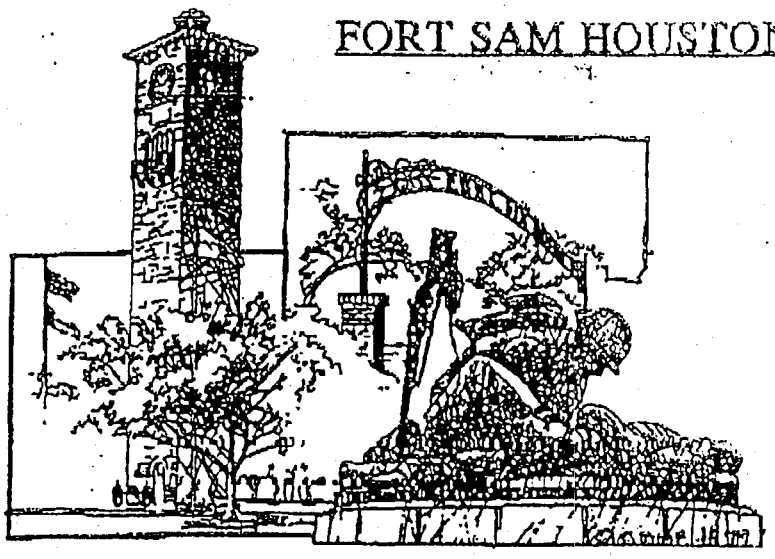
Charles R. Shockey

Charles R. Shockey

Enclosures

 MAJ D. your copy

FORT SAM HOUSTON, TEXAS



FACSIMILE TRANSMITTAL HEADER SHEET

Command/Office	Name/Office Symbol	Office Telephone No.	FAX No.
From: ADMIN/CIVIL LAW DIV., OGSJA FORT SAM HOUSTON, TX	AFZG-JA-AL	DSN 471-2373/0485 (210) 221-2373/0485	DSN 471-2033 (210) 221-2033
TO: JALS-ELC	LTC GRAHAM & MAJ TELLER		DSN (703)696 2940

Classification	Precedence	No. Pages (Including this Header)	Date-Time	Month	Year	Releaser's Signature
Unclassified	Routine	4	250900 CDT	APR	94	J. W. Scanlon, Jr.

REMARKS Latest draft from Owen Ann. As regards the Sierra Club amendment of pleadings - We are literally a step in the market (no pun intended) but I'm not sure we have a good case to defend the action. In the long run, the exclusion of the EPA may work against the Sierra Club - maybe Congress will (eventually) overturn the Act. WE HELP FOR US AND NOWEVER!

Mailing Address Effective 15 March 1994:

Staff Judge Advocate
AFZG-JA-AL
Building 135
1306 Stanley Road
Ft Sam Houston, TX 78234-5019

Richards assails MALDEF for blocking aquifer proposal

Court action threatens jobs of Hispanics, governor says

24 Apr 94
p1A

By Sherrada Scott
Express-News Austin Bureau

AUSTIN — Gov. Ann Richards blasted the state's leading Hispanic civil rights group for scuttling the state's Edwards aquifer plan and said the legal protest threatens the livelihoods of the very people it is meant to protect.

"Is it in the best interests of minority organizations to place in jeopardy thousands of Hispanic families' jobs? I don't think so," Richards told the San Antonio Express-News last week. "I think somebody is going to wake up and is going to say, 'We are seriously hurting the Hispanic community of (San Antonio).' "

The governor, who is seeking a second term of office at the polls this November, assailed the Mexican American Legal Defense and Educational Fund's actions on the Edwards aquifer in a wide-ranging luncheon interview with members of the Express-News at the Governor's Mansion in Austin last week.

Richards, who recently went to Washington to do battle on behalf of Kelly AFB, said the real crisis looming in San Antonio's future is not the possible closure of Kelly.

A greater danger, she volunteered, is that continued disagreement among different political entities could force drastic federal court action imposing water-use limits on the city that, in turn, would force area businesses and military bases to either move or close.

The governor singled out MALDEF for criticism in the aquifer controversy, laying the potential loss of millions in federal military, highway

See RICHARDS/13A

Continued from 1A

and agriculture funds at its feet.

"Are you going to cut off funds to the military installations of San Antonio, Texas, in the interests of who sits on a board and how they got there? ... It's real scary," Richards said, pointing to thousands of Hispanic families who depend on Kelly AFB for their livelihood.

MALDEF, a 25-year-old Hispanic civil-rights group based in Los Angeles with state offices located in San Antonio, helped block a plan, passed by the Texas Legislature last year, to limit pumping from the Edwards aquifer and avert a federal takeover.

It helped convince the U.S. Justice Department that a key board created by the Legislature violates the federal Voting Rights Act, rendering unenforceable the state's aquifer-management plan.

The Justice Department's ruling caught state officials, including Richards, by surprise since Clinton administration officials had previously signaled their unequivocal support for the state plan.

"It is its constituency that is impacted more than any other," Richards said, referring to the potential loss of jobs at places like Kelly, where large numbers of the skilled Hispanic workers are employed.

"I want you to clearly understand that in my youth, I spent an awful lot of time fighting for the very rights that MALDEF is organized to protect," Richards said. "I feel very strongly about both its right to exist and what it tries to do on behalf of people.

"In this particular situation, there is a much larger burden, purpose, that involves the very same people they're trying to protect," she said.

But Judith Sanders-Castro, an attorney for MALDEF, said the governor was deflecting blame for the crisis.

"The blame for the problem that San Antonio is facing and this whole region is facing with regard to the aquifer can be laid directly at the feet of the Texas Legislature," Sanders-Castro said.

"The governor has had the ability to call a special session to fix this legislation throughout this entire process. They were warned when this legislation was first put together that this was going to be a problem. We've offered the state of Texas some possible routes to fix this. Basically, they've ignored us," Sanders-Castro said.

"The governor is taking a very dangerous position in making the kinds of statements that she's

Ann Willis Richards

Born: Sept. 1, 1933, in Lakeview. Only child.

Family: Married in 1953 to high school sweetheart, David Richards. Reared four children. Divorced in 1984, they remain good friends. Has four grandkids whom she adores and sees frequently.

Education: Bachelor's degree from Baylor University (1954), teaching certificate from University of Texas at Austin (1955)

Experience: Junior high school teacher, homemaker, Easter egg hunt organizer, volunteer worker for LBJ campaign and others, Travis County commissioner (elected 1976, re-elected 1980), Texas State Treasurer (elected 1982, re-elected 1986), Texas Governor (elected 1990)

For fun: Walks around Town Lake on weekends; watches movies as often as she can; goes bird hunting and fishing, especially along the Gulf Coast.

Most recent film seen: The Paper

Raves about: Como Agua Para Chocolate (Like Water for Chocolate) By Laura Esquivel

Favorite reads: Murder mysteries) spy thrillers

Latest thrill: fly fishing

Campaign [illegible] a real culmination [illegible] All the rest [illegible] is the deal [illegible]

[illegible] because she is running for office and does need the Hispanic-American community ... she's basically advocating for the Voting Rights Act to be diminished or gutted, which would do away with protections of minorities in this state," Sanders-Castro said. "She's drawing a line in the sand."

At issue is a state plan that the Legislature approved in May to meet Senior U.S. District Judge Lucius Burton III's order to limit pumping from the 178-mile-long aquifer to protect endangered fish and salamanders in aquifer-fed springs.

MALDEF contended the new board, the Edwards Aquifer Authority that was created to enforce pumping limits, discriminated against minority voters because the appointed board would replace the elected Edwards Underground Water District.

MALDEF, which has won numerous other suits forcing single-member voting districts, believes members should be elected from carefully drawn districts that take into account the city's demographics and give areas of concentrated

Mexican-American populations a strong opportunity to elect Mexican-American representatives.

In November, the U.S. Justice Department agreed, refusing to approve the board, and thus rendering the state plan unenforceable.

Judge Bunton appointed a federal monitor to oversee the aquifer.

Texas Attorney General Dan Morales, on behalf of the state's leadership, then filed suit against the Justice Department challenging the ruling.

But on April 15 the Sierra Club, which had brought the original lawsuit under the federal Endangered Species Act that resulted in Bunton's ruling last year, asked the judge to declare an aquifer emergency and establish limits on aquifer use.

The aquifer is San Antonio's sole source of drinking water, and pumping limitations are especially feared by area manufacturers and the military bases because of the way limitations might hinder their operations.

If San Antonio and other water users drag their feet on any new limits, the environmental group urged Bunton to consider action to cut off federal money. The judge is expected to rule on that matter in May.

The news hit the capital last week like a mortar shell. "There goes Kelly" echoed through the offices of top state policymakers.

Kelly AFB is San Antonio's largest military base, employing 26,011 civilian, military, Air National Guard and Air Force reserves. About 31 percent of the civilian work force is Hispanic, said Cynthia Ranz, a Kelly AFB spokeswoman, which, in turn, accounts for a significant percentage of Hispanic civilians employed by the Air Force nationwide, a fact often cited by Kelly supporters.

Richards said she believes that the aquifer had been saved last year when on a "sheer miracle" state lawmakers were able to introduce a 11th-hour compromise plan in the long-running water fight.

The delicate compromise appears to have been rendered meaningless by MALDEF actions and the court response.

Richards said she felt "betrayed" by MALDEF and the Justice Department.

"The incredible part to me is that before that decision came down from Justice — I spoke (U.S. Attorney General) Reno's office like the week before — there was never any suggestion that there was a problem," Richards said.

Richards has said the Legislature call the Legislature into a special session to resolve the issue, instead is searching for other avenues.

"If I thought it could be resolved at the White House level, I would have already done that," she said.

San Antonio Mayor Nelson Wolff also said MALDEF will share the blame if any military jobs are lost, adding: "It is going to have to share the responsibility for this action."

Sandoval-Castro said officials backing the aquifer bill share much to blame as state leaders because "powerbrokers" wanted an appointed board that they could control.

"This will probably be the particularly most powerful board in the San Antonio area," Sandoval-Castro said, noting that there is no precedent for the state replacing an elected board with an appointed one.

"If the state can create a good government reason for getting around the Voting Rights Act, then it diminishes significantly the effectiveness of the Voting Rights Act," she said. "They can start creating all sorts of appointed bodies in this state."

George Ozuna - US Geol Survey

Sect 7 -

Does DOD (services) conduct Biol Assessm prior to implementation of BRAC rec? If not with implem (violates ESA) then DD should either solve or come back to BRAC -

- box closure -

has no authority to have any affect on water - .

only advisory commission

Exempted the "process" for NEPA not explicit to ESA

problem is indirect

we get recs - the assess not done - we rec/Pres recs and implementation is where assess/consult is done - if prob & can't mitigate then redirect

SIERRA CLUB

LONE STAR CHAPTER

April 15, 1994

Please refer to this number when responding 940420-5

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TO: The Honorable Bruce Babbitt, Secretary
United States Department of the Interior
Office of the Secretary
18th and C Streets, N.W.
Mail Slot #MS6217
Washington, D.C. 20240

All Federal agencies listed on Exhibit "A" attached to this notice

The City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit "B"

The Texas Natural Resource Conservation Commission ("TNRCC")

All other "Violators" (Defined Below)

Re: Notice of Endangered Species Act Violations

Dear Secretary Babbitt, all Federal agencies listed on Exhibit "A" attached to this notice, the City of San Antonio and other individuals and entities that withdraw water from the Edwards Aquifer including, without limitation, those listed on Exhibit "B," the TNRCC, and all other violators:

We am writing on behalf of the Sierra Club and Clark Hubbs to notify each of you, pursuant to Section 11(g)(2)(A)(i) of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1540(g)(2)(A)(i), of violations of the ESA, 16 U.S.C. §§ 1531 et seq., by each of you, and of the Sierra Club's and Clark Hubb's intent to sue concerning these violations.

Unlawful actions and failures or refusals to act by all of you cause severe overdrafting of the Edwards Underground River, also known as the Edwards (Balcones Fault Zone) Aquifer, San Antonio Region, hereinafter, "the Edwards." Overdrafting of the Edwards poses a substantial and imminent threat of jeopardy to the continued existence of endangered and threatened species and to the public health and safety of 1.5 million people. Both the species and the people are dependent on clear, clean natural Edwards water. Overdrafting of the Edwards moves hydrogen sulfide, a hazardous

substance, into the fresh water in the Edwards. Overdrafting of the Edwards threatens to poison the Edwards for everyone.

This threat is urgent. Overdrafting has already resulted in takings of endangered species in 1989 and 1990, and according to the largest pumper, San Antonio, threatens to do so again this summer and in 1995 and 1996. Overdrafting has already resulted in jeopardy to endangered species at Comal Springs in 1989 and 1990, and according to San Antonio threatens to do so again in mid-1995 and mid-1996. Overdrafting has already resulted in some movement of bad water, contaminated by hydrogen sulfide, a hazardous substance, in 1956. It threatens to do so again in a repeat of the drought of record, or in a drought less serious than the drought of record but slightly more serious than the droughts of 1984, 1989 and 1990.

This threat requires a vigorous coordinated federal-state-local response, beginning immediately. Michael Spear, Assistant Director of the U.S. Fish & Wildlife Service ("USFWS"), lead agency in charge of the Edwards species, testified in November 1992 that the Texas legislative session ending May 1993 represented the "last chance" for a state solution, before the "blunt axes" of ESA §§ 7 and 9 have to be dropped. That legislative session produced a statute, S.B. 1477 which, according to the State of Texas, is "frozen." No federal, state or local entity has a plan adequate to protect endangered species and human water supplies against overdrafting of the Edwards. The State's last plan "does not come close" to protecting these waters, according to an independent mid-1993 review by the University of Texas.

The background facts are set forth in the Findings of Fact and Conclusions of Law entered on February 1, 1993, by the Honorable Lucius Bunton, Senior United States District Judge, in Sierra Club v. Lujan, 1993 WL 151353 (W.D. Tex.), as amended May 26, 1993, appeal dismissed sub nom. Sierra Club v. Babbitt, 995 F.2d 571 (5th Cir. 1993). A copy is attached as Exhibit "C" and incorporated by reference in this notice of violation.

The Sierra Club and Clark Hubbs hereby give notice of the following violations:

(1) The Secretary of the Interior and the U.S. Fish & Wildlife Service have violated and are violating ESA § 4, 16 U.S.C. § 1533, by (a) failure to act on the listing petitions for certain Comal Springs species; (b) failure to designate critical habitat for those species and for the Texas blind salamander; (c) failure to develop recovery plans for the Comal Springs species and/or population and for the Texas blind salamander; (d) failure to implement key provisions of the San Marcos Recovery Plan, and (e) failure to

promulgate regulations to protect threatened species against reduction in springflows due to excessive pumping of the Edwards.

(2) The Secretary of the Interior and all Federal Agencies listed on Exhibit "A" (together, the "Federal Violators"), including but not limited to the U.S. Fish and Wildlife Service, the U.S. Departments of the Interior, Transportation, Agriculture, Defense, Army and Air Force, the U.S. Defense Base Closure and Realignment Commission, and the Agency for Toxic Substances and Disease Registry, have violated and are violating ESA § 7, 16 U.S.C. § 1536, by failing to review and utilize their authorities to plan and carry out programs for the conservation of the Edwards, Comal and San Marcos species against reduced springflows due to excessive pumping and by failing to engage in coordinated multi-agency consultation to insure that no actions or activities authorized, funded or carried out by them or by other federal agencies are likely to jeopardize the continued existence of any of the Edwards, Comal and San Marcos species.

(3) The Federal Violators, the TNRCC, and the City of San Antonio and other individuals and entities who withdraw water from the Edwards Aquifer, some of whom are listed on Exhibit "B," have violated and are violating ESA § 9 by authorizing, funding or carrying out pumping, or by authorizing, funding or carrying out activities that allow, maintain, encourage or increase pumping, from the Edwards to an extent that reduces Edwards levels and Comal and San Marcos springflow rates to below the points at which endangered wildlife are actually killed or injured.

The Sierra Club and Clark Hubbs intend to amend and supplement the Sierra Club's complaint in Sierra Club v. Babbitt, seeking leave from Judge Bunton for this purpose. The Sierra Club and Clark Hubbs intend to allege violations of ESA Sections 4, 7 and 9 and of other federal statutes, against specific defendants, as set forth in the proposed amended and supplemental complaint, a copy of which is attached as Exhibit "D," and incorporated by reference in this notice of violation. The Sierra Club and Clark Hubbs reserve the right to sue others to whom this notice of violation is sent for the violations covered by this notice, in the proposed amended and supplemental complaint or in a future amended and supplemental complaint. In particular, the Sierra Club and Clark Hubbs give notice that they intend, as necessary, to sue pumpers for violations of ESA Section 9 and seek injunctive relief restricting pumping to prevent violations of Section 9. Such relief may be requested as early as this summer.

Excessive pumping jeopardizes both endangered species and San Antonio's and others' water supply. In summary, federal, state and local authorities have the power and duty to protect the Edwards

against excessive pumping. They have failed and are failing or refusing to carry out their responsibilities. As a result, excessive pumping by San Antonio, the San Antonio military bases, agribusinesses and others imperils the Edwards ecosystem.

The Sierra Club and Clark Hubbs plan to take prompt legal action to obtain judicial remedies for this emergency.

Sincerely,

Ken Kramer, Director
Lone Star Chapter of the
Sierra Club

Stuart Henry
SBN 09484000
202 West 17th Street
Austin, Texas 78701
(512) 479-8125
(512) 479-8269 (fax)

P.M. Schenkkan
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Attachments

cc: Governor Ann Richards

FEDERAL AGENCY VIOLATORS[1/]

1. U.S. Agency for Toxic Substances and Disease Registry
   By serving David Satcher, Administrator
   1600 Clifton Road, N.E.
   Atlanta, GA 30333

2. U.S. Defense Base Closure and Realignment Commission
   By serving James A. Courter, Chairman
   Rosslyn Metro Center Bldg.
   1700 North Moore Street
   Arlington, VA 22209

3. U.S. Department of Agriculture
   By serving Mike Espey, Secretary
   14th and Independence Avenue, S.W.
   Washington, D.C. 20250

4. U.S. Department of Commerce
   By serving Ronald H. Brown, Sr., Secretary
   14th St. and Constitution Avenue, N.W.
   Washington, D.C. 20230

5. U.S. Department of Defense
   By serving William J. Perry, Secretary
   The Pentagon
   Washington, D.C. 20301

6. U.S. Department of the Air Force
   By serving Sheila E. Widnall, Secretary of the Air Force
   The Pentagon
   Washington, D.C. 20330

7. U.S. Department of the Army
   By serving Togo D. West, Jr., Secretary of the Army
   The Pentagon
   Washington, D.C. 20310

8. U.S. Department of the Navy
   By serving John H. Dalton, Secretary of the Navy
   The Pentagon
   Washington, D.C. 20350

9. U.S. Department of Education
   By serving Richard W. Riley, Secretary
   400 Maryland Avenue, S.W.
   Washington, D.C. 20202

10. U.S. Department of Energy
    By serving Hazel R. O'Leary, Secretary
    Forrestal Building
    1000 Independence Avenue, S.W.
    Washington, D.C. 20585

11. U.S. Department of Health and Human Services
    By serving Donna E. Shalala, Secretary
    200 Independence Avenue, S.W.
    Washington, D.C. 20201

12. U.S. Department of Housing and Urban Development
    By serving Henry G. Cisneros, Secretary
    451 Seventh Street, S.W.
    Washington, D.C. 20410

13. U.S. Department of the Interior
    By serving Bruce Babbitt, Secretary
    18th and C Street, N.W.
    Mail Slot #MS6217
    Washington, D.C. 20240

14. U.S. Department of Justice
    By serving Janet Reno, Attorney General
    Tenth Street and Constitution Avenue, N.W.
    Washington, D.C. 20530

15. U.S. Department of Labor
    By serving Robert B. Reich, Secretary
    200 Constitution Avenue, N.W.
    Washington, D.C. 20210

16. U.S. Department of State
    By serving Warren Christopher, Secretary
    2201 C Street, N.W.
    Washington, D.C. 20520

17. U.S. Department of Transportation
    By serving Federico F. Peña, Secretary
    400 Seventh Street, S.W.
    Washington, D.C. 20590

18. U.S. Department of the Treasury
    By serving Lloyd M. Bentsen, Secretary
    1500 Pennsylvania Avenue, N.W.
    Washington, D.C. 20220

[1/] **Each Federal Agency Violator listed above is also served by serving the following:**

Janet Reno,
Attorney General
Department of Justice <u>**and**</u>
Tenth Street and
Constitution Avenue, N.W.
Washington, DC 20530

James H. DeAtley,
U.S. Attorney
Department of Justice
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216

19. U.S. Department of Veterans Affairs
By serving Jesse Brown, Secretary
810 Vermont Avenue, N.W.
Washington, D.C. 20420

20. Environmental Protection Agency
By serving Carol M. Browner, Administrator
401 M Street, S.W.
Washington, D.C. 20460

21. Farm Credit Administration
By serving Billy R. Brown, Chairman
1501 Farm Credit Drive
McLean, VA 22102

22. Farmers Home Administration
By serving Michael V. Dunn, Administrator
14th Street and Independence Avenue, S.W.
Washington, D.C. 20250

23. Federal Communications Commission
By serving Reed E. Hundt, Chairman
1919 M Street, N.W.
Washington, D.C. 20554

24. Federal Deposit Insurance Corporation
By serving Andrew Hove, Chairman
550 Seventeenth Street, N.W.
Washington, DC 20429

25. Federal Emergency Management Agency
By serving James Lee Witt, Director
Federal Center Plaza
500 C Street, S.W.
Washington, DC 20472

26. Federal Home Loan Mortgage Corporation
By serving Leland C. Brendsel, Chairman
8200 Jones Branch Drive
McLean, VA 22102

27. Federal Housing Finance Board
By serving the Chairman
1777 F Street, N.W.
Washington, DC 20006

28. Federal Labor Relations Authority
By serving Jean McKee, Chairman
607 Fourteenth Street, N.W.
Washington, DC 20424-0001

29. Federal Trade Commission
By serving Janet D. Steiger, Chairman
Sixth Street and Pennsylvania Avenue, N.W.
Washington, DC 20580

30. General Services Administration
By serving Roger W. Johnson, Acting Administrator
18th and F Streets, N.W.
Washington, DC 20405

31. International Development Cooperation Agency of the United States
By serving J. Brian Atwood, Director
Department of State Building
320 Twenty-first Street, N.W.
Washington, DC 20523

32. International Trade Commission
By serving Don E. Newquist, Chairman
500 E Street, S.W.
Washington, DC 20436

33. Interstate Commerce Commission
By serving Gail C. MacDonald, Chairman
Twelfth Street and Constitution Avenue, N.W.
Washington, DC 20423

34. National Labor Relations Board
By serving James M. Stephens, Chairman
1099 14th Street, N.W.
Washington, DC 20570

35. Office of Thrift Supervision
By serving Jonathon L. Fiechter, Acting Director
1700 G Street, N.W.
Washington, DC 20552

36. U.S. Postal Service
By serving Marvin Runyon, Postmaster General
475 L'Enfant Plaza West, S.W.
Washington, DC 20260

37. Resolution Trust Corporation Oversight Board
By serving Jack Ryan, Chief Executive Officer
801 17th Street, N.W.
Washington, DC 20434

38. Securities and Exchange Commission
By serving Arthur Levitt, Jr., Chairman
450 Fifth Street, N.W.
Washington, DC 20549

39. Selective Service System
By serving Robert W. Gambino, Director
1515 Wilson Boulevard
Arlington, VA 22209-2425

40. Small Business Administration
By serving Erskine Bawles, Administrator
409 Third Street, S.W.
Washington, DC 20416

Document Separator

Individuals and Entities that Withdraw Water From the Edwards Aquifer

1. City of San Antonio
   By serving Nelson Wolff, Mayor
   100 Military Plaza
   San Antonio, TX 78205

2. Fiesta Texas Showpark, Inc.
   By serving Kenneth W. Smith
   8000 Robert F. McDermott Freeway
   Suite 600
   San Antonio, TX 78230

3. Danny McFadin
   Route 1, Box 16
   Knippa, TX 78870

4. Carl Muecke, Jr.
   Route 1 Box 89
   Knippa, TX 78870

5. Tommy Walker
   HCR 32 Box 29
   Uvalde, TX 78801

6. Redland Stone Products Company
   By serving David L. Wenzel
   17910 IH-10 West
   San Antonio, TX 78257

7. Southwest Research Institute
   By serving Martin Goland
   6220 Culebra
   San Antonio, TX 78238

8. United Services Automobile Association
   By serving Michael D. Wagner
   USAA Building
   9800 Fredericksburg Road
   San Antonio, TX 78288

9. USAA Real Estate Company
   By serving CT Corp. System
   811 Dallas Avenue
   Houston, TX 77002

10. U.S. Department of the Air Force
    By serving Sheila E. Widnall, Secretary of the Air Force
    The Pentagon
    Washington, D.C. 20330

11. U.S. Department of the Army
    By serving Togo D. West, Jr., Secretary of the Army
    The Pentagon
    Washington, D.C. 20310

12. U.S. Department of Defense
    By serving William J. Perry, Secretary
    The Pentagon
    Washington, D.C. 20301

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

FILED
MAY 26 1993
CHARLES W. VAGNER, Clerk
By Deputy

SIERRA CLUB, Plaintiff, GUADALUPE-BLANCO RIVER AUTHORITY, ET AL. Plaintiff-Intervenors, V. BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE, Defendants, DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL. Defendant-Intervenors.	§ §	MO-91-CA-069

AMENDED JUDGMENT

On February 1, 1993, this Court filed its Judgment and separate Findings of Fact and Conclusions of Law in the above-captioned cause. On limited remand from the U.S. Court of Appeals for the Fifth Circuit, this Court now has under consideration the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and Findings. This Court finds that such motion is well taken and that it should be GRANTED.

IT IS THEREFORE ORDERED that the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and Findings is hereby GRANTED, and the Court's February 1, 1993 Judgment is hereby

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EXHIBIT "C"

amended pursuant to Rule 60 of the Federal Rules of Civil Procedure to read as set forth herein.

THIS COURT, by separate Amended Findings of Fact and Conclusions of Law, ruled in favor of Plaintiff and Plaintiff-Intervenors in the above-captioned cause. This Court's rulings properly dispose of Plaintiff's, Plaintiff-Intervenors', Defendants', Defendant-Intervenors', and *Amici Curiae* issues in their entirety. Accordingly, the following Judgment, pursuant to Rule 58 of the Federal Rules of Civil Procedure, is appropriate. Accordingly,

IT IS THEREFORE ORDERED that, in connection with Plaintiffs' allegations of violations by the Federal Defendants of the Endangered Species Act (the "ESA"), the following minimum springflow findings shall serve as *interim* springflow findings for all purposes under the ESA, until the United States Fish and Wildlife Service (the "USFWS") modifies those findings as set forth below:

(1) Fountain Darters are "taken" (within the meaning of 16 U.S.C. § 1538(a)(1)(B)), as a result of withdrawals from the Edwards Aquifer, whenever the Comal springflow drops to some (as-yet) undefined springflow or range of springflows greater than 100 cfs.

(2) The "continued existence" of the Fountain Darter as a species is "jeopardized" (within the meaning of 16 U.S.C. § 1536(a)(2)), as a result of withdrawals from the Edwards Aquifer, whenever the Comal springflow drops to some (as-yet) undefined springflow or range of springflows greater than 0 cfs. Allowing the springs to cease flowing for *any* period of time, even during drought conditions, would pose an unacceptable risk to the continued existence of the Fountain Darter.

(3) "Critical habitat of Texas Wild-rice" is "destroyed or adversely modified" (within the meaning of 16 U.S.C. § 1536(a)(2)), as a result of withdrawals from the Edwards Aquifer, whenever the San Marcos springflow drops to some (as-yet) undefined springflow or range of springflows greater than 100 cfs.

IT IS FURTHER ORDERED that the USFWS may at any time modify the *interim* minimum springflow findings, based on available information and in the exercise of its best professional judgment.

IT IS FURTHER ORDERED that the USFWS shall determine within forty-five (45) days of the filing of this Judgment based on available information and in the exercise of its best professional judgment, each of the following to the extent that it has not yet made such determinations:

(1) the springflow at Comal Springs at which Fountain Darters begin to be "taken" as springflow drops;

(2) the minimum springflow required at Comal Springs to avoid appreciable reduction in the likelihood of survival and recovery of the Fountain Darter in the wild;

(3) the minimum springflow required at San Marcos Springs to avoid appreciable diminution of the value of critical habitat for the survival and recovery of any listed species;

(4) the springflow at San Marcos Springs at which Texas Wild-rice begins to be damaged or destroyed as the springflow drops;

(5) the springflow at San Marcos Springs at which any listed wildlife species begins to be "taken" as the springflow drops;

(6) the minimum springflow required at San Marcos Springs to avoid appreciable reduction in the likelihood of survival and recovery of any listed species in the wild;

(7) the minimum springflows or minimum water levels in the Edwards at which Texas Blind Salamanders begin to be "taken" as springflows and water levels drop; and

(8) the minimum springflows or minimum water levels in the Edwards required to avoid appreciable reduction in the likelihood of survival and recovery the Texas Blind Salamander in the wild.

IT IS FURTHER ORDERED that the USFWS may at any time and from time to time modify any of its minimum springflow or Edwards Aquifer level determinations, based on available information and in the exercise of its best professional judgment.

IT IS FURTHER ORDERED that the USFWS shall notify this Court and all parties of each minimum springflow and Edwards Aquifer level determination, of each USFWS modification to any such determination, and of each USFWS modification to any of this Court's *interim* minimum springflow findings, promptly upon USFWS making the determination or modification.

IT IS FURTHER ORDERED that the USFWS shall file monthly reports on the status of its ongoing efforts to define, and then refine, the Comal and San Marcos minimum springflows, and the Edwards Aquifer minimum levels, required for the conservation and survival of listed species.

IT IS FURTHER ORDERED that the USFWS shall promptly provide all Federal agencies to which Plaintiff or Plaintiff-Intervenors gave notices of violations (the "Federal Agencies") with a copy of this Judgment, and the USFWS shall further advise all Federal Agencies of each minimum springflow and Edwards Aquifer level determination made by the USFWS, and of any modification made by the USFWS to any such determination or to any interim minimum springflow finding made by this Court, promptly upon the USFWS

making that determination or modification, so that those agencies will be able to perform their duties under the ESA *if the State of Texas fails or refuses to regulate withdrawals from the Edwards Aquifer* to whatever extent may be required to avoid jeopardy to, and destruction or adverse modification of critical habitat of, any listed species.

IT IS FURTHER ORDERED that the USFWS shall promptly provide all persons and entities known or believed by the USFWS to be withdrawing water from the Edwards Aquifer ("Pumpers") with a copy of this Judgment, and the USFWS shall further advise all Pumpers of each minimum springflow and Edwards Aquifer level determination made by the USFWS, and of any modification made by the USFWS to any such determination or to any minimum springflow finding made by this Court, promptly upon the USFWS making that determination or modification, so that those Pumpers will be able to take appropriate action if the State of Texas fails or refuses to regulate withdrawals to the extent necessary to avoid unlawful takings of listed wildlife species or unlawful damage or destruction of Texas Wild-rice.

IT IS THEREFORE ORDERED that Defendant-Intervenor the Texas Water Commission shall prepare a plan that, in its best professional judgment, assures that the Comal Springs and San Marcos Springs will not drop below jeopardy levels as defined by the USFWS, even in a repeat of the drought of record, and it shall submit that plan to the Court and all parties by not later than March 1, 1993.

IT IS FURTHER ORDERED that Plaintiff and Plaintiff-Intervenors may seek appropriate relief from this Court at any time *after* May 31, 1993 (the last day of the current regular session of the Texas legislature) *if the State of Texas does not have in effect at such time,* pursuant to new or existing State law, a regulatory system pursuant to which withdrawals from the Edwards Aquifer can and will be limited to whatever extent may be required to avoid unlawful takings of listed species, any appreciable reduction in the likelihood of survival and recovery of listed species in the wild, and any appreciable diminution of the value of critical habitat for the survival and recovery of any listed species, even in a repeat of the drought of record.

IT IS FURTHER ORDERED that upon Motion by Plaintiff and Plaintiff-Intervenors and Order by this Court, the parties are put on notice that this matter is tentatively scheduled for further hearing on Monday, June 28, 1993, to address the following issues:

(1) the status of review by the Texas courts of the TWC's efforts to regulate withdrawals from the Edwards Aquifer based on the TWC's determination that the water is owned by the state in trust for the benefit of the public;

(2) new State laws, if any, relative to the Edwards Aquifer;

(3) the status of applications for new listings of other species that rely upon springflows from the Comal or San Marcos Springs, or that live underground in the Edwards Aquifer;

(4) the status of USFWS' efforts to define, and then refine, the Comal and San Marcos minimum springflows, and the Edwards Aquifer minimum levels, required for the conservation and survival of listed species; and

(5) any additional relief sought by Plaintiff and Plaintiff-Intervenors under Federal law because of inadequacy of

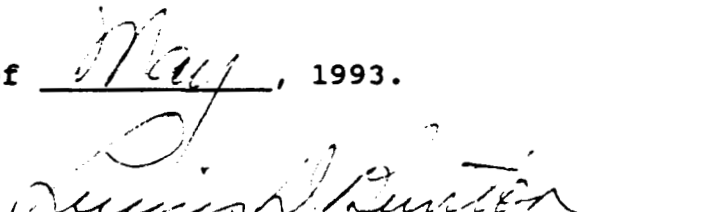
state law or because of inadequacy of the State's implementation under that law.

IT IS FURTHER ORDERED that judgment be entered against the Federal Defendants and in favor of Plaintiff and Plaintiff Intervenors for the cost of litigation, including reasonable attorney and expert witness fees pursuant to 16 U.S.C. § 1540(g)(4) and the Equal Access to Justice Acts, 28 U.S.C. § 2412. Plaintiff and Plaintiff-Intervenors and the Federal Defendants shall agree within thirty (30) days on the cost of litigation, and failing such agreement, shall file briefs stating the dispute of such costs.

IT IS FURTHER ORDERED Costs of Court are assessed against Federal Defendants. *See* 28 U.S.C. § 1920.

IT IS FINALLY ORDERED Motions pursuant to Rules 52, 59, and 60 of the Federal Rules of Civil Procedure shall be filed within ten (10) days after the filing of this Judgment.

SIGNED this 26th day of May, 1993.



HONORABLE LUCIUS D. BUNTON, III
SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

FILED
MAY 26 1993
CHARLES W. WAGNER, Clerk
By Deputy

SIERRA CLUB, Plaintiff, GUADALUPE-BLANCO RIVER AUTHORITY, ET AL. Plaintiff-Intervenors, V. BRUCE BABBITT, in his official capacity as Secretary, Department of Interior, and THE UNITED STATES FISH AND WILDLIFE SERVICE, Defendants, DANNY McFADIN, TOMMY WALKER, CARL MUECKE, ET AL. Defendant-Intervenors.	§ §	MO-91-CA-069

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 1, 1993, this Court filed its Judgment and separate Findings of Fact and Conclusions of Law in the above-captioned cause. On limited remand from the U.S. Court of Appeals for the Fifth Circuit, this Court now has under consideration the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and Findings. This Court finds that such motion is well taken and that it should be GRANTED.

IT IS THEREFORE ORDERED that the Federal Defendants' and Plaintiffs' Joint Motion to Clarify the Judgment and Findings is hereby GRANTED, and the Court's February 1, 1993 Findings of Fact

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and Conclusions of Law are hereby amended pursuant to Rules 60 and 52(b) of the Federal Rules of Civil Procedure to read as set forth herein.

BEFORE THIS COURT came the above-captioned cause for bench trial in Midland, Texas on November 17-19, 1992. The case at bar involves three groups of parties. Group I, aligned as Plaintiffs: Plaintiff SIERRA CLUB; Plaintiff-Intervenors: (1) GUADALUPE-BLANCO RIVER AUTHORITY ("GBRA"); (2) CITY OF SAN MARCOS (3) CITY OF NEW BRAUNFELS and NEW BRAUNFELS UTILITIES; (4) BEXAR METROPOLITAN WATER DISTRICT ("BMWD"); (5) GREEN VALLEY WATER SUPPLY CORPORATION ("GVWSC") and ATASCOSA RURAL WATER SUPPLY CORPORATION ("ARWSC").

Group II, aligned as Defendants: Defendants MANUEL LUJAN, JR., and THE UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"); Defendant-Intervenors: (1) STATE OF TEXAS [TEXAS WATER COMMISSION ("TWC"), TEXAS PARKS AND WILDLIFE DIVISION (the "TPWD"), TEXAS DEPARTMENT OF AGRICULTURE (the "TDA")]; (2) CITY OF SAN ANTONIO, TEXAS; (3) UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), REDLAND STONE PRODUCTS COMPANY ("REDLAND"), SOUTHWEST RESEARCH INSTITUTE ("SOUTHWEST RESEARCH"), USAA REAL ESTATE COMPANY ("USAA REALCO"), and SOUTHWEST FOUNDATION FOR BIOMEDICAL RESEARCH ("SOUTHWEST FOUNDATION") (collectively, "INDUSTRIAL WATER USERS" or "IWU"); (4) GREATER SAN ANTONIO BUILDERS ASSOCIATION ("BUILDERS ASSOCIATION"); DANNY McFADIN, TOMMY WALKER, and CARL MUECKE; (6) LIVING WATERS ARTESIAN SPRINGS, LTD. ("THE CATFISH FARM").

Group III, Aligned as *AMICI CURIAE*: (1) EDWARDS UNDERGROUND WATER DISTRICT ("EUWD"); (2) UNION CARBIDE CHEMICALS and PLASTICS COMPANY, INC., OCCIDENTAL CHEMICAL CORP., E.I. DuPONT De NEMOURS & COMPANY, INC., CENTRAL POWER & LIGHT, CO., THE CARBON/GRAPHITE GROUP, INC., and BP CHEMICALS (collectively, "INDUSTRIAL WATER USERS ON THE LOWER GUADALUPE RIVER ASSOCIATION" ("IWUA")); (3) THELMA AREA NEIGHBORHOOD CORPORATION ("TANC"). Parties and their counsel appeared and announced ready for trial. All jurisdictional prerequisites necessary for the maintenance of the claims of the parties are fulfilled. *See* 28 U.S.C. §§ 1331, 1343; *see also* 28 U.S.C. § 1402(b). After considering all the pleadings, the summary judgment evidence, the evidence presented at trial, and the testimony of live witnesses, the deposition transcripts and summaries, the copious proffered exhibits, the arguments of counsel, creative and otherwise, the controlling legal authorities, post-trial briefs, and proposed findings of fact and conclusions of law, this Court hereby enters its Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

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Endangered Species Act Introduction

1. Notwithstanding the existence of simple innuendos to possible far-reaching impacts, the case *sub judice* specifically concerns the duties of the Secretary of the United States Department of the Interior (the "Secretary") and the United States Fish and Wildlife Service (the "USFWS") (collectively, the Federal Defendants) to protect certain endangered and threatened species and their ecosystems, the Comal Springs, the San Marcos Springs, and the Edwards Aquifer (the "Edwards").

2. The United States Supreme Court observed the Endangered Species Act (the "ESA") as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). Beyond any doubt, "Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. The ESA reflects "an explicit Congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "a conscious decision by Congress to give

endangered species priority over the 'primary missions' of federal agencies." *Id*. at 185.

3. Quoting from a House Committee report, the Supreme Court echoed Congress' concern both about the unknown uses endangered species might have and about the unforeseeable place such species may have in the chain of life on the earth:

> "As we homogenize the habitats in which these plants and animals evolved and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their -- and our own -- genetic heritage.
>
> "*The value of this genetic heritage is, quite literally, incalculable*.
>
> . . . .
>
> "From the most narrow possible point of view, *it is in the best interest of mankind to minimize the losses of genetic variations*. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and they provide answers to questions which we have not yet learned to ask.
>
> "To take a homely, but apt example: one of the critical chemicals in the regulation of ovulations in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed -- or had it been driven out of existence before we knew of its potentialities -- we would never have tried to synthesize it in the first place.
>
> "Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which

> may yet be undiscovered, much less analyzed? . . . Sheer self interest impels us to be cautious."

Id. at 178 (quoting H.R. Rep. No. 93-412, 87th Cong., at 4-5 (1973)) (emphasis added by Supreme Court).

4. The requirements of the various endangered and threatened species are extremely complex; unfortunately, the earthlings' collective knowledge on these issues is still in the infant stages. Accordingly, any permitted deviations from the natural conditions granting the known requirements should be assumed to harm the endangered and threatened species.

<u>The Edwards Aquifer System</u>

5. The Edwards is a 175 mile long underground conduit and covers an expanse of about 3,600 square miles. (Fed. Def. Consol. Answer at ¶ 10). Although challenged, the Texas Water Commission ("TWC") declared the Edwards to be an underground river. (PX-171). Water enters the Edwards mainly (75%) from surface streams as they cross its recharge area. (Thornhill Testimony; PX-189 at p. 6; P-36 [San Marcos Recovery Plan]). Unless intercepted by human withdrawals, water in the Edwards flows west to east, then northeast, and discharges naturally at springs, especially Comal Springs in New Braunfels and San Marcos Springs in San Marcos. *(Id.)*. Water is removed

from the Edwards by withdrawal from wells, interformational movement, and by discharge through spring openings.

6. Although also challenged, the TWC determined the Edwards manifests all the characteristics of a surface watercourse; therefore, the water in the Edwards is owned by the State of Texas in trust for the benefit of the public. (PX-171).

7. The underground formation generally falls in elevation from west to east. (Thornhill Testimony; PX-189 at p. 5). The formation also generally dips toward the Gulf of Mexico. (Thornhill Testimony; PX-189 at p. 5). The piezometric surface of the water (that is, the water level) in the Edwards generally decreases from the west to the east. (Thornhill Testimony; PX-2). The Edwards has two adjacent sub-areas -- a shallower outcrop area where recharge occurs and a deeper artesian area. (Thornhill Testimony).

8. The Edwards is porous and complexly faulted with numerous fractures and solution cavities. The movement of water through the aquifer, except in general terms, is largely undefined. The Edwards Aquifer exists because of the Balcones Fault Zone and to its limestone and dolomite composition. Dissolution of the rock and faulting have created pathways for the water of the Edwards to flow through. Springs, the

natural spill points of the Edwards Aquifer, are all located along major faults. (Thornhill Testimony).

9. A large variability is present in the type and size of the openings in the Edwards Aquifer. The openings range in size from microscopic to large caverns. Many large openings in the subsurface have been encountered while drilling wells. They range from less than a foot to nearly 100 feet; a 90-foot opening has been reported in one well drilled in San Antonio. The relatively large openings are one of the many reasons the Edwards is important and unique. (Thornhill Testimony).

10. Most of the water in the Edwards comes from the flows of surface streams that feed it. (Thornhill Testimony; PX-25; PX-26; PX-189). These streams are located in the upper portion of the Nueces River Basin, the upper portion of the San Antonio River Basin, and a part of the upper portion of the Guadalupe River Basin (the "Contributory Watershed"). (PX-1). Almost all of the base flows and large parts of the flood flows of these streams naturally flow underground to the Edwards through its recharge area. (Thornhill Testimony).

11. The lateral boundaries of the Edwards are: on the north, the northern boundary of the recharge area; on the south, the boundary south of just where the water moves at rates of flow considered insignificant as compared to flow rates north of

the boundary (the boundary is approximated by the "bad-water" line, which separates water containing less than 1000 milligrams per liter of total dissolved solids ("TDS") from water containing more 1000 milligrams per liter of TDS). On the west, the divide near Brackettville in Kinney County separates underground flow toward the Comal and San Marcos Springs from underground flow to the Rio Grande Basin. On the east, the divide northeast of Kyle in Hays County separates underground flow toward the Comal and San Marcos Springs from underground flow to the Colorado River Basin. (PX-189 at p. 5).

12. Water along and south of the "bad-water" line contains much higher concentrations of minerals and is typically charged with hydrogen sulfide. (PX-171; PX-184 at p. 1). Generally, the Edwards is not nearly as porous and permeable south of the "bad-water" line and the water there moves at rates that are insignificant compared to flow rates north of the line. (PX-185 at pp. 19-21).

13. The lower boundary of the Edwards is the underlying Glen Rose Formation. (Thornhill Testimony; PX-189). The upper boundary of the artesian area is the Del Rio Clay. (Thornhill Testimony; PX-189).

14. Water levels at various parts of the Edwards differ, and no *single* well reflects the overall and exact Edwards level. (See Thornhill Testimony).

15. The Edwards is a unique ecosystem, which is home to several unique species. (PX-189 at p. 6). Among these is the Texas Blind Salamander, which is listed by the Federal Defendants as endangered. (Shull Testimony; PX-248; DX-20).

16. The Edwards is the major source of water supply for over one million residents of the Edwards region. The Aquifer was designated as the major source aquifer under the Safe Drinking Water Act. *See* 42 U.S.C. § 300f-300g-6. (Aceves Testimony; Moreno Testimony).

17. The Edwards Aquifer supplies the water needs of municipalities, irrigated agriculture, industry, domestic and livestock uses, and several military installations through wells drilled into the aquifer. (Thornhill Testimony; Aceves Testimony).

18. Unquestionably, the Edwards is a natural resource vital to the economies of the aquifer region. (Perryman Testimony). Therefore, the Edwards should be protected.

19. Two groundwater districts have been created under Texas law to manage the Edwards. *Amicus curiae* Edwards Underground Water District ("EUWD") has authority within Bexar, Comal, and Hays

Counties to conserve, preserve, protect and increase the recharge of and prevent the waste and pollution of the aquifer's waters. EUWD is empowered to develop, implement, and enforce drought management plans in order to minimize, as far as practicable, the drawdown of the water table, or the reduction of artesian pressure or spring flow. The EUWD has adopted rules, effective since 1991, requiring pumping reductions of 10% to in excess of 30%, varying with drought conditions. The EUWD has constructed a number of recharge enhancement structures in the Edwards region. The Medina County Underground Water District has authority within Medina County to permit nonexempt wells, limit pumpage, encourage conservation, and prohibit waste of the aquifer's waters and has adopted rules aimed at achieving these goals. (Masters Testimony; DX-8; DX-9; DX-10).

<u>The Comal Springs and San Marcos Springs</u>

20. The rate of spring flow at San Marcos and Comal Springs is generally related to levels of water in the Edwards, although spring flow at San Marcos is somewhat influenced by local recharge. (See Thornhill Testimony).

21. The primary natural surface outlets of the Edwards, however, are the multiple, natural spring openings of the two largest

springs in Texas and the entire southwest United States: the Comal Springs at New Braunfels (PX-4; PX-5; PX-7; PX-18) and the San Marcos Springs at San Marcos. (PX-6; PX-19; PX-20). Both of these springs are in the Guadalupe River Basin. (Thornhill Testimony).

22. Spring Lake overlies natural spring openings at San Marcos Springs. (Thornhill Testimony). Landa Lake overlies the lower natural spring openings at the Comal Springs. (Thornhill Testimony).

23. Some of the spring openings at Comal Springs are at a higher elevation than Landa Lake. Springflows from these spring openings flow down spring runs (stream channels) into Landa Lake. (Thornhill Testimony).

24. The Comal Springs are a unique ecosystem. The largest springs in the Southwest, the Comal Springs, are home to one of the only two wild populations of the Fountain Darter, which is listed by the Federal Defendants as an endangered species. (Hubbs Testimony; Shull Testimony; Whiteside Testimony; PX-36). The Comal Springs are also home to a species of salamander which may be the San Marcos Salamander, federally listed as threatened, or the salamander may be a unique species. (Hillis Testimony; Whiteside Testimony; PX-36, PX-248). The Comal Springs are also home to certain species

of invertebrates, which the Federal Defendants have under consideration for listing as endangered or threatened. (Shull Testimony; PX-248; DX-63).

25. The San Marcos Springs are a unique ecosystem, being the second largest springs in the Southwest. The San Marcos Springs are home to one of the only two wild populations of the Fountain Darter which is listed by the Federal Defendants as an endangered species. (Hubbs Testimony; Shull Testimony; Whiteside Testimony; Thornhill Testimony; PX-36). The San Marcos Springs and the San Marcos River downstream of those springs are also home to the San Marcos Salamander, federally listed as threatened, the Texas Wild-rice, federally listed as endangered, and the San Marcos Gambusia, federally listed as endangered. (Hillis Testimony; Shull Testimony; Hubbs Testimony; Power Testimony; Whiteside Testimony; PX-36, PX-248). The San Marcos Gambusia may in fact be extinct, but it has not yet been officially declared extinct by the Federal Defendants. (Hubbs Testimony; PX-41; PX-85).

26. The endangered or threatened species living either at or downstream of the Comal and San Marcos Springs or in the Edwards rely upon adequate and continuous natural flows of fresh water through the Edwards and exiting from the natural

spring openings as an environment for their survival. (Admitted, Fed. Def. Consol. Answer at ¶ 123).

The Threats Posed by Pumping of the Edwards

27. Recharge of the Edwards is highly variable, ranging from 46,000 acre feet per year ("ac-ft/yr") to 2 million ac-ft/yr. (Thornhill Testimony; PX-11).

28. But for human withdrawals, natural discharge from the Edwards at the Comal and San Marcos Springs would likely be stable. (Thornhill Testimony).

29. Water lost from the Edwards by well discharge, interformational movement, or spring discharge could be replenished by surface recharge. The quantity of recharge of the Edwards is dependent upon the amount, rate, and location of rain falling in the aquifer's watershed and recharge areas. Limited structures capturing rainfall and runoff enhancing the recharge have been constructed since recovery efforts for the listed species began. (Thornhill Testimony; Masters Testimony).

30. Pumping from the Edwards rose from about 30,000 ac-ft/yr at the turn of the century to over 500,000 ac-ft/yr in recent years. In dry seasons, pumping is expectedly higher,

especially spring, summer, and drought years. (Thornhill Testimony; PX-10; PX-248).

31. The Comal Springs dried up only once, in 1956, for five months, in the worst year of the "drought of record." (Thornhill Testimony; PX-13).

32. The Comal Springs would not have dried up in the drought of record but for human withdrawals from the Edwards. In the absence of such pumping, the Comal Springs would have flowed at a rate of not less than 150 cubic feet per second ("cfs) on the worst day of 1956. (Thornhill Testimony).

33. During the drought of record in 1956, springflow at the San Marcos Springs slowed to 46 cfs. (PX-15). In the absence of human withdrawals from the Edwards, the San Marcos Springs could flow at a rate of not less than 100 cfs on the worst day of the worst year of the drought of record. (Thornhill Testimony).

34. Pumping from the Edwards, during the ten years up to and including 1956, averaged 219,000 ac-ft/yr and peaked at 321,000 ac-ft/yr in 1956. (PX-10). Pumping during the last 10 years averaged 468,000 ac-ft/yr, peaking in 1989 at 542,000 ac-ft/yr.

35. As a result of pumping, the Comal Springs threatened to dry up in 1984, 1989 and 1990. (Thornhill testimony; PX-34 at p. 1).

These three years were years of droughts having an expected severity of approximately once per decade. (Bomar Testimony).

36. If current levels of withdrawals from the Edwards are allowed to continue without control or additional water supply, both the Comal and San Marcos Springs potentially will cease to flow for years during either a repeat of the drought of record or a worse drought. Further, both springs will cease to flow during milder droughts with a shorter duration than the drought of record. (Thornhill Testimony; PX-171; DX-169 at pp. 2, 3, 5-1, 5-67).

37. If current levels of withdrawals are allowed to continue without reduction, endangered and threatened species will be taken, damaged, or destroyed; their designated critical habitat destroyed or adversely modified; and their continued existence severely jeopardized during dry periods or relatively mild droughts. (Thornhill Testimony; PX-34; PX-35; PX-36; PX-171; DX-169).

38. Dry periods and relatively mild droughts occur with some frequency in Texas. (Thornhill Testimony; Bomar Testimony).

39. Pumping from the Edwards has been and remains effectively unregulated. (Hall Testimony; Spear Testimony; Aceves Testimony). Although the Board of Directors of the EUWD did adopt a Demand Management Plan, with concomitant rules

implementing the plan, and a Edward-Balcones Fault Zone Aquifer (the "Aquifer Management Plan").

40. The Edwards is overdrafted; meaning, more water is withdrawn every year than its "firm yield" in the drought of record. (Thornhill Testimony; Spear Testimony; Masters Testimony; Aceves Testimony).

41. Without some regulation of pumping, the Comal and San Marcos Springs will have cyclical drying-up periods with the potential of permanently drying up. (*See* Thornhill Testimony; PX-36; DX-169).

42. The TWC noted, "overdrafting of the Aquifer itself may allow the intrusion of highly mineralized water from underground water adjacent to the [Edwards] otherwise held in check because of the hydrostatic pressure of the Aquifer." (PX-189 at p. 8).

43. A 1986 study published by the United States Geological Society ("USGS") estimated, under conditions of the "worst case" during a repeat of the drought of record, the bad-water would migrate 0.2 miles into the fresh water of the Edwards. Consequently, 11,300 acre-feet of bad water and 76,900 tons of pollutants would be discharged into the fresh water each year. (PX-250).

44. Under the "worst case" estimate in the 1986 USGS report, there would be 22,400 acres of land overlying the Edwards (0.2 miles multiplied by 175 miles), within which existing and future wells supplying water for domestic, municipal, industrial, and irrigation uses would be jeopardized. (PX-250).

45. Under the "worst case" estimate in the 1986 USGS report, 3.7 billion gallons of bad-quality water would be discharged into the fresh water each year. (PX-250).

46. Under the "worst case" estimate in the 1986 USGS report, 154 million pounds of pollutants would be discharged into the fresh water each year. (PX-250).

47. The TWC was advised of the high likelihood the "worst case n estimate made in the 1986 USGS Report *may not be* the worst case. (*See* PX-162). However, the TWC made no determination on this issue. (Masters Testimony, Aceves Testimony; *see* PX-189).

48. In addition to the threat of contamination from the discharge of bad-quality water from south of the bad water line, there also appear to be areas of bad-quality water within the fresh-water portion of the Edwards. These areas presumably exist because there is minimal flow of water in these areas. If the Edwards is drawn down to historical lows, presumably there

will be discharge of bad-quality water from these areas into fresh water. (Thornhill Testimony).

49. Hydrogen sulfide is one of the pollutants in the bad water, both south of the bad water line and in the isolated areas of bad water within the fresh water zone. (Thornhill Testimony). Hydrogen sulfide is a hazardous substance as defined under federal law. *See* 16 U.S.C. § 1261; 40 C.F.R. § 302.4, Table 302.4.

50. A recent study conducted by the EUWD shows the bad water line is much closer to the Comal and San Marcos Springs than was previously assumed. In fact, the study shows the bad water line is located directly beneath the Springs. (PX-184). Bad water has been withdrawn from a well located approximately 300 feet from major spring openings at the San Marcos Springs. (Thornhill Testimony).

51. The USFWS is concerned about threat the movement of bad water, due to overdrafting of the Edwards, may pose to endangered and threatened species. (PX-34, PX-132).

52. If the Comal Springs ceases to flow, there is a risk the bad-quality water containing a hazardous substance will move into fresh water near the spring openings and be discharged out the spring openings when the aquifer levels rise. (Thornhill Testimony; PX-34, PX-132).

53. The surest and most prudent method of ensuring the inexistence of significant adverse water quality impacts, due to pumping from the Edwards, is to limit pumping to the extent necessary to maintain adequate, continuous natural springflows from the Comal Springs at all times. Uncertainties of human knowledge prevent reducing the Edwards level any lower. (*See* Thornhill Testimony).

54. The Texas Department of Water Resources ("TDWR"), the TWC, the EUWD and the City of San Antonio agree: if the Edwards were pumped down too far (presently an unquantifiable figure), movement of bad water could permanently and irreversibly ruin the Edwards. (Thornhill Testimony; Hall Testimony; Masters Testimony; Aceves Testimony; PX-75; PX-189; PX-132 (3/91 letter); PX-171; DX-169).

<u>Endangered Species Act Specifics</u>

55. The ESA promulgates the Federal Defendants as the lucky leading Federal agency-in-charge of protecting endangered and threatened species. *See* 16 U.S.C. § 1531, *et seq*.

56. Pursuant to the ESA, 16 U.S.C. § 1533(a)(1), the Secretary *is required* to determine whether any species is an endangered or threatened species because of any of the following factors:

(a) the present or threatened destruction, modification or curtailment of its habitat or range; (b) over-utilization for commercial, recreational, scientific, or educational purposes; (c) disease or predators; (d) the inadequacy of existing regulatory mechanisms; or (e) other natural or man made factors affecting its continued existence.

57. Under 16 U.S.C. § 1533, the Secretary must determine which species are the endangered or threatened species "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any state or foreign nation, or any political subdivision of the state or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas."

58. Under 16 U.S.C. § 1533(c), the Secretary is required to publish in the Federal Register a list of all species determined by either the Secretary of the Interior or the Secretary of Commerce to be an endangered or threatened species.

59. Under 16 U.S.C. § 1532(6), "the term 'endangered species' means any species which is in danger of extinction throughout

all or a significant part of its range other than the species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man."

60. Under 16 U.S.C. § 1532(20), "the term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range."

61. Region 2 of the USFWS, which includes, Texas, New Mexico, Arizona, and Oklahoma, has responsibility for the endangered and threatened species at issue in this lawsuit. (Spear Testimony; DX-19 at cover page).

62. The species at issue currently listed under the ESA and the geographical areas occupied by these species are described below:

a. **Fountain Darter** (*Etheostoma fonticola*), which is listed in 50 C.F.R. § 17.11 (1988) as endangered. The State of Texas recognized the Fountain Darter (*Etheostoma fonticola*) as an endangered species. 31 Tex. Admin. Code Ann. § 65.183 (1989). The entire known world population of the Fountain Darter in the wild is found at Comal Springs (in the spring runs above Landa Lake, in Landa Lake, and in a segment of the Comal River downstream of Landa Lake) and at San Marcos Springs (in Spring Lake and a segment of the San Marcos River downstream of Spring Lake). The Fountain Darter commonly sinks to the bottom of the river channel due to its small swim bladder. (*See* Whiteside Testimony; Schenck Testimony; PX-23; DX-10 at P. 41).

b. San Marcos Gambusia (*Gambusia georgei*), which is listed in 50 C.F.R. § 17.11 (1988) as endangered. The State of Texas recognizes the San Marcos Gambusia (*Gambusia georgei*) as an endangered species. 31 Tex. Admin. Code Ann. § 65.183 (1989). The entire known world population of the San Marcos Gambusia in the wild was found in a segment of the San Marcos River downstream of Spring Lake. None have been found in the wild since 1985. Although uncertain, the San Marcos Gambusia's disappearance is possibly attributable to the application of herbicide on banks of the river or maybe hybridization. (*See* Hubbs Testimony; PX-24; DX-21; DX98).

c. Texas Wild-rice (*Zizania texana*), which is a member of the plant family *Poaceae*, Texas Wild-rice, listed in 50 C.F.R. § 17.12 (1988) as endangered. The State of Texas recognizes Texas Wild-rice (*Zizania texana*) as an endangered species. Tex. Parks and Wild. Code Ann. § 88.002 (Vernon Supp. 1990). The entire known world supply of Texas Wild-rice in the wild is found in Spring Lake and a segment of the San Marcos River downstream of Spring Lake. (*See* Power Testimony; Shull Testimony; PX-21; PX-32; DX-10 at p.41).

d. San Marcos Salamander (*Eurycea nana*), which is listed in 50 C.F.R. § 17.11 (1988) as threatened. The State of Texas recognizes the San Marcos Salamander (*Eurycea nana*) as a threatened species. 31 Tex. Admin. Code Ann. § 65.173 (1988). The entire known world population of the San Marcos Salamander in the wild is found at natural spring openings of the San Marcos Springs, and possibly also at natural spring openings of the Comal Springs, and in the gravels and immediate spring runs associated with the openings. (*See* PX-22; *cf.* Hillis Testimony; DX-21; DX-98).

e. Texas Blind Salamander (*Typhlomolge rathbuni*). This species is listed by the federal government as endangered at 50 C.F.R. § 17.11 (1988). The State of Texas recognizes the Texas Blind Salamander (*Typhlomolge rathbuni*) as endangered. 31 Tex. Admn. Code Ann. § 65.183 (1989). The entire known world population of the Texas Blind Salamander in the wild is found underground in the Edwards in a

relatively small segment of the Edwards near the San Marcos Springs. (*See* PX-30).

63. Recently, two new, rare and possibly endangered species have been discovered in the Comal Springs. (PX-228). The new discoveries include the dryopid beetle, which is also a genus; meaning, the beetle is unique and deserves its own classification. Comal Springs is thought to be the only place in the world where the dryopid beetle is found. A species of the riffle beetle, found in the Comal Springs, was described as endemic to the Comal system. Each of these species has been proposed for listing under the ESA. (Shull Testimony; PX-248).

64. Section 4 of the ESA provides, the Secretary "shall develop and implement" what is known as a "recovery plan" for each endangered species, unless he finds that it "would not promote the conservation" of the species to do so. 16 U.S.C. § 1533(f).

65. Some agency actions are exempt from judicial review "as actions committed to agency discretion by law." (Fed. Def. Br. at p. 4). However, an action is "committed to agency discretion" where there is "no law for the court to apply." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In the case at bar, a statute commands the agency to act, "there is law to apply"

and this Court "may review whether the agency acted in accordance with Congress' wishes." *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 642 (10th Cir. 1990); *see also Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986) (where statutory command is that agency "shall" act, complainant adversely affected by failure to act can bring an action in District Court). Section 4 of the ESA commands the Secretary to "develop" and "implement" recovery plans.

66. The Administrative Procedures Act (the "APA") standard to which Federal Defendants refer does not limit the Court to review for "arbitrary and capricious" agency action or inaction. The APA permits the Court to correct agency action considered an abuse of discretion, otherwise not in accordance with law, or without observance of procedures required by law. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 981-82 (9th Cir. 1985). And the court is free to subject the agency's action to "thorough probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). An abuse of discretion occurs when an agency which Congress mandates "shall develop and implement a recovery plan" refuses to act on the behalf of species the USFWS knows were in "imminent peril" in 1989 and 1990.

67. The Federal Defendants claim Plaintiffs have "no legal basis" for asserting the Federal Defendants have a nondiscretionary duty under ESA § 4 to identify and communicate the Comal and San Marcos species' springflow requirements. (Fed. Def. Br. at p. 14). To the contrary, § 4 of the ESA provides the USFWS shall determine what species are endangered or threatened and list them; shall designate their critical habitat; and "shall develop and implement" what are known as "recovery plans" -- plans for the "conservation and survival" of listed species. 16 U.S.C. § 1533. Priority is to be given to species whose survival is in conflict with economic activities, such as withdrawals of water from the Edwards. 16 U.S.C. § 1533(f).

68. The "conservation" § 4 recovery plans seek is defined by statute as "to bring any endangered and threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3).

69. In the circumstances of this case, the ESA § 4 duty to develop and implement a plan is mandatory, not discretionary. The ESA says that he "shall" develop and implement such recovery plans. 16 U.S.C. § 1533(f). There is one stated exception: Unless he finds that such a plan will not promote the conservation of the [endangered] species. *Id.* The Federal Defendants have never claimed that this exception applies to

the present case. The Secretary's failure to develop and implement recovery plans permit this Court to review whether the USFWS has acted in accordance with Congress' wishes.

70. Both the Federal Defendants and the Defendant-Intervenors argue the Secretary has discretion to set priorities and determine whether recovery plans will conserve the species. (Fed. Def. Br. at p. 15; Def. Int. Br. at p. 17) (citing *National Wildlife Fed'n v. National Parks Serv.*, 669 F. Supp. 384 (D. Wyo. 1987)). *National Wildlife Fed'n* stands the proposition that, if there exists sufficiently clear justification arising out of facts developed after completion of a recovery plan, the Secretary can temporarily delay implementation of a recovery plan. 669 F. Supp. at 387 (Secretary decided to delay decision on closing campground, pending results of environmental impact statement due to be released within year and which used "the most sophisticated methods to date" to measure human impact on Grizzly Bears).

71. The facts in the instant are markedly different. For eight years, the Federal Defendants failed to implement the existing San Marcos Recovery Plan, and they failed to develop a plan for Comal Springs. They never identified the necessary springflow requirements of the species. The Federal

Defendants argue that "particularly in light of the severe budget constraints" their duty to develop and implement a recovery plan should be discretionary. (Fed. Def. Br. at p. 16). This Court refuses to legislate a new exception reading: "the Secretary shall develop and implement a recovery plan *unless* he claims, or suspects, that "tight budget constraints" make develop or implementation of a recovery plan inconvenient or difficult to reconcile with the needs of other species, in which case he may or may not develop and implement a plan, when and if he pleases. Moreover, under the case law, the argument that budget constraints make the duty to plan discretionary is without merit. *See Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 629 (W.D. Wash. 1991) (budgetary excuse insufficient to justify continued inaction even though the facts proved "prodigious resources" and a "truly remarkable effort" had already been made by the Forest Service).

72. The plans are supposed to spell out what is biologically required to prevent extinction and permit recovery of endangered species. (Shull Testimony).

73. Priority is to be given to species whose survival is in conflict with economic activities, such as withdrawal of water from the Edwards. 16 U.S.C. § 1533(f).

74. Section 9 of the ESA prohibits "any person" from "taking" a member of any endangered species without a permit. 16 U.S.C. § 1538(a). "Take" as used in § 9 includes not only "kill" but also "harm or harass." 16 U.S.C. § 1532(19). "Harm" and "harass" are defined to mean "disrupt[ing] or significantly impair[ing]" behavioral patterns including "breeding, feeding and sheltering." 50 C.F.R. § 17.3.

75. Section 7(a)(1) of the ESA requires all Federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1).

76. Section 7(a)(2) of the ESA requires every Federal agency, in consultation with the Secretary, to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any [designated critical habitat]." 16 U.S.C. § 1536(a)(2). "Jeopardize the continued existence of" means "to engage in an action that reasonably would be expected directly or indirectly to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species." 50 C.F.R. § 402.02.

"Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02.

77. Section 9(a)(2) of the ESA makes it unlawful for "any person to damage or destroy any [listed plant] species . . . in knowing violation of any law or any regulation of any State or in the course of any violation of a State criminal trespass law." 16 U.S.C. § 1538(a)(2).

78. In order to deal with conflicts between the survival requirements of endangered species and their habitats, on the one hand, and human economic activity, on the other hand, § 10(a) of the ESA allows the Federal Defendants to issue "incidental take permits." The incidental take permits allow the death, harm, or harassment of individual members of an endangered species, even substantial numbers of such individuals, as long as (1) this is an unintentional result of an otherwise lawful activity, such as pumping groundwater; (2) the species' survival is not jeopardized; and (3) measures are taken to "minimize and mitigate the impact of such

taking." (16 U.S.C. § 1539(a); Spear Testimony; PX-34; PX-35).

79. In order to deal with severe and unavoidable conflicts between the survival requirements of endangered species, on the one hand, and actions of regional or national significance whose benefits clearly outweigh the benefits of every alternative course of action consistent with conserving the species, on the other hand, § 7(h) of the ESA allows a special, high-level committee to authorize the extinction of an endangered species under certain circumstances. 16 U.S.C. § 1536(h).

80. The endangered or threatened species, at or downstream of the Comal and San Marcos Springs, rely on adequate and continuous natural flows of fresh water through the Edwards and exiting from the natural spring openings of those springs as an environment for their survival. The endangered species living in the Edwards similarly rely upon adequate water levels in the Edwards and adequate and continuous flows of fresh water through the Edwards to the Comal and San Marcos Springs as an environment for their survival. (Admitted. Fed. Def. Consol. Answer at ¶ 123).

Takes of and Jeopardy to Fountain Darters

81. Pursuant to the following discussion, by the time springflow at Comal Springs declines to approximately 100 cfs, "harm," constituting "take," occurs to the endangered Fountain Darter.

82. In the letter of March 26, 1992, the USFWS notified the TWC that by the time Comal springflow has declined to 100 cfs, harm to Fountain Darters, "which likely constitutes 'take,' has occurred to endangered species," specifically the Fountain Darter. (PX-34 at p. 3).

83. The March 26, 1992 USFWS letter and attached comments to the TWC represented the USFWS' best professional judgment with regard to the application of §§ 7, 9, and 10 of the ESA to the protection of endangered and threatened species at Comal Springs. (Admission No. 2; Spear Testimony). The March 26, 1992 USFWS letter and comments were based upon the expert opinions of USFWS staff biologists and hydrologist (Admission No. 3, Spear Testimony, Shull Testimony), together with the views of others with whom USFWS consulted, including Texas Parks and Wildlife Department ("TPWD") biologist Randy Moss. (Shull Testimony).

84. By the time the springflows at Comal Springs have dropped to approximately 100 cfs, the upper spring run (known as "Spring Run J" or "Spring Run 1" and hereinafter referred to as "Spring Run J") has dried up. (Thornhill Testimony; PX-17;

PX-34, comments at p. 3). The normal flowing Spring Run J provides suitable habitat for the Fountain Darters living in Spring Run J. (Whiteside Testimony; Hubbs Testimony; Moss Testimony; PX-16; PX-244). As Spring Run J dries up, Fountain Darters lose the vegetation on which they depend. (Whiteside Testimony; PX-34, comments at p. 3; PX-244). As Spring Run J dries up, Fountain Darters are trapped in isolated pools and either die of lack of oxygen or are eaten by predators. (Whiteside Testimony; Moss Testimony; PX-34, comments at p. 3; PX-244).

85. In the summer of both 1989 and 1990, Fountain Darters were harmed or killed. (Whiteside testimony). Fountain Darters died due to declining water levels in Spring Run J in the summers of 1989 and 1990. (Moss testimony). If the upper springs runs dry up, Fountain Darters could be stranded in pools, if pools form. (PX-244). Isolated pools were formed in 1989 and 1990 as Spring Run J dried up. (Thornhill Testimony; Whiteside Testimony; Moss Testimony; PX-17; TPWDX-4). Dr. Whiteside and Dr. Brandt collected Fountain Darters as part of a rescue operation. They were recorded as "thin," due to interference with their feeding habitat. (Whiteside Testimony; PX-139; PX-244).

86. Comal Springs dropped below 100 cfs for 99 days in 1989, to a low of 46 cfs. Comal Springs dropped below 100 cfs for 28

days in 1990, to a low of 67 cfs. (Thornhill Testimony; PX-205).

87. Considering the discussion below, the Court reasonably finds that the absence of knowledge, by private entities and Federal, State, regional and local governmental entities, of the minimum springflow requirements of the species, caused or allowed takings of, and caused risk or jeopardy to, the Fountain Darter in the dry years of 1989 and 1990.

88. By the time Comal Springs cease flowing completely, jeopardy to the endangered Fountain Darter has occurred. There has been an appreciable reduction in the likelihood of both the survival and recovery of the Fountain Darter in the wild, by reducing its reproduction, numbers, and distribution. This result is clearly contrary to the purpose and goals of the Endangered Species Act. (*See* FF 80 through 84, below).

89. In the March 26, 1992 USFWS letter and comments, the USFWS told the TWC: "By the time Comal Springs cease flowing completely, jeopardy [within the meaning of § 7 of the ESA] has occurred." (PX-34 at p. 2). Further: "By the time Comal Springs cease to flow completely, there has been an appreciable reduction in the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, and distribution of the species. This

result is clearly contrary to the purpose and goals of the [ESA]." (*Id.*, comments at pp. 2-3). The March 26, 1992 USFWS letter and attached comments represent the USFWS' best professional judgment, based on the views of experts on its staff and outside experts with whom they consulted.

90. As the USFWS advised the TWC on March 26, 1992: "[A]ll activities [of Federal agencies, or of State, local or private entities to the extent Federal activities authorize, fund or carry them out] must ensure that the Comal Springs are maintained at or above [the jeopardy] level." (PX-34 at p. 2).

91. Maintaining springflow at Comal Springs is essential to preventing jeopardy because "it is hard to have an aquatic ecosystem without any water." (Whiteside Testimony). As the Defendant-Intervenors' own Fountain Darter expert acknowledged, "we would have slipped up big-time" if Comal and San Marcos Springs ceased flowing. (Schenk Testimony).

92. Essential to the conservation and survival of the Fountain Darter is the maintenance of both wild populations, the population at Comal Springs and the population at San Marcos Springs. If only one wild population exists, the Fountain Darter is at much greater risk of extinction due to a single catastrophic event (such as an accidental oil or chemical

spill) or a deliberate poisoning (such as the poisoning of Treaty Oak in Austin). (Spear Testimony; Shull Testimony; Hubbs Testimony). Except in a drought so severe that the springs would dry up with no pumping, Comal Springs could not go dry without jeopardy occurring. (Spear Testimony).

93. "Jeopardy" is inherently a matter for determination by the exercise of professional judgment. (Shull Testimony; PX-245).

94. The USFWS has not yet exercised its best professional judgment to determine where, above 100 cfs, Fountain Darters at Comal Springs first began to be taken or where, above 0 cfs, jeopardy to the Fountain Darter has occurred. (Spear, Shull Testimony; PX-34).

95. According to the USFWS, Fountain Darter habitat begins to be lost in Spring Run J as Comal Springflow drops to about 150 cfs. (PX-34, comments at p. 3). TPWD biologist Randy Moss testified the decreasing springflow at Comal Springs leads to harm and harassment, and likely to death, of Fountain Darters as the depth of water drops to between four and six inches in Spring Run J. (Moss Testimony). Dr. Whiteside testified the decreasing springflow at Comal Springs significantly reduces Fountain Darter habitat on Spring Run J as the depth of water drops below four inches. Dr. Hubbs testified harm begins to be significant as the depth of flow in Spring Run J drops to twelve inches. Paul Thornhill testified, based on surveys of

Spring Run J and hydrological models, he can promptly convert a given depth of flowing water the biologists say is required in Spring Run J to a Comal Springs flow rate in cfs and an Edwards level at index well J-17. (Thornhill testimony; PX-7; PX-226). Four inches and twelve inches of water in Spring Run J immediately upstream of the footbridge are equivalent to 118 cfs and 385 cfs, respectively. *(Id.)*.

96. Comal Springs came perilously close to drying up in both 1989 and 1990. (Thornhill Testimony; PX-34 at p. 1). As the rains of 1992 repressed any drought concerns, in 1989 and 1990, unusual mid-summer rains saved the springs. (Whiteside Testimony; Bomar Testimony).

97. The direct human cause of low springflows at Comal Springs and resulting takes of and jeopardy or near jeopardy to Fountain Darters in 1989 and 1990 was excessive pumping from the Edwards. (Thornhill Testimony, Spear Testimony).

<u>Takes of and Jeopardy to Other Animal Species at Comal and San Marcos Springs and in the Edwards</u>

98. The USFWS never determined, nor stated its best professional judgment of, the "minimum continuous natural springflow rates" at San Marcos Springs which jeopardize the Fountain Darter, the San Marcos Salamander, and the likely extinct San Marcos Gambusia, if found at San Marcos springs. If it came forth

with these springflow rates, that would allow private entities and Federal, State, regional and local governmental entities to take the actions necessary to avoid jeopardizing these species or the candidate species found there. (Shull Testimony; Spear Testimony; Masters Testimony; Aceves Testimony; Admission 8).

99. The USFWS has never determined, nor stated its best professional judgment of, the minimum continuous natural springflow rates at Comal Springs which would jeopardize the San Marcos Salamander, if found at Comal Springs. If it came forth with these springflow rates, that would allow private entities and Federal, State, regional and local governmental entities to take the actions necessary to avoid jeopardizing the possible new species of salamander found there, or the candidate species found there. (Shull Testimony, Spear Testimony, Masters Testimony, Aceves Testimony; Admission 8).

100. The USFWS has never determined, nor stated its best professional judgment of, the minimum continuous natural springflow rates at Comal and San Marcos Springs, or the minimum Edwards levels, which would jeopardize the Texas Blind Salamander, if found at Comal and San Marcos Springs. If it came forth with these springflow rates, that would allow private entities and Federal, State, regional and local governmental entities to take the actions necessary to avoid

jeopardizing the Texas Blind Salamander or the candidate species found there. (Shull Testimony, Spear Testimony, Masters Testimony, Aceves Testimony; Admission 8.).

<u>Destruction or Adverse Modification of Critical Habitat of Texas Wild-rice. Damage to or Destruction of Texas wild-rice, and Jeopardy to Texas Wild-rice</u>

101. The USFWS never determined, nor stated in its best professional judgment, the minimum continuous springflow rates at San Marcos Springs at which destruction or adverse modification of critical habitat of Texas Wild-rice, damage to or destruction of Texas Wild-rice, or jeopardy to Texas Wildrice, begin to occur. (Shull Testimony, Spear Testimony, Masters Testimony, Aceves Testimony, Power testimony; Admission 8).

102. Adverse modification of the critical habitat of Texas Wild-rice, and damage to or destruction of Texas Wild-rice, have occurred by the time the depth of flowing water where established stands of Texas Wild-rice grow in the San Marcos River at Transect 12 has fallen to 1.5 feet. (Power Testimony). Transect 12 is a cross-section of the San Marcos River uninfluenced by dams, upstream from the sewage treatment plant. (PX-231).

103. As the San Marcos springflow drops, by the time springflow has dropped to 100 cfs, the depth of water in the San Marcos River

at which one or more established stands of Texas Wildrice exist has dropped to 1.5 feet or less. (Power Testimony; Thornhill Testimony; PX-230).

104. During the ten-year period from 1981 through 1990, springflow at the San Marcos Springs dropped below 100 cfs in three years: 1984, 1989, and 1990. (Thornhill Testimony; PX-15; PX-206).

105. Springflow from the San Marcos Springs was below 100 cfs on 169 days in 1984, 140 days in 1989, and 85 days in 1990. (Thornhill Testimony; PX-15; PX-206).

106. One or more established stands of Texas Wild-rice growing in the bed of the San Marcos River were damaged or destroyed, and their critical habitat was adversely modified, in 1984, 1989, and 1990, due to low springflows. (Power Testimony).

107. Texas Wild-rice grows in the wild only in Spring Lake and in the bed of the San Marcos River in a segment of the river downstream of Spring Lake. (Power Testimony).

108. Although *obiter dictum*, the Court is of the opinion the bed of the San Marcos River downstream of the natural spring openings is owned by the State of Texas. Because the grant from the sovereign expressly did not include the stream, the State retained title to the stream bed. *See, e.g., Heard v. Town of*

Refugio, 103 S.W.2d 728, 731 (Tex. 1937)) (*See* PX-200; PX-201; PX-202; PX-203; PX-234).

109. The water in Spring Lake and the water flowing in the San Marcos River downstream of Spring Lake was judicially determined to be owned by the State of Texas in trust for the benefit of the public. (PX-234).

110. Although *obiter dictum*, the Court is of the opinion the Texas Wild-rice growing in the bed of the San Marcos River is owned by the State of Texas. (PX-200; PX-201; PX-202; PX-203; PX-234).

<u>Critical Importance of Developing and Implementing Recovery Plans</u>

111. Increasingly, recovery plans are the fundamental tool the USFWS uses to protect endangered species. (Spear Testimony).

112. Timely development and implementation of recovery plans is critical to many specific recovery actions, including designing and funding required studies and securing cooperation from other federal, state, regional, and local governmental and private entities. (Spear Testimony; PX-66).

113. As the USFWS told the United States Congress in December of 1990, "perhaps the most essential ingredient for the development and implementation of an effective recovery program" is "[c]oordination among Federal, State and local

agencies, academic researchers, cooperation organizations, private individuals, and major land users . . . ," with the USFWS being the "coordinator." (PX-198 at p. 3).

114. In the case of the Comal and San Marcos ecosystems and listed species, the most basic purpose of recovery planning is to establish a baseline flow condition -- flows prohibited from reduction by human activities -- and disseminate the requirements necessary for the protection of the baseline flows. (Spear Testimony).

<u>Failure to Develop a Recovery Plan for the Comal Springs Ecosystem and Species</u>

115. The Federal Defendants failed to develop any recovery plan or plans to secure the survival and recovery of any of the species at issue explicitly through protection of the Comal Springs. (Admitted. Fed. Def. Consol. Answer at ¶ 169).

116. While the existing San Marcos Recovery Plan contains references to Comal Springs, it addresses the protection of the San Marcos ecosystem, not the Comal Springs ecosystem. (Shull Testimony; PX-36).

117. The USFWS does not claim a recovery plan explicitly addressing protection of the Comal Springs ecosystem would "not promote the conservation of the species" of Comal Springs. (Spear Testimony).

118. For more than three years, the USFWS has had under consideration the revision of the San Marcos Recovery Plan to explicitly address protection of the Comal Springs. (Shull Testimony; PX-2; PX-39; PX-248). Meanwhile, Comal Springs twice reached a dire situation in which the springs nearly dried up. (Whiteside Testimony; PX-34; PX-97; PX-244).

<u>Failure to Develop a Recovery Plan for the Texas Blind Salamander</u>

119. Neither the San Marcos Recovery Plan nor any other recovery plan addresses the conservation and survival as the Texas Blind Salamander. (Admission 18; Shull Testimony; PX-36).

120. Federal Defendants claim the Secretary made a finding that a recovery plan for the Texas Blind Salamander will not promote the conservation and survival of the species. (Federal Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Federal Defendants' Cross-Motion for Summary Judgment at p. 31).

121. The evidence does not support the Federal Defendants' claim. The earliest relevant document, a December 1990 report to Congress, says only the only possible recovery measure for the Texas Blind Salamander was to "continue efforts to protect Edwards Aquifer from drawdown and pollution." (PX-198). A May 1991 document prepared by the regional herpetologist for the USFWS is entitled "Recovery Outline, Texas Blind

Salamander," and states the Texas Blind Salamander is "under threat by water use practices" and that "a recovery plan has yet to be written." (PX-131). A February 19, 1992 memorandum from Regional Director Spear to USFWS Director Turner states: the "status" of the Texas Blind Salamander "unknown"; the only place the Texas Blind Salamander "is known to occur is in the Edwards Aquifer underground"; and "[u]ntil additional information is available, the preparation of a recovery plan will be held in abeyance." (PX-199). On May 7, 1992, the Federal Defendants admitted "that FWS has not 'developed' [a] recovery plan that explicitly address[es] the Texas Blind Salamander, but avers that development of such a recovery plan is under consideration by the [USFWS]." (Admission No. 18). A May 18, 1992 USFWS briefing memorandum prepared for Director Turner stated the "new plan will better address the Comal Springs ecosystem and will also include the Texas Blind Salamander." (PX-248). Dr. Brandt of the USFWS never heard anyone say a recovery plan for the Texas Blind Salamander is not needed. (Brandt Testimony).

122. The Federal Defendants demonstrated no rational basis for a finding that a recovery plan for the Texas Blind Salamander "would not promote the conservation of the species." The usual basis for such a finding is that a recovery plan identifying the locations where, for example, an endangered

plant is found would expose it to collectors. Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 Harv. Env. L. Rev. 311, 334 (1990); *see also Endangered Species Act Amendments of 1978; House Report of Merchant Marine and Fisheries Committee*, 95th Cong., 2d Sess. 17 (1978). The basis does not apply to the Texas Blind Salamander. The USFWS considers the status and location of the Texas Blind Salamander unknown, but under threat due to water-use practices. (PX-131; PX-199). The threats to which the Texas Blind Salamander are exposed in its underground habitat include being drawn up wells, and do not apply to the other species at issue. They also include threats, such as lowering of the Edwards level and movement of bad water, which may apply differently to the Texas Blind Salamander than to the other species.

Failure to Implement Essential Features of the San Marcos Recovery Plan Dealing with the Greatest Threat

123. The USFWS failed or refused to implement practices recognized in its own documents, including the San Marcos Recovery Plan, as critical to save the species at issue from extinction.

124. In the early 1980s, with the aid of the San Marcos Recovery Team composed of scientists chosen by the USFWS, the USFWS developed the San Marcos Recovery Plan, and adopted it in

1985. (Spear Testimony; Shull Testimony; PX-36; PX-55; PX-66).

125. The San Marcos Recovery Plan correctly states, the "most serious threat to the continued existence of the San Marcos River ecosystem" and the biota comprising the system is "the cessation of flow of thermally constant clear, clean water from the San Marcos Springs due to overdrafting of the groundwater from the Edwards Aquifer." (PX-36). The USFWS maintains this view. (Spear Testimony). The same threat exists for the Comal ecosystem. (Spear Testimony). "The listed species will become extinct unless an aquatic habitat with appropriate volume, flow and quality characteristics is maintained in the Comal and San Marcos Ecosystems." (Shull Decl. at p. 11; attached to Fed. Defs. Summary Judgment Papers.).

126. The San Marcos Recovery Plan states, the species at San Marcos can be downlisted to threatened "when it is assured that flow in the San Marcos River will continue within its natural cycle of variation." (PX-36). Until December 1989, the Federal Defendants took no action to assure the quantity of flow in the San Marcos River would continue within its natural cycle of variation. (Admitted; Fed. Def. Consol. Answer at ¶ 69).

127. The San Marcos Recovery Plan identifies several "major steps" needed for protection of the San Marcos species and their ecosystem. (PX-36).

Define Minimum Springflow

128. One "major step" was "identify requirements," including flow and habitat requirements. (PX-36 at p. 69). The San Marcos Recovery Plan explained the requirements were not well understood. (*Id.* at p. 69).

129. After the instant suit was filed, the Federal Defendants took some steps to identify the minimum continuous springflow requirements of any of the endangered and threatened species relevant to this lawsuit. (Admissions 26(c), 27(c)). As recently as May, 1992, the USFWS had neither funded, nor requested anyone else to voluntarily and at their own expense to perform, any studies to determine such minimum continuous springflow requirements. (Admission 9). Since suit was filed, the USFWS has not determined any of the minimum springflow requirements of any of the species at issue at either springs except the Fountain Darter at Comal Springs to the limited extent reflected in the March 26, 1992 USFWS letter and comments to the TWC. (PX-34).

130. While the EUWD maintains the USFWS acted reasonably in prioritizing its efforts to enforce the ESA and to protect

endangered species in light of budgetary constraints and the large number of endangered species it is charged to protect, the fact the USFWS has not acted as required remains.

131. Knowledge of the minimum springflow requirements of the species is vital to any Federal, State, regional, or local government or private entity which wishes to take action to protect the species at issue from the greatest threat they face. These entitities seek to avoid action adding to the threat, or wish to avoid the consequences of the "blunt axes" of Federal intervention forged by Congress under ESA §§ 7 and 9 to protect the species. (Spear Testimony; Shull Testimony; Specht Testimony; Masters Testimony; Aceves Testimony; Hall Testimony).

132. The EUWD claims authority to regulate pumping from the Edwards, and to have protection of endangered species habitat as one of the goals of such regulation. (Masters Testimony). One goal of the EUWD is new "Demand Management Plan for the Edwards-Balcones Fault Zone Aquifer" is to "ensure an adequate level of springflow" to "protect habitats within the District dependent on the Edwards Aquifer." (EUWDX-6). However, the EUWD does not know what quantity of minimum springflows at the Comal or San Marcos Springflows needs to be protected. (Masters Testimony). The EUWD on May 10, 1991 made a formal request to Regional Director Spear for a declaration of the

minimum springflows the USFWS will accept as adequate under the ESA to protect the species and their habitat at San Marcos Springs. (PX-132). The USFWS has not answered the EUWD's request. (Spear Testimony; Shull Testimony; Masters Testimony).

133. The United States Department of the Air Force ("USAF") was "unable to determine" whether its activities in pumping Edwards water would affect the endangered species, and requested the USFWS' assistance in evaluating whether its pumping would affect the species. (Plaintiffs' Summary Judgment Exhibit 46). The USFWS responded to the request by stating "specific studies relating to water withdrawal input on listed species are not readily available." (PX-98).

134. In order to develop an adequate State plan, the TWC, City of San Antonio, and the Texas Legislature need to know the minimum continuous springflows required for compliance with the ESA. (Hall Testimony; Masters Testimony; Aceves Testimony; PX-34).

Consultation

135. One of the tools available to the USFWS for protection of endangered species is consultation under § 7 of the ESA. (PX-36 at p. 95).

136. The San Marcos Recovery Plan called for "vigorous pursuit" of a "systematic procedure" of such consultations. (PX-36 at pp. 76-77).

137. Consultation is potentially a powerful, albeit disruptive, tool because it can result in a Court order cutting off all Federal funds and other Federal actions that directly or indirectly authorize, fund, or otherwise carry out pumping from the Edwards to the extent necessary to prevent jeopardy. (Spear Testimony; PX-85; PX-113; PX-68).

138. After adopting the San Marcos Recovery Plan, the Federal Defendants did not vigorously pursue any systematic procedure of consultations concerning minimum springflow quantities. (Admission 26(f)). Until February 21, 1992, the Federal Defendants did not request consultation concerning any Federal activity by any Federal agency that may affect minimum springflow quantities through effects on withdrawals from the Edwards. (Admission 27(g)).

139. In a letter dated February 21, 1992, the USFWS informed the United States Environmental Protection Agency ("EPA") that the new demand placed on the Edwards by the catfish farm artesian well -- a well that shoots a column of water over twenty-five

feet in the air from a thirty-inch diameter pipe (PX-27) -- could appreciably reduce the water supply for the endangered species at issue during low flow periods. (PX-37). The USFWS requested the EPA determine whether granting an application for a National Pollution Discharge Elimination System ("NPDES") permit for the catfish farm well, which would allow the catfish farm to withdraw over 43 million gallons of Edwards water per day, would affect the Fountain Darter and the Texas Wild-rice. *(Id.)*. The USFWS also requested the EPA to review all other NPDES permits authorizing discharges from "major users" of Edwards water -- those discharging more than 1 million gallons per day. *(Id.)*.

Establish Groundwater Controls

140. The species in question are threatened with possible extinction, unless effective controls are objectively established on withdrawals from the Edwards. (Spear Testimony). At a minimum, the objective requires pumping controls to "avoid jeopardy to the species by maintaining an aquifer level which assures a minimum spring flow at Comal Springs." (PX-34 at p. 3).

141. The San Marcos Recovery Plan called for establishing pumping controls, recognizing the plan would require cooperation with State and local authorities. (Ex. 36).

142. Not until after the first notice of intent to sue was filed in this case did the USFWS take any step to encourage any State or local agency to establish controls on the pumping of groundwater from the Edwards. (Admission 26(f)). In response to this lawsuit, the USFWS made certain limited efforts to encourage the State of Texas to establish groundwater pumping controls over the Edwards. (Shull Testimony; PX-34 at p. 1). These efforts consisted largely of jawboning, without specifics. (PX-35; PX-94; PX-101; PX-107; PX-113; PX-117; PX-126).

143. This instant lawsuit was a "key factor" in the emergency action taken and proposed permanent rules announced by the TWC on 4/15/92 to regulate withdrawals from the Edwards. (PX-184 at pp. 2-3).

Contingency Plan

144. The San Marcos Recovery Plan called for development of a contingency plan to rescue members of the endangered species and put them in refugia (aquariums) if springflows drop to low

levels. (PX-36 at p. 72). While the refugia method is advocated as a viable recovery method, refugia is not a recovery measure but an emergency tool to be used in dire emergencies if recovery measures cannot be completed in time. *Id.* (Spear Testimony; Shull Testimony; PX-119; Admission 39).

145. The Federal Defendants did not begin to prepare a contingency plan until after the Comal Springs was on the brink of drying up. (Admissions 34, 35). Federal Defendants did not complete and approve the plan until July 18, 1990, when the Comal Springs nearly dried up again. (Admission 37; PX-83; PX-115; PX-119).

146. The contingency plan was prepared using the voluntary, unpaid assistance of experts who are not employees of the USFWS. (Admission 38).

147. The contingency plan identifies, using the USFWS' best professional judgment, critical aquifer levels and springflow rates at which members of the listed species should be removed to refugia. (Shull Testimony; Whiteside Testimony; Moss Testimony; PX-119). The contingency plan was developed without any prior multi-year Instream Flow Incremental Methodology ("IFIM") or other complex studies. (Shull Testimony; Whiteside Testimony).

148. The contingency plan was relied on to establish critical levels at which "last-ditch" efforts were made to "salvage" Fountain Darters at Comal Springs in the summer of 1990. (Shull Testimony; Whiteside Testimony; Brandt Testimony; PX-119).

Springflow Augmentation

149. The San Marcos Recovery Plan provides, "wells to maintain the natural flow variation regimens below Spring Lake can be a temporary means to achieve continual flow in the San Marcos River." (PX-36). The San Marcos Recovery Plan recognizes that springflow augmentation cannot protect against a "catastrophic loss" of the San Marcos Salamander which lives in the spring openings and that augmentation "will not constitute a recovery action." (PX-36 at p. 74).

150. The TDWR, predecessor of the TWC, evaluated streamflow augmentation in 1983 at the request of the EUWD, which was participating in the development of the San Marcos Recovery Plan. The TDWR advised the EUWD of the substantial risk that movement of "bad water" would "seriously degrade" both the species' habitat and human water supplies if the Edwards were pumped down as proposed. (PX-75).

151. The Federal Defendants, the EUWD, TPWD, the Southwest Texas State University Aquatic Station, the City of New Braunfels, the City of San Marcos, the Edwards Research and Data Center and the Office of State Senator Cyndi Krier at meeting in 1990 concluded: it is "not possible to design an augmentation feasibility study at this time because of the paucity of relevant ecological and physiological data on the endangered species." (PX-132 at p. 3 of the 3/19/91 letter from EUWD to City of San Antonio). The required factual information "is prohibitively deficient." *(Id.)*. "Further," the EUWD stated, "the study design team could not conceive of a practical means for simulating natural springflow." *(Id.)*. Because "the San Marcos Salamander makes its home in the numerous spring orifices collectively called the Comal and San Marcos springs," the meeting concluded that "[s]imply pumping water from Edwards Aquifer wells into Comal and San Marcos rivers is not a solution." *(Id.)*.

152. In the March 26, 1992 USFWS letter to the TWC, the USFWS stated the following about "springflow augmentation":

> Spring flow augmentation studies are not likely to represent a productive use of time and resources. From an endangered species point of view, the Service suggests such proposals be considered extremely unlikely to produce acceptable conditions for endangered species. Even worse, *they divert attention and resources from the hard choices that must be made*.

(PX-34 at p. 3) (emphasis added).

153. In the comments attached to the March 26, 1992 USFWS letter to the TWC, USFWS stated the following about "springflow augmentation":

> Based upon current information, we do not believe that spring flow augmentation is likely to be an acceptable means of ensuring protection of endangered species and their ecosystems in Comal or San Marcos Springs. We are not aware of any evidence that flow augmentation is technically feasible or that it would provide for the biological needs of the species. To make such a determination with a sufficient degree of certainty would require the springs to first dry up. Allowing the Springs to cease flowing for <u>any</u> period of time, even under drought conditions, would pose an unacceptable risk to the continued existence of the listed species, contrary to the ESA.
>
> In addition, it is our understanding that augmenting at Comal Springs would draw the aquifer level down faster at San Marcos. Augmentation at San Marcos Springs cannot be done in a way that would ensure protection of the San Marcos Salamander.
>
> The Service is also concerned about intrusion of bad water at both Comal and San Marcos Springs as aquifer levels decrease. Both springs are very close to the "bad water" line.
>
> We believe springflow augmentation studies would *divert attention and resources from the hard choices that must be made*.

(Comments attached to PX-34 at pp. 5-6.) (underline in original, but emphasis added).

154. Springflow augmentation is not likely to be an acceptable means of ensuring protection of endangered species. (Shull Testimony; PX-34). The USFWS is not aware of evidence establishing springflow augmentation is either technically feasible or provides for the biological needs of the species. (Spear Testimony; PX-34). To make such a determination with a sufficient degree of certainty would require the springs to first dry up, which would pose an unacceptable risk to the continued existence of the species. (PX-34, comments at pp. 5-6). Springflow augmentation "cannot be done in a way that would ensure protection of the San Marcos Salamander" or other endangered species that live in the springs themselves. *(Id.;* PX-132). "Both springs are very close to the 'bad water' line," (Thornhill Testimony; PX-34, comments at p. 6; PX-184), and augmentation worsens the risk of "bad water" intrusion. (Thornhill Testimony).

<u>The Federal Defendants Have Unlawfully Refused or Unreasonably Delayed Implementing Recovery Measures to Protect Minimum Springflow Quantities</u>

155. As the San Marcos Recovery Plan was being finalized in 1984, the Comal Springs nearly dried up. (Thornhill Testimony).

156. When Regional Director Spear sent the San Marcos Recovery Plan to Washington, D.C. for top-level USFWS approval in 1985, he stated the USFWS' major recommendations, including achievement of pumping controls, would be "quite difficult" and "controversial." (PX-55).

157. The USFWS did not convene a meeting of the San Marcos Recovery Team between July 20, 1984 and March 29, 1989. (Admission 14).

158. USFWS biologist Tom Brandt worked in 1986-1988 on keeping Fountain Darters in refugia. This study was not aimed at establishing minimum continuous flow requirements. Dr. Brandt performed this study because he, his superiors at the National Fish Hatchery in San Marcos, and their superiors at the Region 2 office of the USFWS in Albuquerque, New Mexico knew there were going to be problems with the Fountain Darter in the future, due to pumpage of Edwards groundwater and lack of rainfall. (PX-244).

159. In March 1989, Professor Whiteside warned the USFWS about the potentiality the "Comal might go dry again this summer. (PX-42).

160. In the summer of 1989, Alisa Shull, the USFWS scientist in charge of the San Marcos Recovery Plan, recommended the USFWS send letters to Federal agencies requesting consultation on measures to reduce the threat to the springs posed by Edwards

withdrawals and to pumpers, warning them of the potential for takes if pumping is not reduced. (Shull Testimony; Spear Testimony). The letters were drafted. (PX-61; PX-62; PX-63). Mr. Spear and the Federal Defendants at the Washington level decided not to use the "blunt axe" of Federal intervention but *to request the State to establish pumping controls "quickly" on a voluntary basis*. (Spear Testimony). Three years later, the State has *still not established meaningful pumping controls*. (Spear Testimony; Shull Testimony).

161. Defining minimum springflows is a matter that is "long overdue." (Spear; Hubbs Testimony). Even the USFWS now agrees, if Texas does not establish adequate pumping controls in the next regular session of the Texas Legislature, which began in January of 1993, the "blunt axe" must fall. *(Id.)*.

162. Those who withdraw water from the Edwards need to know the minimum springflows at the Comal Springs below which takings begin to occur, so they can restrict withdrawals to the extent necessary to avoid any takings, and so they can seek an incidental take permit to authorize such takings. (Spear Testimony; Shull Testimony; Masters Testimony; Hall Testimony).

163. To date, the Federal Defendants have failed or refused to determine the minimum springflow at the Comal Springs below which takes in violation of ESA § 9 begin to occur.

164. The Federal Defendants were formally advised of takes of Fountain Darters at Comal Springs by Plaintiff-Intervenor GBRA's first Notice of Violations dated June 15, 1989, and they were further advised of their failures to develop and implement recovery plans to prevent takes of and jeopardy to the listed species by the subsequent Notices of Violations by Plaintiff-Intervenor GBRA and the Sierra Club, dated February 17, 1990 and April 12, 1990, respectively (DX-31; DX-32; DX-33).

165. Unauthorized takings of Fountain Darters at the Comal Springs occurred in the summer of 1990, after the Federal Defendants received all of the Notices of Violation.

166. EUWD argues the USFWS does not have the resources necessary to enforce the San Marcos Recovery Plan, to implement and enforce recovery plant of the Texas Wild-rice and the San Marcos Salamander, and to implement and enforce a recovery plan for the Fountain Darter at Comal Springs. However, lack of funding does not excuse the Federal Defendants' failures or refusals to implement key provisions of the San Marcos Recovery Plan responsive to the most serious threat,

overdrafting of the Edwards. The key measures require little cash outlays by the USFWS. Federal Defendants can use existing USFWS and National Fish Hatchery employees. The measures can be done by competent, willing volunteers paid by others (for example, the TPWD), and working out of dedication to the species (for example, the San Marcos Recovery Team members who prepared the contingency plan). (Spear Testimony).

167. The Federal Defendants failed to take timely action to implement key steps in the San Marcos Recovery Plan, critical to the survival of the species, including: define minimum continuous springflows, encourage establishment of pumping controls, prepare the contingency plan, and vigorously pursue a systematic procedure of consultation.

168. The Court does not conclude the Federal Defendants must, without exception, immediately implement every step in every recovery plan. The Court concludes, however, the Federal Defendants may not arbitrarily, for no reason or for inadequate or improper reasons, choose to remain idle. Inaction eviscerates the recovery planning provisions of the ESA and amounts to an abdication of the Federal Defendants' statutory responsibility to plan for the survival and

recovery, not the extinction, of endangered and threatened species.

Danny McFadin, et al. Cross-Claim

169. Under § 4 of the ESA, the Federal Defendants may procure the services of appropriate public and private entities to assist in recovery planning. U.S.C. § 1533(f)(2).

170. The San Marcos Recovery Team members, like the members of other recovery teams, were chosen by the USFWS for their expertise and interest in the relevant species and ecosystems. (Spear Testimony; Admission 12).

171. The San Marcos Recovery Team members are volunteers who are reimbursed for travel and meal expenses, but not otherwise paid by USFWS for their work on the San Marcos Recovery Plan. (Spear Testimony; Shull Testimony; Admission 13).

172. Ms. Power was paid $2,000 by the Plaintiff-Intervenor GBRA for field work on transects of the San Marcos River where Texas Wild-rice stands occur. (Power Testimony). The Court is of the opinion there is no evidence the payments affected Ms. Power's professional judgment.

173. The USFWS asked Ms. Power to become a member of the recovery team in the spring of 1992 with knowledge she was already serving as a consultant to Plaintiff-Intervenor GBRA. (Shull Testimony; Power Testimony).

174. Recovery team members' views of what should be done to secure the survival and recovery of endangered species are not binding on the USFWS, and USFWS' views of what should be done are not binding on recovery team members. Strong disagreements between recovery team members and USFWS are not unprecedented or improper. (Spear Testimony).

175. The USFWS investigated Danny McFadin et al.'s claim regarding the disqualification of certain San Marcos Recovery Team members from working as team members because they served as either consulting experts or, in the case of Ms. Power and Professor Whiteside, testifying experts for the Plaintiff-Intervenor GBRA. The USFWS concluded the disqualification of these San Marcos Recovery Team members is unnecessary and inappropriate. (Spear Testimony).

176. The USFWS determination to continue to use the nonbinding free advisory services of recovery team members, including those who are consultants to or (in the case of the Texas Parks & Wildlife Department) employees of parties to this litigation, is rational.

<u>Standing</u>

177. Plaintiff Sierra Club gave timely and appropriate notice of intent to sue. (DX-33). The suit was duly authorized.

(PX-229; PX-243). Plaintiff-Intervenor GBRA gave timely and appropriate notice of intent to sue. (DX-31; DX-32). No challenge has been made to whether the GBRA's decision to sue was duly authorized. Plaintiff-Intervenor GBRA is a political subdivision of the State of Texas empowered and charged by the State to conserve the waters of the Guadalupe River Basin for protection of water supplies, protection of water quality, and all other useful purposes. (Specht Testimony). The waters of the Comal and San Marcos Springs are waters of the Guadalupe Basin. (Thornhill Testimony; Specht Testimony). The survival and recovery of wild populations of endangered and threatened species is a useful purpose under the ESA. The same minimum springflows, essential to the survival of the endangered and threatened species, make up 30% of the normal base flow of the Guadalupe and more than 70% of its flow during drought; therefore, it is important for Plaintiff-Intervenor GBRA to conserve and protect minimum springflows for protection of water supplies, protection of water quality, as well as for protection of endangered species. (Specht Testimony; Thornhill Testimony).

178. The Defendants and Defendant-Intervenors argue Plaintiffs did not inform the Secretary or the USFWS of the contention the USFWS violated § 9 by taking listed species. (Fed. Def. Br.

at pp. 5-6). This assertion rests on a hypertechnical reading of the GBRA and Sierra Club notices. Both the Sierra Club and GBRA gave notice of violations "of the [§] 9 prohibitions against the taking of any listed wildlife species" and "of the [§] 9 prohibition against removal, damage, or destruction of any listed endangered species of plant." (*See* GBRA's Notice at 13). While Plaintiff and Plaintiff-Intervenors concede these complaints were specifically directed at "Upstream Diverters" (those people withdrawing waters from the Edwards and upstream from the Edwards), these notices were sent to the Secretary in part in order to give him a chance to develop and implement a plan and to take whatever actions are necessary against these Upstream Diverters. Moreover, the USFWS was listed as an Upstream Diverter, 80 it received direct notice it could be sued under § 9 of the ESA. (GBRA's Notice DX-B at p. 29). The purpose of the notice provisions is "to give administrative agencies an opportunity to enforce environmental regulations." *Hallstrom v. Tillamook County*, 110 S.Ct. 304, 308 (1989) (dealing with notice provision of Resource Conservation and Recovery Act ("RCRA"), but Supreme Court noted ESA notice provision and RCRA notice provision were patterned after the same notice provision).

179. Thus, Plaintiff and GBRA gave notice of § 9 takings due to excessive withdrawals from the Edwards, and gave notice that the Federal Defendants had failed to prevent excessive withdrawals by failing to perform their non-discretionary duties under the ESA. After receiving that notice, the Federal Defendants still did nothing.

180. Defendants argument that some of the Plaintiff-Intervenors in the case are not proper parties because they did not give their own notices under the ESA is without merit. (*See* Fed. Def. Br. at pp. 5-6; Def. Int. Br. at p. 29). The purposes of the notice provision were served by the GBRA and Sierra Club notices: to call the violations of the ESA to the attention of the Federal Defendants and to give the Federal Defendants 60 days to remedy the violation.

181. Individual Sierra Club members live in Austin, San Antonio, San Marcos, or New Braunfels. They have visited the springs many times to enjoy the ecosystems and the species, intend to continue doing so, and can readily do so if the springs are not allowed to dry up or species are not extirpated. (Kramer Testimony). Sierra Club member Dr. Clark Hubbs, University of Texas Professor Emeritus of Biology, lives in Austin. He has visited the springs for these purposes as recently as September 1992. (Hubbs Testimony). The Lone Star Chapter of

the Sierra Club organized group trips to the springs for similar purposes, intends to continue to do so, and can readily do 80 if the springs are not allowed to dry up or species are not extirpated. (Kramer Testimony).

182. The economies of Plaintiff-Intervenor the City of San Marcos and Plaintiff-Intervenor the City of New Braunfels are directly and significantly dependent on tourism and research associated with the springs and with the endangered and threatened species who live in those ecosystems. (PX-220; PX-223). The cities foster and encourage studies of the San Marcos and Comal ecosystems, including the endangered species, by professionals, students, and interested lay persons.

183. The Federal Defendants's violations of § 4 deprived the Plaintiff and Plaintiff-Intervenors, Defendant-Intervenors, *amici*, and non-parties of information essential to the protection of the spring-runs, Aquifer levels, and associated species; that is, the minimum quantities of springflows and Aquifer levels which the ESA requires be protected. (Spear Testimony; Specht Testimony; Masters Testimony; Aceves Testimony; Hall Testimony; Hubbs Testimony). The information is essential to the efforts of Federal (USAF), State (TWC), regional (EUWD), and local (San Antonio) entities to devise an adequate plan or plans to regulate pumping and otherwise

protect both the endangered and threatened species and the human economic interests threatened by excessive pumping.

184. Both the USFWS and the TWC concede this instant lawsuit prompted long-overdue efforts to determine and to protect minimum springflows for those spring-dependent species. The Federal Defendants' violations of § 4 of the ESA delayed efforts to develop and to implement measures to determine and protect minimum continuous springflows.

Avoiding or Minimizing Harm

185. Mr. Spear would be "delighted" if the Court were to encourage the Texas legislature and affected parties to solve the Edwards problem by ordering the USFWS to state minimum continuous springflows promptly, and communicate them to all concerned. (Spear Testimony).

186. In wading through the turbid pool of information and alleged negotiations generated by the instant case, no harm to USFWS would result from an order requiring the USFWS to use its best professional judgment to determine minimum continuous springflows within forty-five (45) days. (Spear Testimony). The USFWS would remain free to conduct, or to request others to conduct, such scientific studies as it wishes, on such schedules as it wishes, and to modify its judgments if, as, and when those studies generate different and better

information. Indeed, under 50 C.F.R. § 402.16(b) and *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), the USFWS would be obligated to update its judgments when necessary, in light of subsequent materially different information.

187. No harm to anyone else, and much benefit, would flow from an order requiring the USFWS to make prompt best professional judgments of minimum springflow and Aquifer levels and communicate them to all entities concerned with Edwards issues. The Texas Legislature, the TWC, the EUWD, and the City of San Antonio would benefit by knowing the minimum springflows that an adequate State plan must protect if it is to avoid the "blunt axe" of Federal intervention pursuant to the ESA. (Spear Testimony; Shull Testimony; Aceves Testimony; Masters Testimony; Hall Testimony; Specht Testimony).

188. The economic consequences feared by Defendant-Intervenors the City of San Antonio, the Industrial Water Users, and the Builders Association will not result from USFWS compliance with this Court's order requiring prompt determinations of the minimum springflows to be protected under the ESA. (Aceves Testimony, Perryman Testimony).

189. If such economic consequences ever result at all, it will be due to failure of State and local authorities and regional water users to take prompt and appropriate actions to develop

pumping controls and reduce dependence on the Edwards before the "blunt axes" of Federal intervention under ESA §§ 7 and 9 fall. These actions are independently required by the threat of bad water movement and because the Edwards is badly overdrafted, as well as by the threat of Federal intervention under §§ 7 and 9. (Spear Testimony; Aceves Testimony; Masters Testimony; Hall Testimony; Perryman Testimony).

190. The ESA provides mechanisms to allow the State of Texas substantial time to reduce withdrawals from the Edwards in an orderly and nondisruptive manner. One of those mechanisms is a § 10(a) incidental take permit. The Federal Defendants are willing to grant the State a § 10(a) permit if, but only if, an adequate State plan for pumping controls is adopted and its implementation reasonably assured. (Spear Testimony; PX-34; P-35). *The sooner Texas adopts an adequate plan and obtains a § 10(a) permit, the better*. (Spear Testimony; Shull Testimony; Aceves Testimony; Masters Testimony; Hall Testimony).

191. The serious water supply problem associated with rapid increases in population and municipal, industrial, and agricultural water demand and exclusive dependence on the Edwards by the City of San Antonio has been recognized for over thirty-five years. *See Board of Water Engineers v. City of San Antonio*, 283 S.W.2d 722, 723 (Tex. 1955).

192. The City of San Antonio is blessed with a rare source of water. Unfortunately, the Edwards is currently the City of San Antonio's "sole source" of water because the City of San Antonio failed to develop adequate water supplies from other sources to reduce their reliance of the Edwards.

193. The relatively brief and mild drought of 1984 and associated pumping posed a serious threat to the San Antonio region's water supplies. (DX-112 at p. 1). In response, San Antonio and the EUWD sponsored a 1986 multi-volume *San Antonio Regional Water Resources Study*. (DX-169). For water supply and economic development purposes, as well as to protect the endangered species dependent on springflow, the study shows alternative water supplies using a combination of surface water and wastewater reuse is required. The costs are feasible. *(Id.* at pp. 1-13). Assuming the worst case, "San Antonio would go from being a low-water cost city to a moderate-cost city." *(Id.* at p. 13).

194. Almost four decades of negotiations among the affected parties have failed to yield a resolution of the disputes regarding the proper management of the Edwards. (Specht Testimony; PX-190 at p. 4). *Continuing failure risks Federal intervention to protect*

endangered species. (PX-190 at pp. 4-5). The danger is adequately understated as imminent. (Spear Testimony).

195. The negotiations failed in significant part because those who benefit by unregulated pumping do not believe pumping will be limited to protect endangered species, do not understand what limits are required, or because it is not politically feasible for them to agree to the limits required, absent a Court order. (Spear Testimony; Specht Testimony; Hall Testimony; Aceves Testimony; Masters Testimony; PX-134).

196. *The next session of the Texas legislature offers the last chance for adoption of an adequate state plan before the "blunt axes" of Federal intervention have to be dropped*. (Spear Testimony). There is a debate about the adequacy of the TWC State plan to protect minimum continuous natural springflows and Aquifer levels, which cannot be resolved until the USFWS determines the take and jeopardy levels required to be protected under the ESA. (Thornhill Testimony; Spear Testimony; Specht Testimony; Hall Testimony; Aceves Testimony; Masters Testimony).

197. In order to obtain injunctive relief under the ESA, "the Plaintiffs must establish four facts: (1) actual success on the merits, (2) a substantial threat of irreparable harm absent an injunction, (3) that the irreparable harm threatened is greater than that caused by the injunction, and (4) the

public interest would be served by the injunction." *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1277 (E.D. Tex. 1988) (citing *Tubwell v. Griffith*, 742 F.2d 250, 251 (5th Cir. 1984)). Defendants contend Plaintiffs failed to demonstrate a real and immediate threat of irreparable harm to any of the species at issue is the case *sub judice*.

198. In light of all the findings and contrary to Defendants' assertions, irreparable harm to endangered and threatened species, and to human interests dependent on Edwards and Comal and San Marcos Springs, is likely to occur if the USFWS does not promptly determine and communicate the minimum springflows and Aquifer levels required to be protected under the ESA.

199. Continuous springflows from the Comal Springs can be maintained at all times during a repeat of the drought of the 1950's if pumping were limited to something slightly less than approximately 219,000 acre-feet per year during the 1950's drought. Limiting pumping to an average of roughly 200,000 acre-feet per year during the drought would provide some minimal continuous daily Comal springflows. (Thornhill Testimony).

200. Even if the needs of endangered species were disregarded entirely, there is a water-quality floor below which the level

of water in the Edwards should not be allowed to drop, solely for water supply purposes. (Thornhill Testimony; Aceves Testimony; Hall Testimony; Masters Testimony). The water-quality floor should be defined in part based on known water quality impacts in the Aquifer itself caused by pumping-induced drawdowns and springflow depletion. The water-quality floor should be set high enough to avoid any appreciable risk of significant water-quality harm, taking into account the unknowns and the potential serious consequences accompanying the unknowns. (Thornhill Testimony).

201. The surest and most prudent method of ensuring there will be no significant adverse water quality impact due to pumping from the Edwards is to limit pumping to the extent necessary to maintain adequate continuous natural springflows from the Comal Springs at all times. The evidence demands, until reliable information is garnered stating otherwise, the prohibition of any other limitation. (Thornhill Testimony).

202. The "firm yield" of the Edwards, assuming protection of just minimal continuous daily springflows from the Comal Springs, is on the order of roughly 200,000 acre-feet per year during a repeat of the drought of record. (Thornhill Testimony).

203. The "firm yield" of the Edwards is not 350,000 acre-feet per year. Pumping 350,000 acre-feet per year throughout a repeat

of the drought of the 1950's will cause the Edwards to drop to levels far below the historic low of 612.51 feet mean sea level, dry up the Comal Springs for years and San Marcos Springs for substantial periods of time, contaminate the Edwards by movement of bad quality water into the fresh water, and risk other environmental harm. (Thornhill Testimony).

204. Withdrawals in excess of 200,000 acre-feet per year can be allowed during normal and wet years; especially in years similar to 1992. However, it would be imprudent to rely upon and plan for the Edwards to supply the region 350,000 acre-feet of water per year during a repeat of the drought of the 1950's. (Thornhill Testimony).

205. If the City of San Antonio would seriously and immediately develop additional supplies of water, implement conservation programs and mandates (like minimal lawn watering and credits for native landscaping), reuse water, and seek alternative sources of water, the City of San Antonio is likely to obtain substantial additional water supplies within five to ten years. (Thornhill Testimony; Specht Testimony).

206. If the region is fortunate enough to miss a major drought within the next five to ten years, the only significant economic impact on San Antonio and the region resulting from satisfying the requirements under the ESA to maintain minimum

springflows at the Comal and San Marcos Springs would be the cost of obtaining additional supplies of water within the period of time. (Aceves Testimony; Perryman Testimony).

207. Approximately the same cost would have to be borne by San Antonio and the region, even if the needs of endangered species were disregarded entirely; adequate and continuous natural springflows are needed from the Comal and San Marcos Springs at all times to avoid the risk of significant adverse water quality impacts, solely for water supply purposes. (Aceves Testimony, Perryman Testimony).

208. If the region experiences a major drought within the next five to ten years, and if severe economic harm otherwise results from satisfying the requirements under the ESA (and to avoid water quality risks for water supply purposes) by maintaining minimum continuous natural springflows at the Comal and San Marcos Springs, exemptions can be sought to allow takings, destruction of critical habitat, jeopardy, and even extinction of species during such a crisis, pursuant to §§ 10(a) and 7(h) of the ESA. 16 U.S.C. §§ 1536(h), 1539(a).

209. Destruction of critical habitat, jeopardy, and extinction of species may also be allowed pursuant to § 7(j) of the ESA if necessary for reasons of national security. 16 U.S.C. § 1536(j).

Timing

210. The Court is satisfied Plaintiffs met their burden proving the necessary facts in order to obtain injunctive relief under the ESA; thus, timing is the remaining issue for discussion. The Edwards can fall from record highs to levels at which Comal Springs is below 100 cfs, takes are occurring, and jeopardy is imminent, in less than two years. (Thornhill Testimony; PX-189, PX-190).

211. The Edwards fell from a then-record high in late 1987 to levels at which Comal Springs nearly dried up in the summer of 1989. (PX-207).

212. The Edwards can even fall to levels at which the Comal Springs are imperiled in less than one year. (Thornhill Testimony; PX-248).

213. The Comal Springs in theory could be in danger of drying up again by the summer of 1993 or by the summer of 1994. (Thornhill Testimony; PX-248).

214. The 1984, 1989, and 1990 droughts were once-a-decade drought events. (Bomar Testimony). The risk of Comal Springs drying up again soon is considerable.

215. Once the Edwards has fallen to levels at which Comal Springs has fallen to 100 cfs, it can fall further to levels at which

Comal Springs dries up completely in less than one month. Based on historical experiences in 1956, 1984, 1989, and 1990, the Comal Springs could fall from 100 cfs to 0 cfs in two to three weeks. (Thornhill Testimony).

216. The Federal Defendants' current Flow and Habitat Requirements study addresses only the minimum Comal flow requirements of the Fountain Darter and an invertebrate proposed for listing. (DX-63). It does not address the minimum flow or Aquifer level requirements of any of the other species at issue. (Shull Testimony). This study will take more than one year to complete, and Ms. Shull believes it cannot be completed until Comal Springs have once more dropped to low levels. *(Id.)*. She does not know how low Comal Springs must drop for purposes of this study. *(Id.)*.

217. If the USFWS is allowed to wait until Comal Springs again falls below 100 cfs before determining and communicating the real jeopardy level, above 0 cfs, takes of the Fountain Darter will certainly occur and it is very likely Federal or Court intervention will be too late to save the endangered species from jeopardy through the drying up of Comal Springs.

218. The USFWS can and does determine minimum springflows required for protection of endangered species using best professional judgment, without waiting on the results of multi-year

scientific studies. The USFWS did so in 1990 when it adopted the contingency plan and critical Aquifer and springflow levels at which it would authorize last-ditch removal of endangered species. (PX-119). The USFWS did so again on March 26, 1992, when it advised the TWC of Comal springflow levels below which takes of and jeopardy to the Fountain Darter have already occurred. (PX-34).

219. The Court considers it is feasible for the USFWS to use its best professional judgment to determine, within forty-five (45) days, the minimum Comal and San Marcos springflow levels at which takes of and jeopardy to the Fountain Darter first began to occur, and at which damage to or destruction of or adverse modification of the critical habitat of the Texas wildlife begin to occur. (Whiteside Testimony; Moss Testimony; Hubbs Testimony; Power Testimony; Thornhill Testimony).

220. Springflow and aquifer level determinations made by FWS pursuant to the requirements of this Judgment may be modified by FWS, in the course of ESA Section 7(a)(2) consultations with other federal agencies to insure that actions authorized, funded, or carried out by such agencies are not likely to jeopardize the continued existence of any of endangered or threatened species or result in the destruction

or adverse modification of critical habitat of such species, based upon the best scientific and commercial data available at the time of such consultations. No such consultations have yet occurred.

221. Whenever the FWS modifies any springflow or aquifer level determination that FWS had previously made pursuant to the requirements of this Judgment, whether such modification is made pursuant to ESA Section 7(a)(2) consultations or otherwise, the previous determination made by FWS is not entitled, by reason of the requirement to make the determinations imposed upon FWS by this Judgment, to any presumption of correctness in any subsequent judicial review of the modified determination.

IN ACCORDANCE WITH the foregoing Findings of Fact and Conclusions of Law, the Court will enter its Judgment in the above-captioned cause in favor of Plaintiff and Plaintiff-Intervenors.

SIGNED this 26th day of May, 1993.

Lucius D. Bunton

HONORABLE LUCIUS D. BUNTON, III
SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

SIERRA CLUB and CLARK HUBBS,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	CIVIL ACTION NO. MO-91-CA-069
BRUCE BABBITT, Secretary of the Interior; UNITED STATES FISH & WILDLIFE SERVICE; TEXAS NATURAL RESOURCE CONSERVATION COMMISSION; CITY OF SAN ANTONIO; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION; UNITED STATES DEPARTMENT OF AGRICULTURE; and UNITED STATES DEPARTMENT OF TRANSPORTATION,	§	
	§	
Defendants.	§	

PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT

TO THE HONORABLE LUCIUS D. BUNTON, III, SENIOR DISTRICT JUDGE:

NOW COME the Sierra Club and Clark Hubbs, Plaintiffs, by and through their attorneys of record, and file this their Amended and Supplemental Complaint, seeking additional relief under the Endangered Species Act ("ESA"), 16 U.S.C.A. §§ 1531 et seq., the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601 et seq., and other federal statutes because of the growing threat to endangered species and human water supplies dependent on the Edwards Aquifer.

EXHIBIT "D"

On February 1 and May 26, 1993, this Court ordered the United States Fish and Wildlife Service ("USFWS") to define the minimum continuous natural springflows from the Edwards Aquifer ("Edwards") at Comal Springs and San Marcos Springs needed to avoid takings of, jeopardy to, or damage or destruction of endangered and threatened species. In response to this Court's Order, USFWS determined that Fountain Darters begin to be taken when the springflow from the Comal Springs drops to 200 cfs, that the continued existence of the species is jeopardized when Comal springflow drops to 150 cfs, and that the continued existence of other species is jeopardized when San Marcos springflow drops to 100 cfs.

The Court also ordered the Defendant-Intervenor the Texas Water Commission ("TWC"), predecessor of the Texas Natural Resource Conservation Commission ("TNRCC"), to prepare a plan for regulation of Edwards water withdrawals under state law that "assures that the Comal Springs and San Marcos Springs will not drop below jeopardy levels as defined by the USFWS, even in a repeat of the drought of record. . . ." In response to this Court's Order, the TWC prepared a plan and filed it by the deadline set by the Court. However, that plan "does not come close to providing for adequate flow." (The Center for Research in Water Resources, using the Texas Water Development Board's own computer model.) Not only would the springs go dry in the next severe drought, they would go dry "probably even during a mild drought." (CRWR (1993) at p. 82.)

In its 1993 Judgments and Findings, this Court also found that, "even if the needs of endangered species were disregarded entirely, there is a water-quality floor below which the level of

the water in the Edwards should not be allowed to drop, solely for water supply purposes." The Court found that water-quality floor to be essentially the same as the floor needed to protect endangered species -- pumping must be limited to the extent necessary to maintain adequate, continuous natural springflows from the Comal and San Marcos Springs at all times, including in a repeat of the drought of record, in order to eliminate the threat of release of a hazardous substance (hydrogen sulfide) into the fresh water in the Edwards. Contamination of the fresh water by the migration of such hazardous substance and other pollutants could permanently and irreversibly ruin the Edwards as a water supply.

In its 1993 Judgments and Findings, this Court recognized that the Sierra Club and Plaintiff-Intervenors had deliberately deferred requesting more drastic relief, in hopes that responses to these orders by the State of Texas, San Antonio and the Federal government would result in adequate regulation of Edwards withdrawals by the State of Texas and the rapid acquisition by San Antonio of adequate additional water supplies. But this Court also recognized that these authorities might fail or refuse to carry out their respective duties concerning the Edwards, in the absence of stronger judicial mandates. This Court therefore provided that Plaintiff and Plaintiff-Intervenors could seek additional relief.

In this Court's February 25, 1994 order appointing Joe G. Moore, Jr. as monitor, the Court found "there is no plan in effect by any Federal, State or local governmental entity that adequately

protects against violations of the ESA caused by unregulated pumping from the Edwards Aquifer." In the words of this Court:

> . . . One year after the original Judgment and Findings of Fact and Conclusions of Law were entered in this case, the State of Texas still does not have in effect a regulatory system for the Edwards Aquifer, and the City of San Antonio has failed to develop any water supplies from sources other than the Edwards Aquifer.

February 25, 1994 Order Appointing Joe G. Moore, Jr. As Monitor, p. 2, n. 1.

The Court in its Order "strongly urged" the City of San Antonio and the TNRCC to act. With respect to the TNRCC, the Court "strongly urged" the TNRCC to act by April 1, 1994, by submitting by that date a corrected plan that would be adequate even in a repeat of the drought of record.

Unfortunately, but predictably, San Antonio continues to refuse to take any meaningful steps to acquire new water supplies, and the TNRCC apparently refuses to assist this Court in any way unless it is ordered to act by this Court. Strong urgings by this Court simply are not enough to overcome the political pressures imposed upon the TNRCC by San Antonio and others.

As recognized by this Court, three major objectives must be achieved in order to both protect the species against jeopardy and eliminate the threat of a release of a hazardous substance into the fresh water in the Aquifer:

(1) Withdrawal Regulation. Withdrawals must be limited to whatever levels are needed to insure that the required minimum jeopardy springflows (at least 150 cfs at Comal and at least 100 cfs at San Marcos) will be maintained at

all times, including during a repeat of the drought of record. During major droughts, drastic curtailments from current levels of withdrawals will be required. The regulation of withdrawals could either be direct (e.g., a comprehensive regulatory system based on permits), or indirect (e.g, closure of San Antonio military bases, withholding of federal funds, or ceasing other federal actions that lead to pumping), or some combination of the two.

(2) Conservation and Reuse. All users of water from the Aquifer must take all steps reasonably possible to conserve and reuse water, thereby reducing their demand for water to reasonable and non-wasteful levels.

(3) Additional Water Supplies. Even with significant demand reductions due to conservation and reuse, San Antonio and others in the San Antonio region must have available for immediate use, particularly during droughts, substantial quantities of water from other sources. Studies show that there is plenty of water currently available on a firm basis from other sources, either on a permanent basis or for a substantial number of years, without having to build any new water supply reservoirs. The rapid development of these currently-available water supplies for use by San Antonio and others will avoid or minimize the economic harm that would otherwise occur when withdrawals from the Aquifer must be curtailed drastically during droughts. Avoiding or minimizing

economic harm is a laudable objective in and of itself. In this case, however, taking action that will avoid or minimize economic harm during major droughts will also best insure protection of the listed species and elimination of the threat of contamination of the Aquifer -- if the curtailment of pumping required during a major drought will not cause an economic trainwreck, there should be no real incentive to try to pump more than the allowable amounts during that drought.

This Amended and Supplemental Complaint seeks additional relief because of the unlawful failures or refusals of the State of Texas to limit Edwards withdrawals sufficiently to protect endangered species and human water quality and quantity, and of San Antonio to conserve and reuse water and develop alternative water supplies for itself and others in the San Antonio region. This Amended and Supplemental Complaint also seeks additional relief, to the extent such relief becomes necessary, because of the unlawful failures or refusals of the Secretary of the Interior, the Department of the Interior ("USDOI"), USFWS, Environmental Protection Agency ("USEPA"), Department of Transportation ("USDOT"), Department of Agriculture ("USDOA"), Department of Defense ("USDOD"), United States Defense Base Closure and Realignment Commission ("US Base Closure Commission"), TNRCC, and San Antonio to carry out federal duties to avoid jeopardizing endangered species and to eliminate the threat of releases into human water supplies of hazardous substances.

Plaintiffs seek a quick, comprehensive, equitable, environmentally acceptable and economically feasible solution to the problem. Such a solution can be achieved, with the assistance of this Court, if the Federal parties, State parties and San Antonio cooperate. Specifically, Plaintiffs request the following additional relief at this time:

(1) An order of this Court declaring that there is a substantial and imminent threatened release of hydrogen sulfide, a hazardous substance, into the fresh water in the Edwards Aquifer, due to excessive Edwards pumping; and that this threat constitutes an emergency for public health and safety purposes as well as endangered species purposes, because it threatens the Edwards ecosystem, on which both 1.5 million people and many endangered and threatened species depend, with catastrophic, irreversible damage.

(2) An order of this Court directing the Monitor to prepare, by August 1, 1994, an Emergency Withdrawal Reduction Plan that defines which withdrawals should be limited, and to what extent and under what conditions they should be limited, to assure that the Comal Springs and San Marcos Springs will not drop below jeopardy levels, as defined by the USFWS, at any time, even in a repeat of the drought of record. The Emergency Withdrawal Reduction Plan should correct the March 1, 1993 plan submitted by the TWC by assuming that the repeat of the drought of record has already begun some time prior to the date the

corrected plan is adopted by TNRCC, or that it will begin immediately thereafter. The Emergency Withdrawal Reduction Plan should attempt to minimize overall adverse economic impacts of the region. Essential elements of an Emergency Withdrawal Reduction Plan are contained within the Plaintiffs' Proposed Recovery and Consultation Plan, attached as Exhibit A.

(3) An order of this Court directing the Monitor to prepare, by August 1, 1994, a preliminary, conceptual Emergency Water Conservation and Reuse Plan defining the reductions in withdrawals that could reasonably be achieved simply by conservation and reuse, and the anticipated timetable and the estimated costs of finalization of that plan and of the actions needed to fully implement the final plan.

(4) An order of this Court directing the Monitor to prepare, by August 1, 1994, a preliminary, conceptual Emergency Water Supply Plan for the San Antonio region, defining the amounts of water currently available from other sources that, in addition to reasonable conservation and reuse measures, are necessary or desirable to eliminate the emergency threat of release of a hazardous substance into the fresh water in the Edwards and avoid jeopardy to the listed species during a repeat of the drought of record, the facilities needed to be able to fully utilize such alternative water supplies, the proposed customers of such system in addition to the City of San Antonio, and the anticipated timetable and estimated costs of

finalization of that plan and of the design, acquisition, construction and other actions needed to fully implement the final plan.

(5) As soon as possible after August 1, 1994, an order of the Court:

(a) approving the Monitor's Emergency Withdrawal Reduction Plan, his preliminary, conceptual Emergency Conservation and Reuse Plan, and his preliminary, conceptual Emergency Water Supply Plan, with such modifications as may be deemed necessary or desirable by the Court;

(b) ordering the TNRCC to immediately begin and thereafter continue reducing withdrawals pursuant to the approved Emergency Withdrawal Reduction Plan;

(c) ordering the TNRCC to immediately commence and thereafter diligently pursue to completion the finalization of the approved preliminary, conceptual Emergency Conservation and Reuse Plan, and the actions needed to fully implement the final plan;

(d) ordering and/or authorizing the appropriate party or parties to immediately commence and thereafter diligently pursue to completion the finalization of the approved preliminary, conceptual Emergency Water Supply Plan, and the design, acquisition,

construction and other actions needed to fully implement that final plan.

(6) An order of this Court requiring the City of San Antonio to pay all costs incurred by the party or parties ordered and/or authorized by this Court to finalize the approved preliminary, conceptual Emergency Water Supply Plan, and to design, acquire, construct and take other actions needed to fully implement that final plan, subject to further order of this Court at a later date requiring contribution by others pursuant to § 107(a) of CERCLA and/or other laws or equity to the extent that contribution is later sought by San Antonio and found by this Court to be appropriate.

(7) An order of this Court requiring the City of San Antonio to reimburse Plaintiffs under § 107(a) of CERCLA for all necessary costs of response incurred by Plaintiffs to eliminate the threat of release of a hazardous substance into the fresh water in the Edwards.

Plaintiffs recognize the possibility that the TNRCC and/or San Antonio may fail or refuse to act as ordered by this Court or to act timely, or they may be prevented from doing so by other historically recalcitrant parties. Accordingly, Plaintiffs request that this Court be prepared to pursue an alternative course of action, dropping the "blunt ax" of federal regulation if it becomes necessary to do so. In order to be able to drop the blunt ax on short notice, this Court should enter the following orders <u>now</u>:

(1) An order of this Court requiring the USFWS under ESA § 4 to act, by August 1, 1994, on the pending requests for listing of endangered and threatened species at Comal Springs, to designate the critical habitat of those species and of the Texas Blind Salamander by the same date, and to develop a recovery plan for each endangered and threatened species dependent on Edwards waters. Each such recovery plan may either be a new freestanding plan or part of an amended and updated version of the existing San Marcos Recovery Plan. Plaintiffs request that the Court order require the USFWS, in consultation with other federal and state authorities, to include within the recovery plan or plans concrete steps the USFWS and other federal and state authorities will implement, to prevent jeopardy to endangered species and human water quality and quantity. Plaintiffs request that this Court order the USFWS to include, within the recovery plan or plans, specific dates, Edwards levels and Comal and San Marcos springflow levels as of which they will implement such steps. Plaintiffs also request that this Court order the USFWS and those with whom USFWS consults or confers to consider the Plaintiffs' Proposed Recovery and Consultation Plan attached as Exhibit A.

(2) An Order of this Court directing the Secretary of the Interior and the USDOI, USFWS, USEPA, USDOT, USDOA, USDOD and the US Base Closure Commission (the "Federal Defendants"), and requesting the United States Geological

Survey and the Texas Parks and Wildlife Department, to immediately form an Edwards Interagency Task Force to consult and affirmatively plan under ESA § 7 and other federal statutes including but not limited to CERCLA. The Task Force should promptly identify activities these and other agencies authorize, fund or carry out, directly or indirectly, singularly or cumulatively, that lead to pumping from the Edwards, and it should define the actions that should be taken or ceased by these and other agencies to avoid jeopardy to the listed species and eliminate the threat of release of a hazardous substance into the fresh water in the Edwards, the water supply for 1.5 million people as well as the listed species. Examples of the actions that should be planned for include the following:

(a) ceasing or severely limiting or conditioning all federal funding that leads to pumping;

(b) closure of San Antonio's military bases and, if possible, relocation to any one or more of the many cities in Texas that have adequately planned, and paid, for their current and future water supplies; and

(c) revoking or severely limiting or conditioning all NPDES discharge permits issued by EPA where the effluent is derived in whole or in part from water withdrawn from the Aquifer.

(3) An order of this Court declaring that the Federal Defendants, TNRCC and the City of San Antonio are in violation of ESA § 9's prohibitions against harm to or harassment of endangered species. The State of Texas owns the water flowing through the Edwards in trust for the benefit of the public, and the State's failure to properly regulate withdrawals of its water is causing the threat of takings of species and of a release of a hazardous substance into the fresh water in the Edwards. The State of Texas owns the water in the Edwards in trust for the benefit of the public because the Edwards has all the essential characteristics of a surface watercourse and, therefore, title to its waters was reserved by the sovereign when the sovereign conveyed title to lands overlying the water. In the alternative, the State of Texas owns the waters of the Edwards as trustee pursuant to Article XVI, § 59 of the Texas Constitution. In either event, and in the further alternative, the TNRCC has the state constitutional and statutory power and duty to preserve and protect these natural resources to the extent required to comply with federal law protecting both endangered species and human water supply needs. The City of San Antonio is by far the largest single pumper of Edwards Aquifer water. A significant portion of San Antonio's pumping is for uses such as irrigating lawns and filling swimming pools. The USDOD, at its San Antonio military bases, also pumps Edwards Aquifer water,

much of which is used to irrigate lawns and golf courses. These non-essential uses by San Antonio and the USDOD's San Antonio military bases can be cut back or eliminated if necessary with no disruption of essential public health or safety and little economic impact. Additionally, the Federal Defendants have authorized, funded and carried out actions that allow, maintain and promote Edwards withdrawals that take endangered species and threaten release of a hazardous substance into San Antonio's and others' water supply.

Plaintiffs do not at this time request the following relief. However, should it ever become necessary because of lack of cooperation by San Antonio or others, or because of lack of required action by Federal agencies, Plaintiffs will request the following relief:

(1) An order of this Court that the Federal Defendants <u>immediately</u> cease authorizing, funding or carrying out, directly or indirectly, singularly or cumulatively, any activity that leads to withdrawals from the Edwards Aquifer, and that the Federal Defendants take affirmative actions within their authorities that will lead to reductions of withdrawals, to the extent such withdrawals threaten jeopardy to endangered species and release of a hazardous substance into the fresh water in the Edwards.

(2) An order of this Court that the City of San Antonio and the USDOD <u>immediately</u> cease withdrawals of water to the extent necessary to avoid any takings of listed species

and the threat of release of a hazardous substance into the fresh water in the Edwards.

This Amended and Supplemental Complaint still does not seek the most drastic relief: orders of this Court directly and immediately restricting pumping. Plaintiffs continue to hope that such relief can be avoided. For the sake of absolute, unmistakable clarity, however, the Plaintiffs do outline the pumping cutbacks that they believe are needed, and that <u>will</u> be sought, if necessary:

(1) limit total Edwards withdrawals to 350,000 acre-feet per year in ordinary years by prohibiting all lawn watering and, to the extent necessary, all other irrigation use of Edwards water;

(2) limit total Edwards withdrawals to 150,000 acre-feet per year if the Comal springflow drops to 200 cfs (this occurs at a J-17 Aquifer level of approximately 650 feet, m.s.l.) by prohibiting, among other uses, any remaining lawn watering and other irrigation use of Edwards water, and all Edwards water pumping by or deliveries to any municipal or industrial user commenced on or after June 15, 1989, except for such user's public health and safety needs (drinking water, firefighting, hospitals);

(3) prohibit all remaining Edwards pumping not necessary to meet public health and safety needs if the Comal springflow drops to 150 cfs or the San Marcos springflow drops to 100 cfs.

A more detailed description of the pumping cutbacks that the Plaintiffs will seek if necessary is contained in the Plaintiffs' Proposed Recovery and Consultation Plan attached as Exhibit A.

Plaintiffs respectfully request that the Court's order afford Plaintiffs an additional opportunity to seek such injunctive relief if climatic conditions make it appear necessary.

JURISDICTION

1. Jurisdiction of this action is founded upon 16 U.S.C. § 1540(c), 42 U.S.C. § 9607 and 28 U.S.C. § 1331 (1978).

2. Plaintiff Sierra Club and GBRA gave notice of § 9 takings due to excessive withdrawals from the Edwards, and gave notice that the Federal Defendants had failed to prevent excessive withdrawals by failing to perform their non-discretionary duties under the ESA, and Plaintiffs Sierra Club and Clark Hubbs gave additional notice of all violations alleged herein to all Defendants.

VENUE

3. Venue lies in the Western District of Texas pursuant to 28 U.S.C. § 1391(e), 16 U.S.C. § 1540(g)(3)(A) and 42 U.S.C. § 9607 because violations alleged herein are occurring within the boundaries of the Western District of Texas and actions that form the basis for the claims in this litigation are taking place within the boundaries of the Western District of Texas.

PLAINTIFFS

4. The Sierra Club is a non-profit California corporation having its principal place of business in San Francisco, California. The Sierra Club is a national conservation organization with a membership of more than 560,000. Approximately 22,000 of these members reside in Texas. The Sierra Club has 40 members in New Braunfels and 70 members in San Marcos, Texas. The Comal County members are part of the Alamo Regional Group of the Sierra Club. The San Marcos members belong to the Austin

Regional Group of the Sierra Club. The Club has many members, such as Clark Hubbs, who have direct personal interests in the Edwards Aquifer, the Comal and San Marcos Springs, or in the endangered and threatened species dependent upon their waters.

The Sierra Club has the following purposes: to enhance and protect by all lawful means the natural resources and human environment of the United States and the earth; to explore, enjoy and preserve the scenic resources of the United States, including its canyons, deserts, mountains, waters, and to undertake scientific, literary, and educational studies concerning them; to educate the people with regard to the national and state lands, parks, monuments, and other natural resources and to enlist public interest and cooperation in natural resources protection.

Clark Hubbs is the Clark Hubbs Regent Professor Emeritus of Zoology of The University of Texas at Austin. He has been a member of the Sierra Club since 1986. He secured promotions and established his reputation in the academic community on the basis, among others, of studies of two endangered species found only at Comal and San Marcos Springs. He has visited the Springs on countless occasions over forty years and continues to do so both to observe the species and to enjoy the aesthetic beauty and distinct ecological diversity in these systems.

STANDING

5. Under 16 U.S.C. § 1540(g)(1)(A), any person may commence a civil suit to enjoin any person, including the federal, state

or local government, who is alleged to be in violation of the Endangered Species Act. Under 16 U.S.C. § 1540(g)(1)(C), any person may bring a civil suit against the Secretary of Interior for failure to perform an ESA duty which is not discretionary with the Secretary.

6. The term "person" incudes organizations such as the Sierra Club and individuals such as Clark Hubbs. The Sierra Club has members who would be injured in fact by the takings and ultimately extinction of the endangered or threatened species dependent upon the Edwards Aquifer, Comal and San Marcos Springs ecosystem and by the poisoning of the ecosystem with hydrogen sulfide. Some live immediately alongside of and/or directly use portions of the ecosystem for recreational, aesthetic, or water supply purposes. They have long-term continuous interests in some members seeing or studying one or more of these species and/or their ecosystem. Clark Hubbs has for many years studied the fountain darter, an endangered species found in the wild only at the Comal and San Marcos Springs, has published studies of the fountain darter, and continues to visit the Comal Springs for the purpose of observing and studying the fountain darter. Clark Hubbs named the San Marcos Gambusia, a species listed as endangered and said in the San Marcos Recovery Plan to exist in the wild only in the San Marcos Springs, as a distinct species. He has served as a member of or consultant to a number of recovery terms.

7. Individual Sierra Club members live in Austin, San Antonio, San Marcos, or New Braunfels. They have visited the springs many times to enjoy the ecosystems and the species, intend to continue doing so, and can readily do so if the springs are not allowed to dry up or species are not extirpated. (Kramer Testimony). Sierra Club member Dr. Clark Hubbs lives in Austin. He has visited the springs for these purposes as recently as September 1992. (Hubbs Testimony). The Lone Star Chapter of the Sierra Club organized group trips to the springs for similar purposes, intends to continue to do so, and can readily do so if the springs are not allowed to dry up or species are not extirpated. (Kramer Testimony).

8. Injuries-in-fact to the Sierra Club, its members, and individuals such as Clark Hubbs are caused both by those who pump from the Edwards Aquifer and by federal, state and local governmental agencies and others who have duties to provide information concerning these risks, to plan to reduce these risks, and to take actions or forbear from actions as necessary to assure against these risks. These injuries are redressable by order of this Court, as the previous responses to this litigation and to this Court's orders show.

9. This instant lawsuit and this Court's earlier orders have already prompted long-overdue efforts to determine and to protect minimum springflows for these spring-dependent species.

DEFENDANTS

10. Bruce Babbitt is the United States Secretary of the Interior and is head of the Department of the Interior, successor to Manuel Lujan, previously served with citation in this cause. The USFWS, the agency within the Interior Department to which the Secretary has delegated ESA duties relevant to this matter, has previously been served.

11. The USDOA is a federal agency that authorizes, funds or carries out activities that directly or indirectly maintain or increase pumping from the Edwards, especially by commercial irrigation agriculture interests.

12. The USDOT is a federal agency that authorizes, funds or carries out activities that directly or indirectly result in continued or increased pumping from the Edwards.

13. The USEPA is a federal agency that authorizes, funds or carries out activities that directly or indirectly result in continued or increased pumping from the Edwards, and has principal CERCLA responsibility.

14. The USDOD is a federal agency that authorizes, funds or carries out actions that directly or indirectly result in continued or increased pumping from the Edwards, principally the USDOD bases in the San Antonio area with their water use demands, especially for irrigation of officers' golf courses.

15. The US Base Closure Commission is a federal agency, in accordance with the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2901 et seq., as amended, that makes recommendations for closure or realignment of all

military bases in the San Antonio area that directly or indirectly result in continued or increased pumping from the Edwards.

16. The TNRCC is a state agency, successor to the Texas Water Commission, Defendant-Intervenor, that has the authority and duty to regulate withdrawals of state water, and the authority and duty to regulate all water that is under ground, regardless of ownership, to prevent water quality damage.

17. The City of San Antonio is a municipality, a home-rule city organized under the Constitution and laws of the State of Texas. San Antonio is by far the largest single pumper of Edwards water, more than ten times larger than the next largest. Alone among Edwards pumpers, San Antonio has the legal and practical power to arrange meaningful alternative water supplies without federal or state assistance. San Antonio has failed to pursue any realistic, cost-effective, environmentally sound water supply alternatives. A significant portion of San Antonio's pumping during the most critical time periods is for lawn watering, a use which could be curtailed or eliminated without loss of jobs or tax revenues. San Antonio has known for more than 40 years that, because of its reliance on Edwards water, its citizens and businesses do not have a safe and reliable water supply.

COUNT ONE

Violations by the Secretary of the Interior and USFWS of ESA § 4 Duties to List, to Designate Critical Habitat, to Regulate to Protect Threatened Species, to Develop Recovery Plans, and to Implement Recovery Plans

18. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 31 to 296 below as though the same were fully and completely set forth herein.

19. 16 U.S.C. § 1540(g)(1)(C) of the ESA provides that any person may sue the Secretary of the Interior where there is alleged a failure of the Secretary to perform any act or duty under § 1533 of the Act that is not discretionary with the Secretary.

20. 16 U.S.C. § 1533 requires the Secretary

    (1) to determine whether any species is endangered or threatened and to list such species;

    (2) concurrently to designate the species' critical habitat;

    (3) to issue regulations to provide for the conservation of threatened species; and

    (4) to develop and implement recovery plans for the conservation and survival of listed species.

    The Secretary has delegated these duties to USFWS.

21. This Court is empowered to "compel [federal administrative] agency action unlawfully withheld or unreasonably delayed." Administrative Procedure Act, 5 U.S.C. § 706(1).

22. Five invertebrate species found at Comal Springs in New Braunfels, Texas have been proposed for listing as endangered.

One, Stygobromes (or Stygonectes) pecki was deemed by USFWS in 1984 to be "warranted" for listing "but precluded" because of other pending proposals to list, delist or reclassify species. 56 F.R. 19632 (April 29, 1991). Ten years later, the Secretary/USFWS has still failed or refused to take any action on this species. The USFWS on December 14, 1990 decided that, as to two others of the five, not enough information was provided. **Id.** As to the remaining two, Heterelmis comalensis and a new genus and species in the Dryopidae family, the USFWS on December 14, 1990 found that the petition presented substantial information indicating that thee listings may be warranted, and published this in the Federal Register on April 29, 1991. **Id.** The Secretary/USFWS are obligated to make a listing decision within one year of that finding. The USFWS set a May 29, 1991 deadline for comments on the proposed listing. Three years later, and more than two years after the statutory deadline, the Secretary/USFWS have made no decision on these species. Under the circumstances of the substantial and imminent threat that excessive pumping from the Edwards poses to the Comal Springs ecosystem on which these species depend, the USFWS/Secretary's failure or refusal to take action on Stygobromes (or Stygonectes) pecki, Heterelmis comalensis, and the new genus and species of Dryopidae amounts to unlawful withholding of and unreasonable delay in federal action required.

23. Each of the following Comal Springs species, Stygobromes (or Stygonectes) pecki, Heterelmis comalensis and the new genus

and species of Dryopidae proposed for listing is a species. Each such species is endangered throughout its entire known range, the Comal Springs. The principal threat to each such species is the destruction, modification or curtailment of its habitat, specifically, reduction or cessation of continuous natural Comal springflows due to excessive Edwards pumping "resulting from the inadequacy of existing regulatory mechanisms." Its critical habitat consists of the waters of the Edwards Aquifer and the Comal Springs. The essential recovery plan steps for each such species are measures to assure Edwards Aquifer water levels sufficient for minimum continuous natural Comal springflow at all times, including in a repeat of the drought of record.

24. USFWS's failure to act, one way or the other, and USFWS's failure to explain USFWS's action or excuse for inaction, is arbitrary and capricious, an abuse of discretion, clearly unwarranted by the facts, and amounts to unlawful withholding and unreasonable delay.

25. The Secretary of the Interior and the USFWS have failed or refused to designate critical habitat for the Texas blind salamander, a species that has long been listed as endangered. The Texas blind salamander lives in the Edwards itself. Its critical habitat consists of the waters of the Edwards. The Secretary of the Interior and the USFWS have made no finding and articulated no basis for their failure or refusal to designate critical habitat for the Texas blind salamander. Their failure or refusal to designate critical habitat for the

Texas blind salamander is arbitrary and capricious, an abuse of discretion, not in accordance with law, clearly unwarranted by the facts, and amounts to unlawful withholding and unreasonable delay of agency action.

26. The Secretary of the Interior and the USFWS have failed or refused to develop and implement recovery plans for the Texas blind salamander and for the Comal Springs populations, one of two isolated populations, of the fountain darter and the San Marcos salamander. Their failure or refusal to develop and implement these recovery plans is arbitrary and capricious, an abuse of discretion, not in accordance with law, clearly unwarranted by the facts, and amounts to unlawful withholding and unreasonable delay of agency action.

27. The Secretary of the Interior and the USFWS have failed to implement provisions of the San Marcos Recovery Plan calling for (1) vigorous, systematic consultation with federal agencies sufficient to prevent jeopardy to endangered and threatened species, and (2) strong measures to secure state regulation of Edwards water withdrawals sufficient to prevent takings of and jeopardy to listed species or, failing adequate state regulation, adequate federal agency regulation or, failing that, federal court orders curtailing pumping. Their failure or refusal to implement these provisions of the San Marcos Recovery Plan is arbitrary and capricious, an abuse of discretion, not in accordance with law, clearly unwarranted by the facts, and amounts to unlawful withholding and unreasonable delay of agency action.

28. The Secretary of the Interior and the USFWS have failed or refused to promulgate regulations to protect the San Marcos salamander, a species listed as threatened. Their failure or refusal to promulgate such regulations is arbitrary and capricious, an abuse of discretion, not in accordance with law, clearly unwarranted by the facts, and amounts to unlawful withholding and unreasonable delay of agency action.

29. Despite repeated notices of violation, orders, and warnings, San Antonio and state and federal governments have failed or refused to (1) develop and (2) implement plans that adequately restrict withdrawals of Edwards waters and/or to develop alternative water supplies.

30. There is an emergency within the meaning of 16 U.S.C. § 1533 which requires immediate action by the Secretary of the Interior and the USFWS. Even in moderately dry years, Edwards water levels fall within months from current levels to levels at which endangered and threatened species are taken and jeopardized. At approximately those same levels, the San Antonio region's human water supplies are threatened with substantial and imminent threat of release of hydrogen sulfide, a hazardous substance, through movement of the bad-water line. The failure or refusal of the Secretary of the Interior and the USFWS to act is arbitrary and capricious, an abuse of discretion, not in accordance with law, clearly unwarranted by the facts, and amounts to unlawful withholding and unreasonable delay of agency action, and an abdication of responsibility.

COUNT TWO

Violations by the Federal Defendants of ESA § 7 Duties to Prevent Jeopardy to and Develop and Carry Out Reasonable and Prudent Programs and Alternatives for Conservation of Listed Species

31. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 67 to 296 below as though the same were fully and completely set forth herein.

32. 16 U.S.C. § 1540(g)(1)(A) provides that any person may sue to enjoin any governmental agency which is alleged to be in violation of the ESA or of any regulation issued under the authority thereof.

33. 16 U.S.C. § 1536(a)(1) requires the Secretary of the Interior to "review other programs [other than ESA programs] administered by him and utilize such programs in furtherance of the purposes of [the ESA]."

34. The Secretary has not utilized other programs administered by him in furtherance of the purposes of the ESA as applied to protection of the Edwards species and their ecosystems against their greatest threat, excessive withdrawals of Edwards water.

35. No written records maintained by the Secretary reflect any review of all programs administered by him to determine which programs could and should be so utilized.

36. 16 U.S.C. § 1536(a)(1) requires all other Federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [listed species]."

37. Each of the Federal Defendants has authorities it could use in furtherance of the purposes of the ESA by carrying out programs for the conservation of the Edwards, Comal and San Marcos species against their greatest threat, excessive withdrawals of Edwards water. Such authorities include, without limitation, 49 U.S.C. § 303 (1993 Partial Rev'n) (Transportation obliged to use "all possible planning" to minimize harm to wildlife); 7 U.S.C. § 1010 (Agriculture obliged to develop "program of land conservation" to assist in "preserving natural resources, protecting fish and wildlife," and "protecting the watersheds of navigable streams"; 7 U.S.C. § 5401 et.seq. (Agriculture required to develop and implement detailed plan "to evaluate, prevent and mitigate environmental problems that may result from agricultural production"); and 7 U.S.C. § 5501 et.seq. (Agriculture required to develop and implement a "coordinated, integrated and comprehensive intra-agency program to protect waters from contamination from . . . agricultural production practices.").

38. The Federal Defendants have not utilized their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of the Edwards, Comal and San Marcos species against their greatest threat, excessive withdrawals of Edwards water.

39. No written records maintained by any of the Federal Defendants reflect any review of their authorities to determine which such authorities could and should be used to carry out programs for the conservation of the Edwards, Comal and San

Marcos species against their greatest threat, excessive withdrawals of Edwards water.

40. 16 U.S.C. § 1536(a)(2) requires each Federal agency, in consultation with and with the assistance of the Secretary, to "insure that any action authorized, funded or carried out by such agency," no matter what that action may be, "is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification" of the critical habitat of such species. Under 16 U.S.C. § 1536(d), once such consultation starts, the federal agency and the applicant "shall not make any irreversible or irretrievable commitment of resources" that would have "the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives" that would not jeopardize the species.

41. Each of the Federal Defendants authorizes, funds or carries out activities that may affect the Edwards, Comal and San Marcos species and that, separately or in combination with the activities of others, are likely to jeopardize the continued existence of such species. None of these agencies is in consultation with the Secretary of the Interior or the USFWS to insure that its actions are not in fact likely to jeopardize any of the Edwards species. Each of these agencies continues to make, and to allow applicants for authorization or funding to make, irreversible or irretrievable commitments of resources that have the effect of foreclosing any

reasonable and prudent alternatives to orders drastically restricting pumping.

42. The USDOA authorizes, funds or carries out activities that encourage or allow irrigation agriculture dependent on Edwards water, including loans, crop subsidies, grants, technical staff assistance, and marketing promotions to agribusinesses in Medina, Uvalde and rural Bexar Counties.

43. The USDOT authorizes, funds or carries out activities that encourage or allow municipal and industrial development dependent on Edwards water, including highway construction in the San Antonio metropolitan area.

44. The USDOD and the US Base Closure Commission each authorizes, funds or carries out activities that encourage or allow use of Edwards water, including the maintenance and promotion of military bases in the San Antonio metropolitan area.

45. The USEPA authorizes, funds or carries out activities that encourage or allow use of Edwards water, including the approval of wastewater discharge permits for the City of San Antonio and other municipal and industrial pumpers.

46. The USEPA has flagrantly failed in its ESA § 7 duty to utilize its CERCLA authorities to protect human water supplies and endangered species against the same threat, excessive Edwards pumping.

47. Hydrogen sulfide is a substance hazardous to human health. Excessive Edwards pumping threatens release of this hazardous substance into the human water supply of more than one million people.

48. This threat is imminent and substantial. Hydrogen sulfide is a pollutant or contaminant which if released into the environment of the Edwards would present an imminent and substantial danger to the public health and welfare. There is a substantial threat of such a release.

49. 16 U.S.C. § 9604 gives the President power to take preemptive remedial action against the threatened release of any hazardous substance, pollutant or contaminant into the environment. The President has delegated those powers to the USEPA. Pursuant to 42 U.S.C. § 9605, prevention of the threatened release of hydrogen sulfide into the Edwards should receive the highest priority, "taking into account," among others, "the population at risk, the potential of the hazardous substances at said facilities, the potential for contamination of drinking water supplies" and "the potential for destruction of sensitive ecosystems."

50. 42 U.S.C. § 9607 makes the owners and operators of facilities or sites liable for all costs of removal, remedial action or other response to a release or threatened release of a substance hazardous to public health.

51. The TNRCC, on behalf of the State of Texas, is an owner and/or operator of the facility within the meaning of CERCLA.

52. In the alternative, the TNRCC, on behalf of the State of Texas, is an owner and/or operator of the facility within the meaning of CERCLA by virtue of Tex. Const. art. XVI § 59 and Texas Water Code § 28.011 as amended.

53. The City of San Antonio is also an owner and/or operator of the facility within the meaning of CERCLA.

54. Under the facts of the Edwards situation, it is arbitrary, capricious, and an abuse of discretion amounting to an abdication of statutory responsibility, for USEPA to fail to utilize its CERCLA authorities and to take no action under 42 U.S.C. §§ 9604, 9605 and 9607 against the TNRCC and San Antonio to prevent the threatened poisoning of the Edwards.

55. 16 U.S.C. § 1536(a)(4) requires each Federal agency to confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed or result in the destruction or adverse modification of its proposed critical habitat. None of the foregoing agencies has conferred with the Secretary as to any of the Comal Springs species proposed for listing.

56. 16 U.S.C. § 1536(b)(3)(A) requires the Secretary to provide each consulting Federal agency a written statement "detailing how the agency action affects the species or its critical habitat." The Secretary and USFWS have provided no such written statements concerning the Edwards, Comal and San Marcos species.

57. 16 U.S.C. § 1536(b)(3)(A) also requires the Secretary, if jeopardy or adverse modification is found, to propose reasonable and prudent alternatives. The Secretary and USFWS have not proposed any reasonable and prudent alternatives. The only alternatives they have proposed are: (1) hoping the

State of Texas will do something adequate and (2) hoping that, if Texas does not, rain will save the species.

58. 16 U.S.C. § 1536(3), (g), (h), (i), (j), (k), (l), (m), (n) and (o) concern agency actions that need to be curtailed to insure that listed species are not likely to be jeopardized, or their critical habitat adversely modified, where the benefits of those actions may be of regional or national significance and may outweigh the benefits of "alternative courses of action consistent with conserving the species or its critical habitat." The Act creates an Endangered Species Committee, popularly known as the God Committee, because of its power of life and death over endangered species. The Committee consists of seven or more members, including the Secretaries of Agriculture, the Army and Interior, the Administrator of the EPA, and one person from each affected state.

59. The God Committee may by a 5 to 2 vote authorize Federal actions likely to result in extinction if, but only if, it determines on the record after adjudicatory hearing that:

(1) there are no reasonable and prudent alternatives to the agency action;

(2) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat;

(3) the action is of regional or national significance;

(4) neither the Federal agency concerned nor the exemption applicant has "made any irreversible or

irretrievable commitment of resources prohibited under 16 U.S.C. § 1536(d)"; and

(5) the Committee establishes reasonable, necessary and appropriate mitigation and enhancement measures "to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned." 16 U.S.C. § 1536(h)(1).

60. The full costs of such mitigation and enhancement measures shall be borne by the applicant. 16 U.S.C. § 1536(l).

61. The Secretary, the USFWS, these federal action agencies, irrigators, San Antonio and state authorities have utterly failed or refused to explore reasonable and prudent alternatives. They have not even acquired information from each well operator concerning historic and current usage. They have continued to make or authorize, fund or carry out irreversible or irretrievable commitments of resources, including new water wells, new water customers, and expanded military base operations.

62. The State's "plan" is to hope the drought of record does not repeat itself. At present no state agency is actively asserting authority to develop and implement a plan adequate in a repeat of the drought of record. The USFWS's "plan" is to hope that the State is right, or in the alternative to hope that the State will magically develop an adequate plan. In the further alternative, the USFWS' "plan" is to watch the extinction of the Comal, San Marcos and Edwards species.

63. These failures or refusals to plan, consult, confer and actively utilize existing authorities to develop reasonable and prudent alternatives have three times, in 1984, 1989 and 1990, jeopardized the Comal, San Marcos and Edwards species and caused destruction of or adverse modification to their habitat.

64. Each of the ESA Section 7 defendants "will doubtless have to coordinate its planning efforts with other agencies." Such "coordination" is "contemplated under the ESA." **Seattle Audubon Soc'y v. Evans**, 952 F.2d 297, 302 (9th Cir. 1991). Such multiagency, multistatute coordinated ESA Section 7 consultation and recovery planning is entirely feasible.

65. Federal, state and local agencies have two clear precedents to compare. In the northern spotted owl/old growth timber controversy, the U.S. Forest Service of the Department of Agriculture and the Bureau of Land Management, USFWS and National Parks Service of the Department of the Interior formed an Interagency Scientific Committee whose mission was "to develop a scientifically credible conservation strategy for the northern spotted owl in the United States." **Seattle Audubon Soc'y v. Evans**, 771 F.Supp. 1081, 1085 (W.D. Wash. 1991). But then political directives "by higher authorities in the executive branch" countermanded interagency's plan and dictated "deliberate and systematic refusal by the Forest Service and the FWS to comply with the laws," a "remarkable series of violations of the environmental laws." **Id.** at 1089-1090, **aff'd** 952 F.2d 297 (9th Cir. 1991). Because of

this federal intransigence, federal courts were required to order large-scale reductions in clearcut logging. In the Upper Colorado River Basin, the Secretary and the USFWS took the lead in devising a Section 7 Consultation and Recovery Action Plan, covering multiple endangered species in multiple tributaries and mainstream segments of the Colorado, in conjunction with multiple other Federal, state and local agencies.

66. The Secretary has colorfully described as "trainwrecks" confrontations over protection of listed species and their habitat, caused by failure or refusal to plan, consult, confer and act to avoid them. If even mild drought conditions begin immediately and no coordinated, planned, systematic actions to restrict Edwards pumping, to reduce demand and to develop alternative supplies have been taken, there will be a trainwreck.

COUNT THREE

Violations by the Federal Defendants, TNRCC, and the City of San Antonio of their ESA § 9 Duties Not to Harm or Harass Endangered Species

67. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 83 to 296 below as though the same were fully and completely set forth herein.

68. 16 U.S.C. § 1538 prohibits any person from "taking" any endangered species of fish or wildlife. 16 U.S.C. § 1532(19) defines "take" to include "harass" or "harm." By regulation, the USFWS has defined "harm" to "include 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 definition has been approved by the 9th Circuit Court of Appeals and applied by the Fifth Circuit Court of Appeals.

69. Significant habitat modification or degradation--specifically, sharply reduced springflows--actually killed and injured fountain darters, an endangered species, at Comal Springs in 1989 and 1990, by drying up the water they breed, feed and shelter in.

70. The direct, producing cause of this habitat modification or degradation that killed and injured fountain darters in 1989 and 1990 was excessive pumping from the Edwards, principally by the City of San Antonio and by irrigation agribusiness interests in Medina, Uvalde and Bexar Counties. San Antonio

and many irrigation agribusiness pumpers took fountain darters in 1990 despite having previously been served with written notice that their pumping had that effect and violated EPA § 9.

71. A substantial proximate cause of the 1989 and 1990 takings of the fountain darters was the failure of the TWC, predecessor of the TNRCC, to exercise its clear power and carry out its clear constitutional and statutory duties to regulate Edwards pumping to preserve contamination of all forms of water found under the surface of the ground.

72. The waters of the Edwards constitute an underground river, and as such are owned by the State of Texas in trust for the benefit of the public. By allowing pumpers to pump state-owned Edwards water without restriction, the TWC/TNRCC allows them to take endangered fountain darters.

73. The TWC in 1992 promulgated rules and regulations concerning withdrawals of Edwards water on the basis of its decision that the Edwards has all the essential characteristics of a surface watercourse and is, therefore, an underground river. Without ruling on whether the Edwards is in fact an underground river, a State district court held that the Commission lacked authority "under existing statutes" to regulate on that basis. The Commission in 1993 withdrew its rules, and a State appeals court has ordered that the district court judgment be vacated and the case dismissed as moot. The Edwards is in fact an underground river.

74. Texas Constitution Act XVI § 59 declares "the presentation and conservation" of all waters to be "public rights and duties" and requires the Legislature to "pass such laws as may be appropriate thereto."

75. The Legislature more than 50 years ago passed what was codified as Texas Water Code § 28.011. In 1989 and 1990, this statute obligated the relevant state agency, the Texas Water Commission, to "make and enforce rules and regulations for conserving, protecting, preserving and distributing underground, subterranean, and percolating water," and provided that the Commission "shall do all things necessary for this purpose. . . ." The Commission sought and obtained an Attorney General's Opinion confirming the validity of § 28.011. Out of fear of agricultural political pressure, however, the Commission never made rules and regulations under § 28.011 for conserving, protecting, preserving and distributing the waters of the Edwards.

76. In 1993, the Legislature merged the Texas Water Commission into the TNRCC, and amended § 28.011 to provide that the TNRCC "may make and enforce rules and regulations for protecting and preserving the quality of underground water."

77. The TNRCC has taken no action to make rules to protect the Edwards Aquifer against contamination by bad water containing hydrogen sulfide due to over-pumping of the Edwards.

78. San Antonio is by far the largest single user of Edwards water -- using more than ten times the amount of water used by the next largest pumper. San Antonio is the only single user,

other than the Federal pumpers, with the legal power and financial resources, unaided, to develop substantial additional resources quickly. For more than 40 years, San Antonio has known, found in its own studies and decisions, and admitted publicly that its sole reliance on Edwards water is foolhardy. Yet San Antonio has done nothing to develop or connect to alternative water supply sources in 20 years other than to propose the hydrologically trivial and environmentally and economically unsound Applewhite Project. San Antonio by ordinance "recognizes that Aquifer levels are affected by water consumption and reductions in water consumption are required to insure the maintenance of an adequate supply of water for the economic and ecological well-being of the [Aquifer] Region; . . ." Yet San Antonio's Aquifer Management Plan and Reduction Measures are plainly inadequate to prevent takes of and jeopardy to endangered species and contamination of the Aquifer by movement of bad water.

79. In 1993 the Texas Legislature passed S.B. 1477, creating the EAA and giving it certain powers and duties to regulate water withdrawals from the Edwards, including to "protect aquatic and wildlife habitat, to "hold permits . . . under federal law pertaining to the Endangered Species Act," and to "protect the water quality of the aquifer." The U.S. Department of Justice has declined to pre-clear S.B. 1477. The EAA has taken no action to regulate withdrawals of water from the Edwards. According to the State of Texas, the EAA is "frozen" by the lack of preclearance.

80. Unregulated pumping is certain to again cause Aquifer levels to drop to where fountain darters are killed or injured by substantial springflow modification. This will happen in the next mild drought. The State of Texas has no adequate rules or regulations in place to prevent this. The State's failures and refusals to act represent conscious, knowing decisions to violate EPA § 9 in mild drought conditions.

81. San Antonio's failures and refusals to reduce pumping from the Edwards Aquifer sufficiently to prevent renewed takes and jeopardy represent conscious, knowing decisions to violate ESA § 9 in mild drought conditions.

82. The Federal Defendants are also substantial proximate causes of the past and imminent future takings of and jeopardy to endangered Edwards species. They authorize, fund and carry out activities that maintain and increase pumping demands on the Edwards Aquifer. In combination, they support most of the economic activity in Medina, Uvalde and Bexar Counties that drives excessive pumping levels. They have made no organized, coordinated effort to reduce pumping to sustainable long-term levels, nor even to plan for the future reduction of such pumping to sustainable levels. Their failures or refusals to act, and their decisions to authorize, fund and carry out activities that maintain and increase pumping, represent conscious, knowing decisions to violate ESA § 9 in mild drought conditions.

FACTS UNDERLYING ALL COUNTS

Endangered Species Act Introduction

83. The Endangered Species Act requires every agency of the United States government, every state and local government, and every person to take certain steps to protect endangered and threatened species and their ecosystems: in this case, the species dependent on the Comal Springs, the San Marcos Springs, and the Edwards.

84. The United States Supreme Court described the Endangered Species Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). Beyond any doubt, "Congress intended endangered species to be afforded the highest of priorities." Id. at 174. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Id. at 184. The ESA reflects "an explicit Congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species" and "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." Id. at 185.

85. Quoting from a House Committee report, the Supreme Court echoed Congress' concern both about the unknown uses endangered species might have and about the unforeseeable place such species may have in the chain of life on the earth:

> "As we homogenize the habitats in which these plants and animals evolved and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their -- and our own -- genetic heritage.
>
> "The value of this genetic heritage is, quite literally, incalculable.
>
> . . . .
>
> "From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and they provide answers to questions which we have not yet learned to ask.
>
> "To take a homely, but apt example: one of the critical chemicals in the regulation of ovulations in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed -- or had it been driven out of existence before we knew of its potentialities -- we would never have tried to synthesize it in the first place.
>
> "Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self interest impels us to be cautious."

Id. at 178 (quoting H.R. Rep. No. 93-412, 87th Cong., at 4-5 (1973)) (emphasis added by Supreme Court).

86. The requirements of the various endangered and threatened species are extremely complex; unfortunately, the earthlings' collective knowledge on these issues is still in the infant stages. Accordingly, any permitted deviations from the natural conditions granting the known requirements should be assumed to harm the endangered and threatened species.

87. The ESA also calls for the protection of endangered and threatened species' ecosystems, especially the critical

portions of their habitats. This protection serves human interests in another way besides preserving biodiversity. Humans depend on many of the same ecosystems that endangered species do, and suffer many of the same harms. In this case, movement of the bad-water line as a result of excessive Edwards pumping would cause devastating and irreversible harm both to the Edwards species and to the 1.5 million people who use Edwards water.

Introduction to CERCLA

88. CERCLA was passed in 1980 in reaction to Love Canal and other public health disasters, and amended and strengthened in 1986. CERCLA seeks to identify sites where hazardous substances have been released or where there is a threatened release of hazardous substances to the environment.

89. Among other provisions, CERCLA makes the owners and operators of sites which have released or which threaten to release hazardous wastes liable for all necessary response costs incurred by others. CERCLA also gives the EPA power to take preemptive action against threatened releases of hazardous substances that may present "imminent and substantial" danger to public health or the environment. "Imminent" is not limited to "immediate." It includes harm that is reasonably certain to occur if nothing is done.

90. If nothing adequate is done about excessive Edwards pumping, release of hydrogen sulfide into the Edwards is certain to

occur in a repeat of the drought of record. Such a release is reasonably certain in the next mild to moderate drought.

The Edwards

91. The Edwards is a 175 mile long underground conduit and covers an expanse of about 3,600 square miles. (Fed. Def. Consol. Answer at ¶ 10). Water enters the Edwards mainly (75%) from surface streams as they cross its recharge area. (Thornhill Testimony; PX-189 at p. 6; P-36 [San Marcos Recovery Plan]). Unless intercepted by human withdrawals, water in the Edwards flows west to east, then northeast, and discharges naturally at springs, especially Comal Springs in New Braunfels and San Marcos Springs in San Marcos. (Id.). Water is removed from the Edwards by withdrawal from wells, interformational movement, and by discharge through spring openings.

92. The Edwards is an underground river. Specifically, the Edwards has defined and known boundaries, distinct water sources, identifiable current, direction of flow, continuity and destination, constitutes aquatic habitat for unique fish and other underground species, and is of great human utility. 17 Tex. Reg. 6605-6606. Under Texas caselaw, the water in the Edwards is therefore owned by the State of Texas in trust for the benefit of the public. The Texas Water Commission so found in 1992. (PX-171). Factually, its underground river findings have not been challenged in any court. The center for Research in Water Resources of the Bureau of Engineering Research at the University of Texas at Austin has recently

independently reviewed the facts and concluded that "the Edwards Aquifer can be considered an underground river, independent of legal aspects or considerations."

93. The underground formation generally falls in elevation from west to east. (Thornhill Testimony; PX-189 at p. 5). The formation also generally dips toward the Gulf of Mexico. (Thornhill Testimony; PX-189 at p. 5). The piezometric surface of the water (that is, the water level) in the Edwards generally decreases from the west to the east. (Thornhill Testimony; PX-2). The Edwards has two adjacent sub-areas -- a shallower outcrop area where recharge occurs and a deeper artesian area. (Thornhill Testimony).

94. The Edwards is porous and complexly faulted with numerous fractures and solution cavities. The movement of water through the aquifer, except in general terms, is largely undefined. The Edwards Aquifer exists because of the Balcones Fault Zone and to its limestone and dolomite composition. Dissolution of the rock and faulting have created pathways for the water of the Edwards to flow through. Springs, the natural spill points of the Edwards Aquifer, are all located along major faults. (Thornhill Testimony).

95. A large variability is present in the type and size of the openings in the Edwards Aquifer. The openings range in size from microscopic to large caverns. Many large openings in the subsurface have been encountered while drilling wells. They range from less than a foot to nearly 100 feet; a 90-foot opening has been reported in one well drilled in San Antonio.

The relatively large openings are one of the many reasons the Edwards is important and unique. (Thornhill Testimony).

96. Most of the water in the Edwards comes from the flows of surface streams that feed it. (Thornhill Testimony; PX-25; PX-26; PX-189). These streams are located in the upper portion of the Nueces River Basin, the upper portion of the San Antonio River Basin, and a part of the upper portion of the Guadalupe River Basin (the "Contributory Watershed"). (PX-1). Almost all of the base flows and large parts of the flood flows of these streams naturally flow underground to the Edwards through its recharge area. (Thornhill Testimony).

97. The lateral boundaries of the Edwards are: on the north, the northern boundary of the recharge area; on the south, the boundary south of just where the water moves at rates of flow considered insignificant as compared to flow rates north of the boundary (the boundary is approximated by the "bad-water" line, which separates water containing less than 1000 milligrams per liter of total dissolved solids ("TDS") from water containing more 1000 milligrams per liter of TDS). On the west, the divide near Brackettville in Kinney County separates underground flow toward the Comal and San Marcos Springs from underground flow to the Rio Grande Basin. On the east, the divide northeast of Kyle in Hays County separates underground flow toward the Comal and San Marcos Springs from underground flow to the Colorado River Basin. (PX-189 at p. 5).

98. Water along and south of the "bad-water" line contains much higher concentrations of minerals and is typically charged

with hydrogen sulfide. (PX-171; PX-184 at p. 1). Generally, the Edwards is not nearly as porous and permeable south of the "bad-water" line and the water there moves at rates that are insignificant compared to flow rates north of the line. (PX-185 at pp. 19-21).

99. The lower boundary of the Edwards is the underlying Glen Rose Formation. (Thornhill Testimony; PX-189). The upper boundary of the artesian area is the Del Rio Clay. (Thornhill Testimony; PX-189).

100. Water levels at various parts of the Edwards differ, and no single well reflects the overall and exact Edwards level. (See Thornhill Testimony).

101. The Edwards is a unique ecosystem, which is home to several unique species. (PX-189 at p. 6). Among these is the Texas Blind Salamander, which is listed by the Federal Defendants as endangered. (Shull Testimony; PX-248; DX-20).

102. The Edwards is the major source of water supply for over one million residents of the Edwards region. The Aquifer was designated as the major source aquifer under the Safe Drinking Water Act. See 42 U.S.C. § 300f-300g-6. (Aceves Testimony; Moreno Testimony).

103. The Edwards supplies the water needs of municipalities, irrigated agriculture, industry, domestic and livestock uses, and several military installations through wells drilled into the aquifer. (Thornhill Testimony; Aceves Testimony).

104. Unquestionably, the Edwards is a natural resource vital to the economies of the aquifer region. (Perryman Testimony). Therefore, the Edwards should be protected.

105. The Texas Natural Resources Conservation Commission (TNRCC) has statutory powers to regulate the Edwards Underground River, pursuant to TWC Ch. 11. In the alternative, a court may adjudicate rights to the use of the waters of the Edwards Underground River.

106. Alternatively, the TNRCC has the statutory power to regulate withdrawals of Edwards water to prevent contamination of the quality of underground water by bad-water line movement, pursuant to Texas Water Code § 28.011 as amended in 1993.

107. Two groundwater districts have been created under Texas law to manage the Edwards. Amicus curiae Edwards Underground Water District ("EUWD") has authority within Bexar, Comal, and Hays Counties to conserve, preserve, protect and increase the recharge of and prevent the waste and pollution of the aquifer's waters. EUWD is empowered to develop, implement, and enforce drought management plans in order to minimize, as far as practicable, the drawdown of the water table, or the reduction of artesian pressure or spring flow. The EUWD has adopted rules, effective since 1991, requiring pumping reductions of 10% to in excess of 30%, varying with drought conditions. The EUWD has constructed a number of recharge enhancement structures in the Edwards region. The Medina County Underground Water District has authority within Medina County to permit nonexempt wells, limit pumpage, encourage

conservation, and prohibit waste of the aquifer's waters and has adopted rules aimed at achieving these goals. (Masters Testimony; DX-8; DX-9; DX-10).

108. S.B. 1477, passed and signed into law in mid-1993, authorized the creation of a third special governmental entity, the Edwards Aquifer Authority (EAA). The EAA was given state powers and responsibilities to manage and regulate withdrawals from the Edwards for various purposes, including protection of aquatic habitat, compliance with the ESA, and protection of the water quality of the Edwards. The Mexican-American Legal Defense Fund challenged S.B. 1477 as violating the Voting Rights Act. The U.S. Department of Justice refused to preclear S.B. 1477. The State of Texas has now sued the United States in federal district court for the District of Columbia. (State of Texas v. United States of America, C.A. No. 94-0465 (D.D.C.) filed March 9, 1994.) A copy of the State's complaint is attached as Exhibit B.

109. The "frozen nature of the [Edwards Aquifer] Authority" poses an "immediate crisis" because of "the state's inability to implement the regulatory system established in S.B. 1477." (Id.) According to the State of Texas, the frozen nature of the EAA "makes it impossible for the state to satisfy the ESA-based concerns of the Sierra Club court so as to avoid federal court regulation" of the Edwards. Id.

The Comal Springs and San Marcos Springs

110. The rate of spring flow at San Marcos and Comal Springs is generally related to levels of water in the Edwards, although spring flow at San Marcos is somewhat influenced by local recharge. (See Thornhill Testimony).

111. The primary natural surface outlets of the Edwards, however, are the multiple, natural spring openings of the two largest springs in Texas and the entire southwest United States: the Comal Springs at New Braunfels (PX-4; PX-5; PX-7; PX-18) and the San Marcos Springs at San Marcos. (PX-6; PX-19; PX-20). Both of these springs are in the Guadalupe River Basin. (Thornhill Testimony).

112. Spring Lake overlies natural spring openings at San Marcos Springs. (Thornhill Testimony). Landa Lake overlies the lower natural spring openings at the Comal Springs. (Thornhill Testimony).

113. Some of the spring openings at Comal Springs are at a higher elevation than Landa Lake. Springflows from these spring openings flow down spring runs (stream channels) into Landa Lake. (Thornhill Testimony).

114. The Comal Springs are a unique ecosystem. The largest springs in the Southwest, the Comal Springs, are home to one of the only two wild populations of the Fountain Darter, which is listed by the Secretary of the Interior and USFWS ("Secretary/USFWS") as an endangered species. (Hubbs Testimony; Shull Testimony; Whiteside Testimony; PX-36). The Comal Springs are also home to a species of salamander which

may be the San Marcos Salamander, federally listed as threatened, or the salamander may be a unique species. (Hillis Testimony; Whiteside Testimony; PX-36, PX-248). The Comal Springs are also home to certain species of invertebrates, which the Secretary/USFWS have under consideration for listing as endangered or threatened. (Shull Testimony; PX-248; DX-63). The Secretary of the Interior and USFWS have failed or refused to timely complete action on these proposed listings.

115. The San Marcos Springs are a unique ecosystem, being the second largest springs in the Southwest. The San Marcos Springs are home to one of the only two wild populations of the Fountain Darter which is listed by the Secretary/USFWS as an endangered species. (Hubbs Testimony; Shull Testimony; Whiteside Testimony; Thornhill Testimony; PX-36). The San Marcos Springs and the San Marcos River downstream of those springs are also home to the San Marcos Salamander, federally listed as threatened, the Texas Wild-rice, federally listed as endangered, and the San Marcos Gambusia, federally listed as endangered. (Hillis Testimony; Shull Testimony; Hubbs Testimony; Power Testimony; Whiteside Testimony; PX-36, PX-248). The San Marcos Gambusia may in fact be extinct, but it has not yet been officially declared extinct by the Secretary/USFWS. (Hubbs Testimony; PX-41; PX-85).

116. The endangered or threatened species living either at or downstream of the Comal and San Marcos Springs or in the

Edwards rely upon adequate and continuous natural flows of fresh water through the Edwards and exiting from the natural spring openings as an environment for their survival. (Admitted, Fed. Def. Consol. Answer at ¶ 123).

The Threats Posed by Pumping of the Edwards

117. Recharge of the Edwards is highly variable, ranging from 46,000 acre feet per year ("ac-ft/yr") to 2 million ac-ft/yr. (Thornhill Testimony; PX-11).

118. But for human withdrawals, natural discharge from the Edwards at the Comal and San Marcos Springs would likely be stable. (Thornhill Testimony).

119. Water lost from the Edwards by well discharge, interformational movement, or spring discharge could be replenished by surface recharge. The quantity of recharge of the Edwards is dependent upon the amount, rate, and location of rain falling in the aquifer's watershed and recharge areas. Limited structures capturing rainfall and runoff enhancing the recharge have been constructed since recovery efforts for the listed species began. (Thornhill Testimony; Masters Testimony).

120. Pumping from the Edwards rose from about 30,000 ac-ft/yr at the turn of the century to over 500,000 ac-ft/yr in recent years. In dry seasons, pumping is expectedly higher, especially spring, summer, and drought years. (Thornhill Testimony; PX-10; PX-248).

121. The Comal Springs dried up only once, in 1956, for five months, in the worst year of the "drought of record." (Thornhill Testimony; PX-13).

122. The Comal Springs would not have dried up even in the drought of record but for human withdrawals from the Edwards. In the absence of such pumping, the Comal Springs would have flowed at a rate of not less than 150 cubic feet per second ("cfs) on the worst day of 1956. (Thornhill Testimony).

123. During the drought of record in 1956, springflow at the San Marcos Springs slowed to 46 cfs. (PX-15). In the absence of human withdrawals from the Edwards, the San Marcos Springs could flow at a rate of not less than 100 cfs on the worst day of the worst year of the drought of record. (Thornhill Testimony).

124. Pumping from the Edwards, during the ten years up to and including 1956, averaged 219,000 ac-ft/yr and peaked at 321,000 ac-ft/yr in 1956. (PX-10). Pumping during the last 10 years averaged 468,000 ac-ft/yr, peaking in 1989 at 542,000 ac-ft/yr.

125. As a result of pumping, the Comal Springs threatened to dry up in 1984, 1989 and 1990. (Thornhill testimony; PX-34 at p. 1). These three years were years of droughts having an expected severity of approximately once per decade. (Bomar Testimony).

126. If current levels of withdrawals from the Edwards are allowed to continue without substantially greater controls than now exist, or additional water supply, both the Comal and San Marcos Springs potentially will cease to flow for years during

either a repeat of the drought of record or a worse drought. Further, both springs will cease to flow during milder droughts with a shorter duration than the drought of record. (Thornhill Testimony; PX-171; DX-169 at pp. 2, 3, 5-1, 5-67).

127. If current levels of withdrawals are allowed to continue without reduction, endangered and threatened species will be taken, damaged, or destroyed; their designated critical habitat destroyed or adversely modified; and their continued existence severely jeopardized during dry periods or relatively mild droughts. (Thornhill Testimony; PX-34; PX-35; PX-36; PX-171; DX-169).

128. Dry periods and relatively mild droughts occur with some frequency in Texas. (Thornhill Testimony; Bomar Testimony).

129. Pumping from the Edwards has been and remains effectively unregulated. (Hall Testimony; Spear Testimony; Aceves Testimony). The Board of Directors of the EUWD did adopt a Demand Management Plan, with concomitant rules implementing the plan, and a Edward-Balcones Fault Zone Aquifer (the "Aquifer Management Plan"). This plan is inadequate to protect minimum continuous natural springflows.

130. The 1992 TWC regulations, since withdrawn, would by the TWC's own admission have been inadequate to protect minimum continuous natural springflows in a repeat of the drought of record. The TWC's plan "does not come close to providing for adequate flow." (The Center for Research in Water Resources, running the Texas Water Development Board's own computer model). Not only would the springs go dry in the next severe

drought, they would go dry "probably even during a mild drought." (CRWR (1993) at p. 82.)

131. The Edwards is overdrafted; meaning, more water is withdrawn every year than its "firm yield" in the drought of record. (Thornhill Testimony; Spear Testimony; Masters Testimony; Aceves Testimony).

132. Without some regulation of pumping, the Comal and San Marcos Springs will have cyclical drying-up periods with the potential of permanently drying up. (See Thornhill Testimony; PX-36; DX-169).

133. The TWC has recognized that "overdrafting of the Aquifer itself may allow the intrusion of highly mineralized water from underground water adjacent to the [Edwards] otherwise held in check because of the hydrostatic pressure of the Aquifer." (PX-189 at p. 8).

134. A 1986 study published by the United States Geological Society ("USGS") estimated, under conditions of the "worst case" during a repeat of the drought of record, the bad-water would migrate 0.2 miles into the fresh water of the Edwards. Consequently, 11,300 acre-feet of bad water and 76,900 tons of pollutants would be discharged into the fresh water each year. (PX-250).

135. Under the "worst case" estimate in the 1986 USGS report, there would be 22,400 acres of land overlying the Edwards (0.2 miles multiplied by 175 miles), within which existing and future wells supplying water for domestic, municipal, industrial, and irrigation uses would be jeopardized. (PX-250).

136. Under the "worst case" estimate in the 1986 USGS report, 3.7 billion gallons of bad-quality water would be discharged into the fresh water each year. (PX-250).

137. Under the "worst case" estimate in the 1986 USGS report, 154 million pounds of pollutants would be discharged into the fresh water each year. (PX-250).

138. The TWC was advised of the high likelihood the "worst case estimate made in the 1986 USGS Report may not be the worst case. (See PX-162). However, the TWC and TNRCC have made no determination on this issue. (Masters Testimony, Aceves Testimony; see PX-189).

139. In addition to the threat of contamination from the discharge of bad-quality water from south of the bad water line, there also appear to be areas of bad-quality water within the fresh-water portion of the Edwards. These areas presumably exist because there is minimal flow of water in these areas. If the Edwards is drawn down to historical lows, presumably there will be discharge of bad-quality water from these areas into fresh water. (Thornhill Testimony).

140. Hydrogen sulfide is one of the pollutants in the bad water, both south of the bad water line and in the isolated areas of bad water within the fresh water zone. (Thornhill Testimony). Hydrogen sulfide is a hazardous substance as defined under federal law. See 16 U.S.C. § 1261; 40 C.F.R. § 302.4, Table 302.4.

141. A recent study conducted by the EUWD shows the bad water line is much closer to the Comal and San Marcos Springs than was

previously assumed. In fact, the study shows the bad water line is located directly beneath the Springs. (PX-184). Bad water has been withdrawn from a well located approximately 300 feet from major spring openings at the San Marcos Springs. (Thornhill Testimony).

142. The USFWS is concerned about threat the movement of bad water, due to overdrafting of the Edwards, may pose to endangered and threatened species. (PX-34, PX-132).

143. If the Comal Springs ceases to flow, there is a risk the bad quality water containing a hazardous substance will move into fresh water near the spring openings and be discharged out the spring openings when the aquifer levels rise. (Thornhill Testimony; PX-34, PX-132).

144. The surest and most prudent method of ensuring the inexistence of significant adverse water quality impacts, due to pumping from the Edwards, is to limit pumping to the extent necessary to maintain adequate, continuous natural springflows from the Comal Springs at all times. Uncertainties of human knowledge prevent reducing the Edwards level any lower. (See Thornhill Testimony).

145. The Texas Department of Water Resources ("TDWR"), the TWC, the EUWD and the City of San Antonio agree: if the Edwards were pumped down too far (presently an unquantified figure), movement of bad water could permanently and irreversibly ruin the Edwards. (Thornhill Testimony; Hall Testimony; Masters Testimony; Aceves Testimony; PX-75; PX-189; PX-132 (3/91 letter); PX-171; DX-169).

146. San Antonio on February 24, 1994 recognized a significant risk to Edwards water quality at or near Aquifer level 620 feet m.s.l. (as measured at index well J-17) and stated that undetermined measures would be invoked to attempt to deal with this risk.

147. When Edwards water level reaches 620 m.s.l. as reflected in Index well J-17, it is far too late to implement measures adequate to prevent a substantial and imminent threat of release of hydrogen sulfide and minerals from the bad-water into the Edwards. By the time the Edwards has fallen to 620, the Comal Springs have dried up or are within a few days of drying up, and repeat of the drought of record experience or worse is almost certain.

Endangered Species Act Specifics

148. Pursuant to the ESA, the Secretary is the lucky leading Federal agency-in-charge of protecting endangered and threatened species. See 16 U.S.C. § 1531, et seq. By regulation, the Secretary has tossed this hot potato(e) to USFWS.

149. Pursuant to the ESA, 16 U.S.C. § 1533(a)(1), the Secretary is required to determine whether any species is an endangered or threatened species because of any of the following factors: (a) the present or threatened destruction, modification or curtailment of its habitat or range; (b) over-utilization for commercial, recreational, scientific, or educational purposes; (c) disease or predators; (d) the inadequacy of existing

regulatory mechanisms; or (e) other natural or man made factors affecting its continued existence.

150. Under 16 U.S.C. § 1533, the Secretary must determine which species are the endangered or threatened species "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any state or foreign nation, or any political subdivision of the state or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas."

151. Under 16 U.S.C. § 1533(c), the Secretary is required to publish in the Federal Register a list of all species determined by either the Secretary of the Interior or the Secretary of Commerce to be an endangered or threatened species.

152. Under 16 U.S.C. § 1532(6), "the term 'endangered species' means any species which is in danger of extinction throughout all or a significant part of its range other than the species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man."

153. Under 16 U.S.C. § 1532(20), "the term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range."

154. Region 2 of the USFWS, which includes, Texas, New Mexico, Arizona, and Oklahoma, has responsibility for the endangered and threatened species at issue in this lawsuit. (Spear Testimony; DX-19 at cover page).

155. The species at issue currently listed under the ESA and the geographical areas occupied by these species are described below:

a. Fountain Darter (Etheostoma fonticola), which is listed in 50 C.F.R. § 17.11 (1988) as endangered. The State of Texas recognized the Fountain Darter (Etheostoma fonticola) as an endangered species. 31 Tex. Admin. Code Ann. § 65.183 (1989). The entire known world population of the Fountain Darter in the wild is found at Comal Springs (in the spring runs above Landa Lake, in Landa Lake, and in a segment of the Comal River downstream of Landa Lake) and at San Marcos Springs (in Spring Lake and a segment of the San Marcos River downstream of Spring Lake). The Fountain Darter commonly sinks to the bottom of the river channel due to its small swim bladder. (See Whiteside Testimony; Schenck Testimony; PX-23; DX-10 at P. 41).

b. San Marcos Gambusia (Gambusia georgei), which is listed in 50 C.F.R. § 17.11 (1988) as endangered. The State of Texas recognizes the San Marcos Gambusia (Gambusia georgei) as an endangered species. 31 Tex. Admin. Code Ann. § 65.183 (1989). The entire known world population of the San Marcos Gambusia in the wild was found in a segment of the San Marcos River downstream of Spring Lake. None have been found in the wild since 1985. Although uncertain, the San Marcos Gambusia's disappearance is possibly attributable to the application of herbicide on banks of the river or maybe hybridization. (See Hubbs Testimony; PX-24; DX-21; DX98).

c. Texas Wild-rice (Zizania texana), which is a member of the plant family Poaceae, Texas Wild-rice, listed in 50 C.F.R. § 17.12 (1988) as endangered. The State of Texas recognizes Texas Wild-rice (Zizania texana) as an endangered species. Tex. Parks and Wild. Code Ann. § 88.002 (Vernon Supp. 1990). The entire known world supply of Texas

Wild-rice in the wild is found in Spring Lake and a segment of the San Marcos River downstream of Spring Lake. (See Power Testimony; Shull Testimony; PX-21; PX32; DX-10 at p.41).

d. San Marcos Salamander (Eurycea nana), which is listed in 50 C.F.R. § 17.11 (1988) as threatened. The State of Texas recognizes the San Marcos Salamander (Eurycea nana) as a threatened species. 31 Tex. Admin. Code Ann. § 65.173 (1988). The entire known world population of the San Marcos Salamander in the wild is found at natural spring openings of the San Marcos Springs, and possibly also at natural spring openings of the Comal Springs, and in the gravels and immediate spring runs associated with the openings. (See PX-22; cf. Hillis Testimony; DX-21; DX-98).

e. Texas Blind Salamander (Typhlomolge rathbuni). This species is listed by the federal government as endangered at 50 C.F.R. § 17.11 (1988). The State of Texas recognizes the Texas Blind Salamander (Typhlomolge rathbuni) as endangered. 31 Tex. Admn. Code Ann. § 65.183 (1989). The entire known world population of the Texas Blind Salamander in the wild is found underground in the Edwards in a relatively small segment of the Edwards near the San Marcos Springs. (See PX-30).

156. Recently, two new, rare and possibly endangered species have been discovered in the Comal Springs. (PX-228). The new discoveries include the dryopid beetle, which is also a genus; meaning, the beetle is unique and deserves its own classification. Comal Springs is thought to be the only place in the world where the dryopid beetle is found. A species of the riffle beetle, found in the Comal Springs, was described as endemic to the Comal system. Each of these species has been proposed for listing under the ESA. (Shull Testimony; PX-248). The Secretary and the USFWS have unlawfully refused or unreasonably delayed action on these proposals.

157. Section 4 of the ESA also requires the Secretary to designate critical habitat for each listed species unless the critical habitat is not determinable. "Critical habitat" includes areas outside the geographic area occupied by the species but "essential for the conservation of the species." The critical habitat of each Edwards species is readily determinable--the waters of the Edwards, at least sufficient for continuous minimum natural springflows, are essential to each such species.

158. The Secretary and the USFWS have never designated critical habitat for the Texas blind salamander.

159. Section 4 of the ESA provides, the Secretary "shall develop and implement" what is known as a "recovery plan" for each endangered species, unless he finds that it "would not promote the conservation" of the species to do so. 16 U.S.C. § 1533(f).

160. The "conservation" that § 4 recovery plans seek is defined by statute as "to bring any endangered and threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3).

161. In the circumstances of this case, the ESA § 4 duty to develop and implement a plan is mandatory, not discretionary. The ESA says that the Secretary "shall" develop and implement such recovery plans. 16 U.S.C. § 1533(f). There is one stated exception: Unless the Secretary finds that such a plan will not promote the conservation of the [endangered] species. Id.

The Secretary/USFWS have never claimed that this exception applies to the present case.

162. For eight years, the Secretary/USFWS have failed to implement the existing San Marcos Recovery Plan, and they have failed to develop a plan covering the endangered, threatened and proposed for listing species at Comal Springs. The Secretary/USFWS have never developed a recovery plan for the Texas blind salamander.

163. Recovery plans are supposed to spell out what is biologically required to prevent extinction and permit recovery of endangered species. (Shull Testimony).

164. Priority is to be given to species whose survival is in conflict with economic activities, such as withdrawal of water from the Edwards. 16 U.S.C. § 1533(f).

165. Section 9 of the ESA prohibits "any person" from "taking" a member of any endangered species without a permit. 16 U.S.C. § 1538(a). "Take" as used in § 9 includes not only "kill" but also "harm or harass." 16 U.S.C. § 1532(19). "Harm" and "harass" are defined to mean "disrupt[ing] or significantly impair[ing]" behavioral patterns including "breeding, feeding and sheltering." 50 C.F.R. § 17.3.

166. Section 7 of the ESA requires every Federal agency to use its affirmative powers to develop and carry out programs for the conservation of listed species, requires them to consult with the Secretary and USFWS to insure that no action authorized, funded or carried out by such agency is likely to jeopardize any listed species or destroy or adversely modify its critical

habitat, and requires them to cease all irreversible and irretrievable commitments of resources pending consultation.

167. Section 7(a)(1) of the ESA requires all Federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1).

168. Section 7(a)(2) of the ESA requires every Federal agency, in consultation with the Secretary, to "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any [designated critical habitat]." 16 U.S.C. § 1536(a)(2). "Jeopardize the continued existence of" means "to engage in an action that reasonably would be expected directly or indirectly to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers or distribution of that species." 50 C.F.R. § 402.02. "Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. § 402.02.

169. Section 9(a)(2) of the ESA makes it unlawful for "any person to damage or destroy any [listed plant] species . . . in knowing violation of any law or any regulation of any State or in the course of any violation of a State criminal trespass law." 16 U.S.C. § 1538(a)(2).

170. In order to deal with conflicts between the survival requirements of endangered species and their habitats, on the one hand, and human economic activity, on the other hand, § 10(a) of the ESA allows the Secretary/USFWS to issue "incidental take permits." The incidental take permits allow the death, harm, or harassment of individual members of an endangered species, even substantial numbers of such individuals, as long as (1) this is an unintentional result of an otherwise lawful activity, such as pumping groundwater; (2) the species' survival is not jeopardized; and (3) measures are taken to "minimize and mitigate the impact of such taking." (16 U.S.C. § 1539(a); Spear Testimony; PX-34; PX-35).

171. In order to deal with severe and unavoidable conflicts between the survival requirements of endangered species, on the one hand, and actions of regional or national significance whose benefits clearly outweigh the benefits of every alternative course of action consistent with conserving the species, on the other hand, § 7(h) of the ESA allows a special, high-level committee to authorize the extinction of an endangered species under certain circumstances. 16 U.S.C. § 1536(h).

172. The endangered or threatened species, at or downstream of the Comal and San Marcos Springs, rely on adequate and continuous

natural flows of fresh water through the Edwards and exiting from the natural spring openings of those springs as an environment for their survival. The endangered species living in the Edwards similarly rely upon adequate water levels in the Edwards and adequate and continuous flows of fresh water through the Edwards to the Comal and San Marcos Springs as an environment for their survival. (Admitted. Fed. Def. Consol. Answer at ¶ 123).

Takes of and Jeopardy to Fountain Darters

173. By the time springflow at Comal Springs declines to approximately 200 cfs (if nothing is done about the rams-horn snail) or 150 cfs (if something is done), "harm," constituting "take," occurs to the endangered Fountain Darter.

174. In the letter of March 26, 1992, the USFWS notified the TWC that by the time Comal springflow has declined to 100 cfs, harm to Fountain Darters, "which likely constitutes 'take,' has occurred to endangered species," specifically the Fountain Darter. (PX-34 at p. 3).

175. The March 26, 1992 USFWS letter and attached comments to the TWC represented the USFWS' best professional judgment at that time with regard to the application of §§ 7, 9, and 10 of the ESA to the protection of endangered and threatened species at Comal Springs. (Admission No. 2; Spear Testimony). The March 26, 1992 USFWS letter and comments were based upon the expert opinions of USFWS staff biologists and hydrologist (Admission No. 3, Spear Testimony, Shull Testimony), together with the

views of others with whom USFWS consulted, including Texas Parks and Wildlife Department ("TPWD") biologist Randy Moss. (Shull Testimony).

176. By the time the springflows at Comal Springs have dropped to approximately 100 cfs, the upper spring run (known as "Spring Run J" or "Spring Run 1" and hereinafter referred to as "Spring Run J") has dried up. (Thornhill Testimony; PX-17; PX-34, comments at p. 3). The normal flowing Spring Run J provides suitable habitat for the Fountain Darters living in Spring Run J. (Whiteside Testimony; Hubbs Testimony; Moss Testimony; PX-16; PX-244). As Spring Run J dries up, Fountain Darters lose the vegetation on which they depend. (Whiteside Testimony; PX-34, comments at p. 3; PX-244). As Spring Run J dries up, Fountain Darters are trapped in isolated pools and either die of lack of oxygen or are eaten by predators. (Whiteside Testimony; Moss Testimony; PX-34, comments at p. 3; PX-244).

177. In the summer of both 1989 and 1990, Fountain Darters were harmed or killed. (Whiteside testimony). Fountain Darters died due to declining water levels in Spring Run J in the summers of 1989 and 1990. (Moss testimony). If the upper springs runs dry up, Fountain Darters could be stranded in pools, if pools form. (PX-244). Isolated pools were formed in 1989 and 1990 as Spring Run J dried up. (Thornhill Testimony; Whiteside Testimony; Moss Testimony; PX-17; TPWDX-4). Dr. Whiteside and Dr. Brandt collected Fountain Darters as part of a rescue operation. They were recorded as "thin,"

due to interference with their feeding habitat. (Whiteside Testimony; PX-139; PX-244).

178. Comal Springs dropped below 100 cfs for 99 days in 1989, to a low of 46 cfs. Comal Springs dropped below 100 cfs for 28 days in 1990, to a low of 67 cfs. (Thornhill Testimony; PX-205).

179. On April 15, 1993, in response to this Court's order in February 1993, the USFWS reported that it has given additional expert attention to the "take" level at Comal Springs and changed its best professional judgment concerning the springflow levels at which takes are likely to occur. USFWS now says that takes are likely to occur at 200 cfs (if nothing is done about the rams-horn snail) or 150 cfs (if something is done).

180. Pumping by San Antonio and others, and failures of Federal, State, regional and local authorities to develop and implement recovery plans, utilize programs and others, confer, consult and act to protect the minimum springflow requirements of the species, caused or allowed takings of, and caused risk or jeopardy to, the Fountain Darter in the dry years of 1989 and 1990.

181. By the time Comal Springs cease flowing completely, jeopardy to the endangered Fountain Darter has occurred. There has been an appreciable reduction in the likelihood of both the survival and recovery of the Fountain Darter in the wild, by reducing its reproduction, numbers, and distribution. This

result is clearly contrary to the purpose and goals of the Endangered Species Act. (See FF 80 through 84, below).

182. In the March 26, 1992 USFWS letter and comments, the USFWS told the TWC: "By the time Comal Springs cease flowing completely, jeopardy [within the meaning of § 7 of the ESA] has occurred." (PX-34 at p. 2). Further: "By the time Comal Springs cease to flow completely, there has been an appreciable reduction in the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, and distribution of the species. This result is clearly contrary to the purpose and goals of the [ESA]." (Id., comments at pp. 2-3). The March 26, 1992 USFWS letter and attached comments represented the USFWS' best professional judgment, based on the views of experts on its staff and outside experts with whom they consulted, as of that date.

183. The USFWS advised the TWC on March 26, 1992: "[A]ll activities [of Federal agencies, or of State, local or private entities to the extent Federal activities authorize, fund or carry them out] must ensure that the Comal Springs are maintained at or above [the jeopardy] level." (PX-34 at p. 2).

184. Maintaining springflow at Comal Springs is essential to preventing jeopardy because "it is hard to have an aquatic ecosystem without any water." (Whiteside Testimony). As the Defendant-Intervenors' own Fountain Darter expert

acknowledged, "we would have slipped up big-time" if Comal and San Marcos Springs ceased flowing. (Schenk Testimony).

185. Essential to the conservation and survival of the Fountain Darter is the maintenance of both wild populations, the population at Comal Springs and the population at San Marcos Springs. If only one wild population exists, the Fountain Darter is at much greater risk of extinction due to a single catastrophic event (such as an accidental oil or chemical spill) or a deliberate poisoning (such as the poisoning of Treaty Oak in Austin). (Spear Testimony; Shull Testimony; Hubbs Testimony). Except in a drought so severe that the springs would dry up with no pumping, Comal Springs could not go dry without jeopardy occurring. (Spear Testimony).

186. "Jeopardy" is inherently a matter for determination by the exercise of professional judgment. (Shull Testimony; PX-245).

187. As of November, 1992, the USFWS had not yet exercised its best professional judgment to determine where, above 100 cfs, Fountain Darters at Comal Springs first began to be taken or where, above 0 cfs, jeopardy to the Fountain Darter has occurred. (Spear, Shull Testimony; PX-34).

188. Since then, in response to this Court's order in early 1993, the USFWS has devoted expert attention to the jeopardy level. On June 15, the USFWS advised the Court, the parties, and others who should be concerned that the jeopardy level at Comal Springs is 150 cfs (without rams-horn snail control) or "60 cfs for short time periods" (with snail control). However, the USFWS did not make public its judgment concerning

these jeopardy levels until after the end of the session in which the Texas legislature passed S.B. 1477. Thus, despite this Court's clear intention that the Texas legislature know what jeopardy level needs to be protected, it lacked that essential information.

189. According to the USFWS, Fountain Darter habitat begins to be lost in Spring Run J as Comal Springflow drops to about 150 cfs. (PX-34, comments at p. 3). TPWD biologist Randy Moss testified the decreasing springflow at Comal Springs leads to harm and harassment, and likely to death, of Fountain Darters as the depth of water drops to between four and six inches in Spring Run J. (Moss Testimony). Dr. Whiteside testified the decreasing springflow at Comal Springs significantly reduces Fountain Darter habitat on Spring Run J as the depth of water drops below four inches. Dr. Hubbs testified harm begins to be significant as the depth of flow in Spring Run J drops to twelve inches. Paul Thornhill testified, based on surveys of Spring Run J and hydrological models, he can promptly convert a given depth of flowing water the biologists say is required in Spring Run J to a Comal Springs flow rate in cfs and an Edwards level at index well J-17. (Thornhill testimony; PX-7; PX-226). Four inches and twelve inches of water in Spring Run J immediately upstream of the footbridge are equivalent to 118 cfs and 385 cfs, respectively. (Id.).

190. Comal Springs came perilously close to drying up in both 1989 and 1990. (Thornhill Testimony; PX-34 at p. 1). As the rains of 1992 temporarily repressed any drought concerns, in 1989

and 1990, unusual mid-summer rains saved the springs. (Whiteside Testimony; Bomar Testimony).

191. The direct human cause of low springflows at Comal Springs and resulting takes of and jeopardy or near jeopardy to Fountain Darters in 1989 and 1990 was excessive pumping from the Edwards. (Thornhill Testimony, Spear Testimony).

192. Substantial proximate causes of low springflows at Comal Springs and resulting takes of and jeopardy or near-jeopardy to Fountain Darters in 1989 and 1990 were failures or refusals of federal, state and local governments to prevent these crises.

Take of and Jeopardy to Other Animal Species at Comal and San Marcos Springs and in the Edwards

193. Before this Court's order in early 1993, the USFWS had never determined, nor stated its best professional judgment of, the "minimum continuous natural springflow rates" at San Marcos Springs which jeopardize the Fountain Darter, the San Marcos Salamander, and the likely extinct San Marcos Gambusia, if found at San Marcos springs. This Court found that, if USFWS came forth with these springflow rates, that would allow private entities and Federal, State, regional and local governmental entities to take the actions necessary to avoid jeopardizing these species or the candidate species found there. (Shull Testimony; Spear Testimony; Masters Testimony; Aceves Testimony; Admission 8). USFWs now needs to coordinate

a vigorous, systematic process of consultation to insure protection of these minimum levels.

194. Likewise, until after the USFWS in June 1993 complied with this Court's order, the USFWS had never determined, nor stated its best professional judgment of, the minimum continuous natural springflow rates at Comal Springs which would jeopardize the San Marcos Salamander, if found at Comal Springs. It has now come forth with these springflow rates. USFWS needs to coordinate a vigorous, systematic process of consultation to assure that private entities and Federal, State, regional and local governmental entities take the actions necessary to avoid jeopardizing the possible new species of salamander found there, or the candidate species found there. (Shull Testimony, Spear Testimony, Masters Testimony, Aceves Testimony; Admission 8).

195. Likewise, until after the USFWS in June 1993 complied with this Court's order, the USFWS had never determined, nor stated its best professional judgment of, the minimum continuous natural springflow rates at Comal and San Marcos Springs, or the minimum Edwards levels, which would jeopardize the Texas Blind Salamander. Again, the USFWS has now identified these minimum levels, in response to this Court's order. USFWS needs to coordinate a vigorous, systematic procedure of consultation with private entities and Federal, State, regional and local governmental entities to insure that they take the actions necessary to avoid jeopardizing the Texas

Blind Salamander. (Shull Testimony, Spear Testimony, Masters Testimony, Aceves Testimony; Admission 8.).

Destruction or Adverse Modification of Critical Habitat of Texas Wild-rice. Damage to or Destruction of Texas wild-rice, and Jeopardy to Texas Wild-rice

196. Until it did so in June 1993 in response to this Court's order, the USFWS had never determined, nor stated in its best professional judgment, the minimum continuous springflow rates at San Marcos Springs at which destruction or adverse modification of critical habitat of Texas Wild-rice, damage to or destruction of Texas Wild-rice, or jeopardy to Texas Wild-rice, begin to occur. (Shull Testimony, Spear Testimony, Masters Testimony, Aceves Testimony, Power testimony; Admission 8).

197. This Court found that adverse modification of the critical habitat of Texas Wildrice, and damage to or destruction of Texas Wild-rice, have occurred by the time the depth of flowing water where established stands of Texas Wild-rice grow in the San Marcos River at Transect 12 has fallen to 1.5 feet. (Power Testimony). Transect 12 is a cross-section of the San Marcos River uninfluenced by dams, upstream from the sewage treatment plant. (PX-231).

198. This Court found that, as the San Marcos springflow drops, by the time springflow has dropped to 100 cfs, the depth of water in the San Marcos River at which one or more established stands of Texas Wildrice exist has dropped to 1.5 feet or less. (Power Testimony; Thornhill Testimony; PX-230).

199. During the ten-year period from 1981 through 1990, springflow at the San Marcos Springs dropped below 100 cfs in three years: 1984, 1989, and 1990. (Thornhill Testimony; PX-15; PX-206).

200. Springflow from the San Marcos Springs was below 100 cfs on 169 days in 1984, 140 days in 1989, and 85 days in 1990. (Thornhill Testimony; PX-15; PX-206).

201. One or more established stands of Texas Wild-rice growing in the bed of the San Marcos River were damaged or destroyed, and their critical habitat was adversely modified, in 1984, 1989, and 1990, due to low springflows. (Power Testimony).

202. Texas Wild-rice grows in the wild only in Spring Lake and in the bed of the San Marcos River in a segment of the river downstream of Spring Lake. (Power Testimony).

203. In June 1993, in response to this Court's order, the USFWS gave its own best professional judgment that at least 100 cfs needs to be maintained in the San Marcos ecosystem to avoid damage and destruction to the Texas wild rice. The USFWS now needs to coordinate a vigorous, systematic process of consultation to insure that private, Federal, State, regional and local entities take action or forebear action as necessary to protect these minimal water levels.

204. The bed of the San Marcos River downstream of the natural spring openings is owned by the State of Texas. Because the grant from the sovereign expressly did not include the stream, the State retained title to the stream bed. See, e.g., Heard

v. Town of Refugio, 103 S.W.2d 728, 731 (Tex. 1937)) (See PX-200; PX-201; PX-202; PX-203; PX-234).

205. The water in Spring Lake and the water flowing in the San Marcos River downstream of Spring Lake was judicially determined to be owned by the State of Texas in trust for the benefit of the public. (PX-234).

206. The Texas Wild-rice growing in the bed of the San Marcos River is owned by the State of Texas. (PX-200; PX-201; PX-202; PX-203; PX234).

Critical Importance of Developing and Implementing Recovery Plans

207. Increasingly, recovery plans are the fundamental tool the USFWS uses to protect endangered species. (Spear Testimony).

208. Timely development and implementation of recovery plans is critical to many specific recovery actions, including designing and funding required studies and securing cooperation from other federal, state, regional, and local governmental and private entities. (Spear Testimony; PX-66).

209. As the USFWS told the United States Congress in December of 1990, "perhaps the most essential ingredient for the development and implementation of an effective recovery program" is "[c]oordination among Federal, State and local agencies, academic researchers, cooperation organizations, private individuals, and major land users . . . ," with the USFWS being the "coordinator." (PX-198 at p. 3).

210. In the case of the Comal and San Marcos ecosystems and listed species, the most basic purpose of recovery planning is to

establish a baseline flow condition -- flows prohibited from reduction by human activities -- and disseminate the requirements necessary for the protection of the baseline flows. (Spear Testimony).

Failure to Develop a Recovery Plan for the Comal Springs Ecosystem and Species

211. The Secretary/USFWS failed to develop any recovery plan or plans to secure the survival and recovery of any of the species at issue explicitly through protection of the Comal Springs. (Admitted. Fed. Def. Consol. Answer at ¶ 169).

212. While the existing San Marcos Recovery Plan contains references to Comal Springs, it addresses the protection of the San Marcos ecosystem, not the Comal Springs ecosystem. (Shull Testimony; PX-36).

213. The USFWS does not claim a recovery plan explicitly addressing protection of the Comal Springs ecosystem would "not promote the conservation of the species" of Comal Springs. (Spear Testimony).

214. For more than three years, the USFWS has had under consideration the revision of the San Marcos Recovery Plan to explicitly address protection of the Comal Springs. (Shull Testimony; PX-2; PX-39; PX-248). Meanwhile, Comal Springs twice reached a dire situation in which the springs nearly dried up. (Whiteside Testimony; PX-34; PX-97; PX-244).

Failure to Develop a Recovery Plan for the Texas Blind Salamander

215. Neither the San Marcos Recovery Plan nor any other recovery plan addresses the conservation and survival of the Texas Blind Salamander. (Admission 18; Shull Testimony; PX-36).

216. The Secretary has never made a written finding that a recovery plan for the Texas Blind Salamander will not promote the conservation and survival of the species.

217. The earliest relevant document, a December 1990 report to Congress, says only the only possible recovery measure for the Texas Blind Salamander was to "continue efforts to protect Edwards Aquifer from drawdown and pollution." (PX-198). A May 1991 document prepared by the regional herpetologist for the USFWS is entitled "Recovery Outline, Texas Blind Salamander," and states the Texas Blind Salamander is "under threat by water use practices" and that "a recovery plan has yet to be written." (PX-131). A February 19, 1992 memorandum from Regional Director Spear to USFWS Director Turner states: the "status" of the Texas Blind Salamander "unknown"; the only place the Texas Blind Salamander "is known to occur is in the Edwards Aquifer underground"; and "[u]ntil additional information is available, the preparation of a recovery plan will be held in abeyance." (PX-199). On May 7, 1992, the Secretary/USFWS admitted "that FWS has not 'developed' [a] recovery plan that explicitly address[es] the Texas Blind Salamander, but avers that development of such a recovery plan is under consideration by the [USFWS]." (Admission No. 18). A May 18, 1992 USFWS briefing memorandum prepared for Director

Turner stated the "new plan will better address the Comal Springs ecosystem and will also include the Texas Blind Salamander." (PX-248). Dr. Brandt of the USFWS never heard anyone say a recovery plan for the Texas Blind Salamander is not needed. (Brandt Testimony).

218. If the Secretary were to make a finding that a recovery plan for the Texas Blind Salamander "would not promote the conservation of the species," such a finding would lack any rational basis. The usual basis for such a finding is that a recovery plan identifying the locations where, for example, an endangered plant is found would expose it to collectors. Salzman, Evolution and Application of Critical Habitat Under the Endangered Species Act, 14 Harv. Env. L. Rev. 311, 334 (1990); see also Endangered Species Act Amendments of 1978; House Report of Merchant Marine and Fisheries Committee, 95th Cong., 2d Sess. 17 (1978). The basis does not apply to the Texas Blind Salamander. The USFWS considers the status and location of the Texas Blind Salamander unknown, but under threat due to water-use practices. (PX-131; PX-199). The threats to which the Texas Blind Salamander is exposed in its underground habitat include being drawn up wells, and do not apply to the other species at issue. They also include threats, such as lowering of the Edwards level and movement of bad water, which may apply differently to the Texas Blind Salamander than to the other species.

Failure to Implement Essential Features of the San Marcos Recovery Plan Dealing with the Greatest Threat

219. As this Court found in 1993, the USFWS failed or refused to implement practices recognized in its own documents, including the San Marcos Recovery Plan, as critical to save the species at issue from extinction.

220. In the early 1980s, with the aid of the San Marcos Recovery Team composed of scientists chosen by the USFWS, the USFWS developed the San Marcos Recovery Plan, and adopted it in 1985. (Spear Testimony; Shull Testimony; PX-36; PX-55; PX-66).

221. The San Marcos Recovery Plan correctly states, the "most serious threat to the continued existence of the San Marcos River ecosystem" and the biota comprising the system is "the cessation of flow of thermally constant clear, clean water from the San Marcos Springs due to overdrafting of the groundwater from the Edwards Aquifer." (PX-36). The USFWS maintains this view. (Spear Testimony). The same threat exists for the Comal ecosystem. (Spear Testimony). "The listed species will become extinct unless an aquatic habitat with appropriate volume, flow and quality characteristics is maintained in the Comal and San Marcos Ecosystems." (Shull Decl. at p. 11; attached to Fed. Defs. Summary Judgment Papers.).

222. The San Marcos Recovery Plan states, the species at San Marcos can be downlisted to threatened "when it is assured that flow in the San Marcos River will continue within its natural cycle

of variation." (PX-36). Until December 1989, the Secretary/USFWS took no action to assure the quantity of flow in the San Marcos River would continue within its natural cycle of variation. (Admitted; Fed. Def. Consol. Answer at ¶ 69).

223. The San Marcos Recovery Plan identifies several "major steps" needed for protection of the San Marcos species and their ecosystem. (PX-36).

Define Minimum Springflow

224. One "major step" was "identify requirements," including flow and habitat requirements. (PX-36 at p. 69). The San Marcos Recovery Plan explained the requirements were not well understood. (Id. at p. 69).

225. After the instant suit was filed, the Secretary/USFWS took some steps to identify the minimum continuous springflow requirements of some of the endangered and threatened species relevant to this lawsuit. (Admissions 26(c), 27(c)). As recently as May, 1992, the USFWS had neither funded, nor requested anyone else to voluntarily and at their own expense to perform, any studies to determine such minimum continuous springflow requirements. (Admission 9). Only after and in response to this Court's order did the USFWS determine any of the minimum springflow requirements of any of the species at issue at either springs except the Fountain Darter at Comal Springs to the limited extent reflected in the March 26, 1992 USFWS letter and comments to the TWC. (PX-34).

226. Knowledge of the minimum springflow requirements of the species is vital to any Federal, State, regional, or local government or private entity which wishes to take action to protect the species at issue from the greatest threat they face. These entities seek to avoid action adding to the threat, or wish to avoid the consequences of the "blunt axes" of Federal intervention forged by Congress under ESA §§ 7 and 9 to protect the species. (Spear Testimony; Shull Testimony; Specht Testimony; Masters Testimony; Aceves Testimony; Hall Testimony).

227. The EUWD claims authority to regulate pumping from the Edwards, and to have protection of endangered species habitat as one of the goals of such regulation. (Masters Testimony). One goal of the EUWD's new "Demand Management Plan for the Edwards-Balcones Fault Zone Aquifer" is to "ensure an adequate level of springflow" to "protect habitats within the District dependent on the Edwards Aquifer." (EUWDX-6). However, the EUWD does not know what quantity of minimum springflows at the Comal or San Marcos Springflows needs to be protected. (Masters Testimony). The EUWD on May 10, 1991 made a formal request to Regional Director Spear for a declaration of the minimum springflows the USFWS will accept as adequate under the ESA to protect the species and their habitat at San Marcos Springs. (PX-132). The USFWS has not answered the EUWD's request. (Spear Testimony; Shull Testimony; Masters Testimony).

228. The United States Department of the Air Force ("USAF") was "unable to determine" whether its activities in pumping Edwards water would affect the endangered species, and requested the USFWS' assistance in evaluating whether its pumping would affect the species. (Plaintiffs' Summary Judgment Exhibit 46). The USFWS responded to the request by stating "specific studies relating to water withdrawal input on listed species are not readily available." (PX-98).

229. In order to develop an adequate State plan, the TWC, City of San Antonio, and the Texas Legislature needed to know the minimum continuous springflows required for compliance with the ESA. (Hall Testimony; Masters Testimony; Aceves Testimony; PX-34). This information was not made available to them until June 1993, after and in response to this Court's order. By then it was too late for the Texas Legislature to consider this information. This information is now available, but has not yet been used by the Texas Legislature or the TNRCC to prepare an adequate State plan. The "Take," "Jeopardy" and other Edwards water levels and Comal and San Marcos springflow rates determined by the USFWS in response to this Court's order are, however, now being used by the U.S. Geological Survey, the University of Texas at Austin on contract to the TNRCC and USGS, and others studying management of the Edwards.

Consultation

230. One of the tools available to the USFWS for protection of endangered species is consultation under § 7 of the ESA. (PX-36 at p. 95).

231. The San Marcos Recovery Plan called for "vigorous pursuit" of a "systematic procedure" of such consultations. (PX-36 at pp. 76-77).

232. Consultation is potentially a powerful, albeit disruptive, tool because it can result in a Court order cutting off all Federal funds and other Federal actions that directly or indirectly authorize, fund, or otherwise carry out pumping from the Edwards to the extent necessary to prevent jeopardy. (Spear Testimony; PX-85; PX-113; PX-68).

233. After adopting the San Marcos Recovery Plan, the Secretary/USFWS did not vigorously pursue any systematic procedure of consultations concerning minimum springflow quantities. (Admission 26(f)). Until February 21, 1992, the Secretary/USFWS did not request consultation concerning any Federal activity by any Federal agency that may affect minimum springflow quantities through effects on withdrawals from the Edwards. (Admission 27(g)).

234. In a letter dated February 21, 1992, the USFWS informed the United States Environmental Protection Agency ("EPA") that the new demand placed on the Edwards by the catfish farm artesian well -- a well that shoots a column of water over twenty-five feet in the air from a thirty-inch diameter pipe (PX-27) -- could appreciably reduce the water supply for the endangered

species at issue during low flow periods. (PX-37). The USFWS requested the EPA determine whether granting an application for a National Pollution Discharge Elimination System ("NPDES") permit for the catfish farm well, which would allow the catfish farm to withdraw over 43 million gallons of Edwards water per day, would affect the Fountain Darter and the Texas Wild-rice. (Id.). The USFWS also requested the EPA to review all other NPDES permits authorizing discharges from "major users" of Edwards water -- those discharging more than 1 million gallons per day. (Id.).

235. Since February 1992, the USFWS has not consulted with the USEPA on NPDES permits affecting Edwards Aquifer usage. On October 22, 1993, the TNRCC voted to issue Living Waters Artesian Springs Ltd., the owner of the catfish farm, a wastewater discharge permit, and the permit was actually issued on December 22, 1993. The TNRCC Order does not disclose any consultation with the EPA or the USFWS concerning the effects of the catfish farm's withdrawals from the Edwards upon the Edwards, Comal or San Marcos water levels or flow rates, upon endangered species, or upon the threatened release into the Edwards of hydrogen sulfide.

236. The USFWS and USDOA have not consulted concerning activities authorized, funded or carried out by USDOA which may adversely affect Edwards species.

237. The USFWS and USDOT have not consulted concerning activities authorized, funded or carried out by USDOT which may adversely affect Edwards species.

238. The USFWS and DOD have not consulted concerning activities authorized, funded or carried out by DOD which may adversely affect Edwards species.

239. The USFWS has, in other major regional ESA contexts, participated in or coordinated interagency scientific committees or other multiagency recovery planning and action agencies. The San Marcos Recovery Plan, in calling for a vigorous, systematic consultation process, contemplates such an effort in the Edwards context.

Establish Groundwater Controls

240. The species in question are threatened with possible extinction, unless effective controls are objectively established on withdrawals from the Edwards. (Spear Testimony). At a minimum, the objective requires pumping controls to "avoid jeopardy to the species by maintaining an aquifer level which assures a minimum spring flow at Comal Springs." (PX-34 at p. 3).

241. The San Marcos Recovery Plan called for establishing pumping controls, recognizing the plan would require cooperation with State and local authorities. (Ex. 36).

242. Not until after the first notice of intent to sue was filed in this case did the USFWS take any step to encourage any State or local agency to establish controls on the pumping of groundwater from the Edwards. (Admission 26(f)). In response to this lawsuit, the USFWS made certain limited efforts to encourage the State of Texas to establish groundwater pumping

controls over the Edwards. (Shull Testimony; PX-34 at p. 1). These efforts consisted largely of jawboning, without specifics. (PX-35; PX-94; PX-101; PX-107; PX-113; PX-117; PX-126).

243. This instant lawsuit was a "key factor" in the emergency action taken and proposed permanent rules announced by the TWC on 4/15/92 to regulate withdrawals from the Edwards. (PX-184 at pp. 2-3).

244. This Court's order was a crucial factor in the Texas legislature's passage of S.B. 1477. S.B. 1477 has been described by the State of Texas in its suit against the United States over the Voting Rights Act barrier to implementation as "a major new step for Texas in the regulation of underground water resources." The State of Texas has judicially admitted that this Court's decisions were in part what "prompted the 73rd Texas Legislature to develop [S.B. 1477's] comprehensive legislation."

245. The Secretary and the USFWS have done nothing to encourage, assist or require the State of Texas to develop any reasonable and prudent alternative approach to S.B. 1477. As long as S.B. 1477 remains "frozen," the Secretary, the USFWS and the TNRCC have effectively abandoned efforts to protect the Edwards, Comal and San Marcos species through meaningful state controls of Edwards withdrawals.

Contingency Plan

246. The San Marcos Recovery Plan called for development of a contingency plan to rescue members of the endangered species and put them in refugia (aquariums) if springflows drop to low levels. (PX-36 at p. 72). While the refugia method is advocated as a viable recovery method, refugia is not a recovery measure but an emergency tool to be used in dire emergencies if recovery measures cannot be completed in time. Id. (Spear Testimony; Shull Testimony; PX-119; Admission 39).

247. The Secretary/USFWS did not begin to prepare a contingency plan until after the Comal Springs was on the brink of drying up. (Admissions 34, 35). The Secretary/USFWS did not complete and approve the plan until July 18, 1990, when the Comal Springs nearly dried up again. (Admission 37; PX-83; PX-115; PX-119).

248. The contingency plan was prepared using the voluntary, unpaid assistance of experts who are not employees of the USFWS. (Admission 38).

249. The contingency plan identifies, using the USFWS' best professional judgment, critical aquifer levels and springflow rates at which members of the listed species should be removed to refugia. (Shull Testimony; Whiteside Testimony; Moss Testimony; PX-119). The contingency plan was developed without any prior multi-year Instream Flow Incremental Methodology ("IFIM") or other complex studies. (Shull Testimony; Whiteside Testimony).

250. The contingency plan was relied on to establish critical levels at which "last-ditch" efforts were made to "salvage" Fountain Darters at Comal Springs in the summer of 1990. (Shull Testimony; Whiteside Testimony; Brandt Testimony; PX-119).

251. "Last-ditch" efforts must be made to salvage minimum continuous natural springflows at Comal Springs both for endangered species and human water supplies, during the summer of 1994.

Springflow Augmentation

252. The San Marcos Recovery Plan provides, "wells to maintain the natural flow variation regimens below Spring Lake can be a temporary means to achieve continual flow in the San Marcos River." (PX-36). The San Marcos Recovery Plan recognizes that springflow augmentation cannot protect against a "catastrophic loss" of the San Marcos Salamander which lives in the spring openings and that augmentation "will not constitute a recovery action." (PX-36 at p. 74).

253. The TDWR, predecessor of the TWC, evaluated streamflow augmentation in 1983 at the request of the EUWD, which was participating in the development of the San Marcos Recovery Plan. The TDWR advised the EUWD of the substantial risk that movement of "bad water" would "seriously degrade" both the species' habitat and human water supplies if the Edwards were pumped down as proposed. (PX-75).

254. The Secretary/USFWS, the EUWD, TPWD, the Southwest Texas State University Aquatic Station, the City of New Braunfels, the City of San Marcos, the Edwards Research and Data Center and the Office of State Senator Cyndi Krier at meeting in 1990 concluded: it is "not possible to design an augmentation feasibility study at this time because of the paucity of relevant ecological and physiological data on the endangered species." (PX-132 at p. 3 of the 3/19/91 letter from EUWD to City of San Antonio). The required factual information "is prohibitively deficient." (Id.). "Further," the EUWD stated, "the study design team could not conceive of a practical means for simulating natural springflow." (Id.). Because "the San Marcos Salamander makes its home in the numerous spring orifices collectively called the Comal and San Marcos springs," the meeting concluded that "[s]imply pumping water from Edwards Aquifer wells into Comal and San Marcos rivers is not a solution." (Id.).

255. In the March 26, 1992 USFWS letter to the TWC, the USFWS stated the following about "springflow augmentation":

> Spring flow augmentation studies are not likely to represent a productive use of time and resources. From an endangered species point of view, the Service suggests such proposals be considered extremely unlikely to produce acceptable conditions for endangered species. Even worse, they divert attention and resources from the hard choices that must be made.

(PX-34 at p. 3) (emphasis added).

256. In the comments attached to the March 26, 1992 USFWS letter to the TWC, USFWS stated the following about "springflow augmentation":

> Based upon current information, we do not believe that spring flow augmentation is likely to be an acceptable means of ensuring protection of endangered species and their ecosystems in Comal or San Marcos Springs. We are not aware of any evidence that flow augmentation is technically feasible or that it would provide for the biological needs of the species. To make such a determination with a sufficient degree of certainty would require the springs to first dry up. Allowing the Springs to cease flowing for <u>any</u> period of time, even under drought conditions, would pose an unacceptable risk to the continued existence of the listed species, contrary to the ESA.
>
> In addition, it is our understanding that augmenting at Comal Springs would draw the aquifer level down faster at San Marcos. Augmentation at San Marcos Springs cannot be done in a way that would ensure protection of the San Marcos Salamander.
>
> The Service is also concerned about intrusion of bad water at both Comal and San Marcos Springs as aquifer levels decrease. Both springs are very close to the "bad water" line.
>
> We believe springflow augmentation studies would <u>divert attention and resources from the hard choices that must be made</u>.

(Comments attached to PX-34 at pp. 5-6.) (underline in original, but emphasis added).

257. Springflow augmentation is not likely to be an acceptable means of ensuring protection of endangered species. (Shull Testimony; PX-34). The USFWS is not aware of evidence establishing springflow augmentation is either technically feasible or provides for the biological needs of the species. (Spear Testimony; PX-34). To make such a determination with

a sufficient degree of certainty would require the springs to first dry up, which would pose an unacceptable risk to the continued existence of the species. (PX-34, comments at pp. 5-6). Springflow augmentation "cannot be done in a way that would ensure protection of the San Marcos Salamander" or other endangered species that live in the springs themselves. (Id.; PX-132). "Both springs are very close to the 'bad water' line," (Thornhill Testimony; PX-34, comments at p. 6; PX-184), and augmentation worsens the risk of "bad water" intrusion. (Thornhill Testimony).

The Secretary/USFWS Have Unlawfully Refused or Unreasonably Delayed Implementing Recovery Measures to Protect Minimum Springflow Quantities

258. As the San Marcos Recovery Plan was being finalized in 1984, the Comal Springs nearly dried up. (Thornhill Testimony).

259. When Regional Director Spear sent the San Marcos Recovery Plan to Washington, D.C. for top-level USFWS approval in 1985, he stated the USFWS' major recommendations, including achievement of pumping controls, would be "quite difficult" and "controversial." (PX-55).

260. The USFWS did not convene a meeting of the San Marcos Recovery Team between July 20, 1984 and March 29, 1989. (Admission 14).

261. USFWS biologist Tom Brandt worked in 1986-1988 on keeping Fountain Darters in refugia. This study was not aimed at establishing minimum continuous flow requirements. Dr. Brandt performed this study because he, his superiors at the National

Fish Hatchery in San Marcos, and their superiors at the Region 2 office of the USFWS in Albuquerque, New Mexico knew there were going to be problems with the Fountain Darter in the future, due to pumpage of Edwards groundwater and lack of rainfall. (PX-244).

262. In March 1989, Professor Whiteside warned the USFWS about the potentiality the "Comal might go dry again this summer." (PX-42).

263. In the summer of 1989, Alisa Shull, the USFWS scientist in charge of the San Marcos Recovery Plan, recommended the USFWS send letters to Federal agencies requesting consultation on measures to reduce the threat to the springs posed by Edwards withdrawals and to pumpers, warning them of the potential for takes if pumping is not reduced. (Shull Testimony; Spear Testimony). The letters were drafted. (PX-61; PX-62; PX-63). Mr. Spear and the Secretary/USFWS at the Washington level decided not to use the "blunt axe" of Federal intervention but <u>only to request the State to establish pumping controls "quickly" on a voluntary basis</u>. (Spear Testimony). Five years later, the State has <u>still not established meaningful pumping controls</u>. (Spear Testimony; Shull Testimony).

264. At trial in November 1992, Michael Spear, now USFWS's highest-ranking official in charge of endangered species matters, testified if Texas did not establish adequate pumping controls in the next regular session of the Texas Legislature, which began in January of 1993, the "blunt axe" must fall. <u>(Id.)</u>.

265. Each Defendant except the TNRCC and the United States Defense Base Closure and Realignment Commission was formally advised of takes of Fountain Darters at Comal Springs by Plaintiff-Intervenor GBRA's first Notice of Violations dated June 15, 1989, and they were further advised of their failures to develop and implement recovery plans or otherwise to prevent takes of and jeopardy to the listed species by the subsequent Notices of Violations by Plaintiff-Intervenor GBRA and the Sierra Club, dated February 17, 1990 and April 12, 1990, respectively (DX-31; DX32; DX-33).

266. Unauthorized takings of Fountain Darters at the Comal Springs occurred in the summer of 1990, after the Notices of Violation.

267. The Secretary/USFWS failed to take timely action to implement key steps in the San Marcos Recovery Plan, critical to the survival of the species, including: define minimum continuous springflows, encourage establishment of pumping controls, prepare the contingency plan, and vigorously pursue a systematic procedure of consultation.

268. Plaintiffs do not allege that the Secretary/USFWS must, without exception, immediately implement every step in every recovery plan. The Secretary/USFWS, however, may not arbitrarily, for no reason or for inadequate or improper reasons, choose to remain idle. Inaction eviscerates the recovery planning provisions of the ESA and amounts to an abdication of the Secretary/USFWS' statutory responsibility to

plan for the survival and recovery, not the extinction, of endangered and threatened species.

269. A year has passed since this Court found that the Secretary and USFWS had failed in the respects identified above to develop recovery plan(s) or to update and expand the San Marcos Recovery Plan to cover the Comal Springs populations and species and the Texas Blind Salamander. These delays are unreasonable and unlawful, and should not be permitted to continue any longer.

270. In the past, the Secretary and USFWS have complained that budget and staff constraints impair their ability to develop recovery plans and conduct consultations. Attached as Appendix A is Plaintiffs' Proposed Recovery and Consultation Plan. It would help the recovery planning and consultation process for USFWS to consider this proposed plan. It is feasible for USFWS to determine in 30 days what changes, if any, are appropriate in this plan.

Avoiding or Minimizing Harm

271. The State of Texas, including the TNRCC, and the City of San Antonio recognize that excessive pumping from the Edwards threatens both extinctions and grave economic harms. (Aceves Testimony, Perryman Testimony, TWC Rule).

272. To prevent these economic and environmental harms, State and local authorities and regional water users must take prompt, appropriate and effective actions to develop adequate pumping controls and reduce dependence on the Edwards before the

"blunt axes" of Federal intervention under ESA §§ 7 and 9 and CERCLA fall. These actions are independently required by the threat of bad water movement and because the Edwards is badly overdrafted, as well as by the threat of Federal intervention under ESA §§ 7 and 9 and CERCLA. (Spear Testimony; Aceves Testimony; Masters Testimony; Hall Testimony; Perryman Testimony).

273. The ESA provides mechanisms to allow the State of Texas substantial time to reduce withdrawals from the Edwards in an orderly and nondisruptive manner. One of those mechanisms is a § 10(a) incidental take permit. The Secretary of the Interior and USFWS are willing and legally empowered to grant the State a § 10(a) permit if, but only if, an adequate State plan for pumping controls is adopted and its implementation reasonably assured. (Spear Testimony; PX-34; P-35). The sooner Texas adopts an adequate plan and obtains a § 10(a) permit, the better. (Spear Testimony; Shull Testimony; Aceves Testimony; Masters Testimony; Hall Testimony).

274. The serious water supply problem associated with rapid increases in population and municipal, industrial, and agricultural water demand and exclusive dependence on the Edwards by the City of San Antonio has been recognized for over thirty-five years. See Board of Water Engineers v. City of San Antonio, 283 S.W.2d 722, 723 (Tex. 1955).

275. The City of San Antonio is blessed with a rare source of water. Unfortunately, the Edwards is currently the City of San Antonio's "sole source" of water because the City of San

Antonio failed to develop adequate water supplies from other sources to reduce their reliance of the Edwards.

276. The relatively brief and mild drought of 1984 and associated pumping posed a serious threat to the San Antonio region's water supplies. (DX-112 at p. 1). In response, San Antonio and the EUWD sponsored a 1986 multi-volume San Antonio Regional Water Resources Study. (DX-169). For water supply and economic development purposes, as well as to protect the endangered species dependent on springflow, the study shows alternative water supplies using a combination of surface water and wastewater reuse is required. The costs are feasible. (Id. at pp. 1-13). Assuming the worst case, "San Antonio would go from being a low-water cost city to a moderate-cost city." (Id. at p. 13).

277. Almost four decades of negotiations among the affected parties have failed to yield a resolution of the disputes regarding the proper management of the Edwards. (Specht Testimony; PX-190 at p. 4). Continuing failure risks Federal intervention to protect endangered species (PX-190 at pp. 4--5), and to prevent released of a hazardous substance into human water supplies. The danger is adequately understated as imminent. (Spear Testimony).

278. The negotiations failed in significant part because those who benefit by unregulated pumping do not believe pumping will be limited to protect endangered species, do not understand what limits are required, or because it is not politically feasible for them to agree to the limits required, absent a Court

order. (Spear Testimony; Specht Testimony; Hall Testimony; Aceves Testimony; Masters Testimony; PX-134).

279. This Court found in early 1993 that the next session of the Texas legislature offers the last chance for adoption of an adequate state plan before the "blunt axes" of Federal intervention have to be dropped. Another year or more has passed and there is still no State plan adequate to protect minimum continuous natural springflows at Comal Springs in a repeat of the drought of record, in a severe drought, or even in a moderate drought.

280. Continuous springflows from the Comal Springs can be maintained at all times during a repeat of the drought of the 1950's if pumping were limited to something slightly less than approximately 219,000 acre-feet per year during the 1950's drought. Limiting pumping to an average of roughly 200,000 acre-feet per year during the drought would provide some minimal continuous daily Comal springflows. (Thornhill Testimony).

281. Even if the needs of endangered species were disregarded entirely, there is a water-quality floor below which the level of water in the Edwards should not be allowed to drop, solely for water supply purposes. (Thornhill Testimony; Aceves Testimony; Hall Testimony; Masters Testimony). The water - quality floor should be defined in part based on known water quality impacts in the Aquifer itself caused by pumping-induced drawdowns and springflow depletion. The water-quality floor should be set high enough to avoid any appreciable risk

of significant water-quality harm, taking into account the unknowns and the potential serious consequences accompanying the unknowns. (Thornhill Testimony).

282. The surest and most prudent method of ensuring there will be no significant adverse water quality impact due to pumping from the Edwards is to limit pumping to the extent necessary to maintain adequate continuous natural springflows from the Comal Springs at all times. The evidence demands, until reliable information is garnered stating otherwise, the prohibition of any other limitation. (Thornhill Testimony). No new data have been acquired since 1992 and no new studies published that justify any lesser limitation of pumping.

283. The "firm yield" of the Edwards, assuming protection of just minimal continuous daily springflows from the Comal Springs, is on the order of roughly 200,000 acre-feet per year during a repeat of the drought of record. (Thornhill Testimony).

284. The "firm yield" of the Edwards is not 350,000 acre-feet per year. Pumping 350,000 acre-feet per year throughout a repeat of the drought of the 1950's will cause the Edwards to drop to levels far below the historic low of 612.51 feet mean sea level, dry up the Comal Springs for years and San Marcos Springs for substantial periods of time, contaminate the Edwards by movement of bad quality water into the fresh water, and risk other environmental harm. (Thornhill Testimony).

285. Withdrawals in excess of 200,000 acre-feet per year can be allowed during normal and wet years; especially in years similar to 1992. However, it would be imprudent to rely upon

and plan for the Edwards to supply the region 350,000 acre-feet of water per year during a repeat of the drought of the 1950's. (Thornhill Testimony).

286. If the City of San Antonio would seriously and immediately develop additional supplies of water, implement conservation programs and mandates (like minimal lawn watering and credits for native landscaping), reuse water, and seek alternative sources of water, the City of San Antonio is likely to obtain substantial additional water supplies within five to ten years. (Thornhill Testimony; Specht Testimony).

287. If the region is fortunate enough to miss a major drought within the next five to ten years, the only significant economic impact on San Antonio and the region resulting from satisfying the requirements under the ESA to maintain minimum springflows at the Comal and San Marcos Springs would be the cost of obtaining additional supplies of water within the period of time. (Aceves Testimony; Perryman Testimony).

288. Approximately the same cost would have to be borne by San Antonio and the region, even if the needs of endangered species were disregarded entirely; adequate and continuous natural springflows are needed from the Comal and San Marcos Springs at all times to avoid the risk of significant adverse water quality impacts, solely for water supply purposes. (Aceves Testimony, Perryman Testimony). The ESA may compel Texas and/or San Antonio to incur these costs now in order to prevent the threatened release of hydrogen sulfide into San Antonio's existing water supply.

289. If the region experiences a major drought within the next five to ten years, and if severe economic harm otherwise results from satisfying the requirements under the ESA and to avoid water quality risks for water supply purposes by maintaining minimum continuous natural springflows at the Comal and San Marcos Springs, exemptions can be sought to allow takings, destruction of critical habitat, jeopardy, and even extinction of species during such a crisis, pursuant to §§ 10(a) and 7(h) of the ESA. 16 U.S.C. §§ 1536(h), 1539(a). No government can grant an "exemption" from the physical laws that will result in destruction of the Edwards Aquifer through movement of the bad-water line.

Timing

290. The Edwards can fall from record highs to levels at which Comal Springs is below 100 cfs, takes are occurring, and jeopardy is imminent, in less than two years. (Thornhill Testimony; PX-189, PX-190).

291. The Edwards fell from a then-record high in late 1987 to levels at which Comal Springs nearly dried up in the summer of 1989. (PX-207).

292. The Edwards can even fall to levels at which the Comal Springs are imperiled in less than one year. (Thornhill Testimony; PX-248).

293. The Comal Springs in theory could be in danger of drying up again by the summer of 1994. (Thornhill Testimony; PX-248).

294. The 1984, 1989, and 1990 droughts were once-a-decade drought events. (Bomar Testimony). The risk of Comal Springs drying up again soon is considerable.

295. Once the Edwards has fallen to levels at which Comal Springs has fallen to 100 cfs, it can fall further to levels at which Comal Springs dries up completely in less than one month. Based on historical experiences in 1956, 1984, 1989, and 1990, the Comal Springs could fall from 100 cfs to 0 cfs in two to three weeks. (Thornhill Testimony).

296. The San Antonio Water System's CEO has advised his Board as to the conditions we are facing. If dry weather conditions track those of the recent time period from mid-1987 to mid-1990, the following Edwards Aquifer water levels can be expected:

July 1994 -	640 ft.
July 1995 -	625 ft.
July 1996 -	620 ft.

These conditions would result in Comal Springs being below the "take" level beginning in mid-1994 and below "jeopardy" levels in both mid-1995 and mid-1996. Undoubtedly, "the Comal Springs would be severely stressed." (Aceves Memo, for 2/1/94 Board Meeting, a copy of which is attached as Exhibit C).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court:

(1) set this case for (a) hearing on cross-motion for summary judgment; and (b) as to any genuine issues of material disputed fact, trial on the merits;

(2) declare that the substantial and imminent threatened release of hydrogen sulfide, a hazardous substance, into the fresh water in the Edwards, constitutes an emergency for public health and safety purposes as well as endangered species purposes, because it threatens the Edwards ecosystem, on which both 1.5 million people and many endangered and threatened species depend, with catastrophic, irreversible damage;

(3) direct the Monitor to prepare, by August 1, 1994, an Emergency Withdrawal Reduction Plan that defines which withdrawals should be limited, and to what extent and under what conditions they should be limited, to assure that the Comal Springs and San Marcos Springs will not drop below jeopardy levels, as defined by the USFWS, at any time, even in a repeat of the drought of record. The Emergency Withdrawal Reduction Plan should correct the March 1, 1993 plan submitted by the TWC by assuming that the repeat of the drought of record has already begun some time prior to the date the corrected plan is adopted by TNRCC, or that it will begin immediately thereafter. The Emergency Withdrawal Reduction Plan should attempt to

minimize overall adverse economic impacts of the region. Essential elements of an Emergency Withdrawal Reduction Plan are contained within the Plaintiffs' Proposed Recovery and Consultation Plan, attached as Exhibit A;

(4) direct the Monitor to prepare, by August 1, 1994, a preliminary, conceptual Emergency Water Conservation and Reuse Plan defining the reductions in withdrawals that could reasonably be achieved simply by conservation and reuse, and the anticipated timetable and the estimated costs of finalization of that plan and of the actions needed to fully implement the final plan;

(5) direct the Monitor to prepare, by August 1, 1994, a preliminary, conceptual Emergency Water Supply Plan for the San Antonio region, defining the amounts of water currently available from other sources that, in addition to reasonable conservation and reuse measures, are necessary or desirable to eliminate the emergency threat of release of a hazardous substance into the fresh water in the Edwards and avoid jeopardy to the listed species during a repeat of the drought of record, the facilities needed to be able to fully utilize such alternative water supplies, the proposed customers of such system in addition to the City of San Antonio, and the anticipated timetable and estimated costs of finalization of that plan and of the design, acquisition, construction and other actions needed to fully implement the final plan.

(6) As soon as possible after August 1, 1994:

(a) approve the Monitor's Emergency Withdrawal Reduction Plan, his preliminary, conceptual Emergency Conservation and Reuse Plan, and his preliminary, conceptual Emergency Water Supply Plan, with such modifications as may be deemed necessary or desirable by the Court;

(b) order the TNRCC to immediately begin and thereafter continue reducing withdrawals pursuant to the approved Emergency Withdrawal Reduction Plan;

(c) order the TNRCC to immediately commence and thereafter diligently pursue to completion the finalization of the approved preliminary, conceptual Emergency Conservation and Reuse Plan, and the actions needed to fully implement the final plan;

(d) order and/or authorize the appropriate party or parties to immediately commence and thereafter diligently pursue to completion the finalization of the approved preliminary, conceptual Emergency Water Supply Plan, and the design, acquisition, construction and other actions needed to fully implement that final plan;

(7) order the City of San Antonio to pay all costs incurred by the party or parties ordered and/or authorized by this Court to finalize the approved preliminary, conceptual Emergency Water Supply Plan, and to design, acquire,

construct, and take other actions needed to fully implement that final plan, subject to further order of this Court at a later date requiring contribution by others pursuant to § 107(a) of CERCLA and/or other laws or equity to the extent that contribution is later sought by San Antonio and found by this Court to be appropriate;

(8) order the City of San Antonio to reimburse Plaintiffs under § 107(a) of CERCLA for all necessary costs of response incurred by Plaintiffs to eliminate the threat of release of a hazardous substance into the fresh water in the Edwards;

(9) declare that the Secretary of the Interior and the USFWS have in violation of ESA § 4 unlawfully withheld or unreasonably delayed actions on (a) pending petitions to list Edwards species; (b) designations of the critical habitat of those species and of the Texas blind salamander; (c) regulations to protect the San Marcos Salamander; and (d) development and implementation of recovery plans for the conservation and survival of all endangered and threatened Edwards species against the greatest threat they face, excessive pumping; and set dates certain for actions by the Secretary and USFWS on the same;

(10) declare that the Federal Defendants are violating and are imminently threatening to violate ESA § 7 by unlawfully withholding or unreasonably delaying review and utilization of all programs and authorities administered

by them for the conservation of the Edwards, Comal and San Marcos species; and enjoin the said Secretary/USFWS to begin such review immediately;

(11) declare that the Federal Defendants have violated, are violating and are imminently threatening to violate ESA § 7 by failing or refusing to consult and insure that no action authorized, funded or carried out by such agencies is likely to jeopardize the continued existence of the Edwards, Comal and San Marcos species through destruction or adverse modification of their ecosystem, and enjoin the said Federal Defendants to begin consultations immediately;

(12) order the Federal Defendants, and request the USGS and the Texas Parks and Wildlife Department, to <u>immediately</u> form an Edwards Interagency Task Force to consult and affirmatively plan under ESA § 7, CERCLA and other federal statutes. The Task Force should promptly identify activities these and other agencies authorize, fund or carry out, directly or indirectly, singularly or cumulatively, that lead to pumping from the Edwards, and it should define the actions that should be taken or ceased by these and other agencies to avoid jeopardy to the listed species and eliminate the threat of release of a hazardous substance into the fresh water in the Edwards, the water supply for 1.5 million people as well as the listed species. Examples of the actions that should be planned for include the following:

(a) ceasing or severely limiting or conditioning all federal funding that leads to pumping;

(b) closure of San Antonio's military bases and, if possible, relocation to any one or more of the many cities in Texas that have adequately planned, and paid, for their current and future water supplies; and

(c) revoking or severely limiting or conditioning all NPDES discharge permits issued by USEPA where the effluent is derived in whole or in part from water withdrawn from the Aquifer.

(13) should it ever become necessary because of lack of cooperation by San Antonio or others, or because of lack of required action by federal agencies, Plaintiffs pray that this Honorable Court order the Federal Defendants to <u>immediately</u> cease authorizing, funding or carrying out, directly or indirectly, singularly or cumulatively, any activity that leads to withdrawals from the Edwards Aquifer, and that the Federal Defendants take affirmative actions within their authorities that will lead to reduction of withdrawals, to the extent such withdrawals threaten jeopardy to endangered species and release of a hazardous substance into the fresh water in the Edwards;

(14) declare that the Federal Defendants, TNRCC, and the City of San Antonio have violated, are violating, and are imminently threatening to violate ESA § 9; that they have harmed or harassed, are harming or harassing, and

threaten to harm or harass the Edwards, Comal and San Marcos species by excessive Edwards withdrawals by authorizing, funding or carrying out activities that support excessive Edwards withdrawals, and enjoin all the said Defendants to consult and confer immediately to reach agreement, within thirty (30) days of the entry of this Court's order, upon a joint Federal and state plan that is adequate at all times, beginning immediately, to assure minimum continuous natural springflows at the Comal Springs even in a repeat of the drought of record, and enjoin the said Defendants to consider, among other alternatives, Plaintiffs' Proposed Recovery and Consultation Plan attached as Exhibit A;

(15) reserve the right of Plaintiffs to seek additional relief, including injunctive relief against Edwards pumpers, if necessary;

(16) enter judgment against the Defendants for the costs of litigation, including reasonable attorney and expert witness fees; and

(17) grant such other and further relief, both legal and equitable, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have sent a true and correct copy of the foregoing document by hand-delivery or certified mail, return receipt requested, on the 15 day of April, 1994, to the Monitor and those counsel who have appeared in the above case:

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PLAINTIFFS' PROPOSED
RECOVERY AND CONSULTATION PLAN

1. Purpose: Insure that pumping of Edwards water no longer jeopardizes the water supplies on which 1.5 million people and many endangered, threatened and other species depend.

2. Target: Minimum continuous natural springflows at both Comal and San Marcos Springs even during a repeat of the drought of record.

3. Principal Means:

(a) pumping restrictions adequate to protect target springflows;

(b) demand reduction measures and alternative supplies to minimize hardship and allow for economic growth.

4. Design Criteria:

(a) Face ecological and hydrological facts with integrity.

(b) Define property rights in pumpable Edwards water and then let the free market work.

(c) Take no chances on irreversible losses of valuable resources.

5. Two Phases: Past failures by federal, state and local government have allowed prolonged excessive pumping and no immediate alternatives. As a result:

(a) Phase I. Until demand can be permanently reduced and ecologically and economically sound alternative supplies developed, pumping restrictions must cut Edwards pumping to 350,000 afy in normal weather years. In dry years, restrictions must cut pumping

further, to enough below long-term safe yield of 200,000 afy to offset prior excesses and guarantee minimum continuous springflow.

(b) Phase II. Once demand has been permanently reduced and ecologically adequate and economically sound alternative supplies developed, higher amounts can be pumped in wet years.

6. Management Control: The Director of USFWS, the Secretaries of Interior, Agriculture, Transportation, Defense, Army and Air Force, the Chairman of the Defense Base Closure and Realignment Commission, the Administrator of the EPA, the Chairman of the TNRCC, and the Chairman of the TWDB, or their respective high-level staff designees, shall constitute the Edwards Interagency Task Force, charged with developing and implementing this comprehensive recovery and consultation plan.

7. Scientific Integrity: The Edwards Interagency Task Force shall create an Interagency Scientific Advisory Council composed of federal, state and academic experts, including, but not limited to, the existing San Marcos Recovery Team, the staff of the FWS Austin office, and the Center for Research in Water Resources of the Engineering Department of the University of Texas at Austin.

Phase I Pumping Restrictions

1. Claimed historical beneficial use filings with TNRCC within 30 days concerning every Edwards well (other than domestic wells producing less than 3 afy). Municipal and industrial users separately identify annual lawn watering and recreational (private swimming pools) portions of usage. Municipal and industrial users also to separately estimate and document essential public health and safety needs (drinking water, firefighting, hospitals).

2. Review historical use filings to identify waste and estimate actual historical beneficial use.

3. Compare aggregate historical beneficial use with 350,000 afy.

4. To the extent that aggregate historical beneficial use exceeds 350,000 afy, reduce municipal and industrial systems' usage for lawn watering and recreational purposes pro rata, until excess is eliminated.

5. If there is not enough lawn watering and recreational usage to eliminate all of excess of historical beneficial use over 350,000 afy, reduce irrigation agriculture usage pro rata until remaining excess is eliminated.

6. Notify each well owner and operator of resulting share of 350,000 afy. No restrictions on sale, lease or other voluntary transfer of such shares, other than notification to Task Force.

7. Monitor Edwards water levels. Whenever Aquifer level falls to 660 feet m.s.l. at J-17, notify all pumpers to expect cutbacks when and if springflow from Comal Springs drops to 200 cfs, the level at which USFWS says species begin to be taken (this occurs at a J-17 Aquifer level of approximately 650 feet, m.s.l.), and estimate cutbacks.

8. When Comal springflow drops to 200 cfs, notify all pumpers of cutbacks required to reduce pumping to 150,000 afy.

9. Calculate cutbacks from 350,000 to 150,000 afy as follows:

(1) first, eliminate any lawn watering usage not already eliminated;

(2) second, reduce and if necessary eliminate any irrigation agriculture pumping;

(3) third, reduce and if necessary prohibit all pumping by or deliveries to industrial or commercial customers added to municipal systems on or after June 15, 1989, except for essential public health and safety needs; and

(4) finally, reduce and if necessary eliminate other industrial and commercial usage, except for essential public health and safety needs.

10. If Comal springflow drops to 150 cfs, or if San Marcos springflow drops to 100 cfs, notify all pumpers of further cuts to eliminate all but essential public health and safety uses (drinking water, firefighting, hospitals).

11. While the Phase I Plan is in place, San Antonio shall not add any new water consuming industrial or commercial users to its system until and to the extent it has permanently reduced its existing customers' demand for Edwards water and/or added alternative water supplies of at least 20 years' duration to offset or meet the new customers' demands.

Enforcement

1. All federal agencies that authorize, fund or carry out activities that maintain, increase or affect Edwards withdrawals shall cease such actions as soon as consultation begins and not begin again until the Phase I Plan is "in place." Until the Phase I Plan is "in place," San Antonio shall not add any new hookups other than for physical health and safety purposes.

2. The Phase I Plan will be "in place" once the USFWS has approved a § 10(a) permit to the TNRCC and the EPA has approved the remedial action set forth in Plaintiffs' Amended and Supplemental Complaint. The USFWS shall not approve a § 10(a) permit to the

TNRCC and EPA shall not adopt remedial action unless and until assured, as required under federal law, that the TNRCC has the legal power to implement and enforce the pumping restrictions embodied in the Phase I Plan and that the State of Texas (TNRCC and TWDB), San Antonio, and the federal pumpers (USDOD, US Army and US Air Force) together have committed the necessary resources to fund the implementation of the TWDB's Emergency Conservation and Reuse Plan and its Emergency Water Supply Plan.

3. Joint consultation by the EPA, USDOA, USDOT, USDOD, US Army, US Air Force and the Base Closure Commission with the USFWS shall begin immediately. Consultation by other federal agencies shall begin as soon as anyone identifies to the Task Force any activities that such agencies authorize, fund or carry out which may affect Edwards withdrawals.

Demand Reduction and Alternative Water Supplies

1. The Task Force shall, with the help of the Interagency Scientific Advisory Council, identify the ecologically and economically best measures to permanently reduce demand for Edwards water and to supply water from alternative sources to San Antonio and smaller municipal and industrial users of Edwards water.

2. Water supply alternatives to be investigated shall include supplies from the San Antonio, the Guadalupe, Lavaca and Colorado River Basins which might be available on a nonpermanent but substantial (beyond the year 2000) interim basis.

3. Water supply alternatives shall be chosen to insure that, by the end of 20 years, Phase I will end and the § 10(a) permit will expire.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS 209 W. 14th St. 14th & Lavaca, 8th Floor Price Daniel, Sr., Bldg. Austin, Texas 78701, *Plaintiff,*	§ § § § § § § §	JUNE GREEN, J. J
vs.	§ §	Civil Action No. 94 0165
UNITED STATES OF AMERICA *Defendant.*	§ § §	MAR 0 9 1994

COMPLAINT

The State of Texas ("Texas") files this action for a declaratory judgment with respect to a Texas statute enacted by the 73rd Texas Legislature, Act of June 11, 1993, ch. 626, 1993 TEX. SESS. LAW SERV. 2353 (Vernon), denominated Senate Bill 1477 ("S.B. 1477") and sometimes popularly termed the Edwards Aquifer Authority Act. The action is based on the following grounds:

JURISDICTION AND PARTIES

1. This action arises under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

2. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1331 and 42 U.S.C. § 1973c. Texas requests that a three-judge Court be convened pursuant to the provisions of 28 U.S.C. § 2284 and 42 U.S.C. § 1973c.

3. The State of Texas is a jurisdiction covered by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. See 28 C.F.R. Part 51, App. (1993). Texas is the plaintiff in this action.

4. The United States of America is the national sovereign and has substantial

EXHIBIT "B"

responsibilities under section 5 of the Voting Rights Act. The United States of America is the defendant in this action.

DEVELOPMENTS LEADING TO ENACTMENT OF S.B. 1477

5. An understanding of the historical treatment of groundwater in Texas is critical to an understanding of the origins of this suit. The rule of capture always has been applied to groundwater, and there was no protection for this resource. The minimal state regulation which existed authorized creation of underground water districts with extremely limited powers, such as the power to register and space water wells and to perform research. These districts are known as Chapter 52 districts.

6. The southern portions of the Edwards Aquifer ("Aquifer") is a unique structure which contains 215 million acre-feet of water beneath a relatively arid 165 mile swath of Texas. The Aquifer has a variety of users, including farmers, municipal governments, industry, the military, and recreational entities. The water in the Aquifer moves from west to east, with farmers in Uvalde and Medina Counties using nearly one-third of the amount of water currently used from the system. The Bexar County usage, predominantly municipal, accounts for roughly one-third of the usage. Enormous springs, Comal and San Marcos, at the Aquifer's eastern edge feed rivers which provide municipal, industrial, and agricultural needs as they flow to the Gulf of Mexico, accounting for the remaining one-third of the usage.

7. The increased demands on the Aquifer, as the population of South Texas has grown, and the cyclical nature of rainfall cause the Aquifer level to vary dramatically over short periods of time. San Marcos and Comal springs have historically stopped flowing because of depressed Aquifer level caused by low rainfall and pumping demand.

8. The Edwards Underground Water District ("District") is a Chapter 52 district created in 1959 and, at that time, covered the five major counties situated above the Aquifer. In 1989, Uvalde and Medina counties withdrew from the District, leaving a

district which represented a majority of the population and tax base of the Aquifer, but only one-third of the users. The District levies a property tax and thus is primarily funded by Bexar County residents.

9. During this same period, environmental groups and interests dependent on Comal and San Marcos springflows began complaining that, when the Aquifer level dropped, the springflow decreased, threatening or killing endangered species which live in the springs.

10. Attempts to negotiate a settlement and prevent a lawsuit under the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 *et seq.* ("ESA"), proved unsuccessful.

11. In May, 1991, the Sierra Club and spring interests filed a suit against the United States Secretary of Interior and an agency, the United States Fish and Wildlife Service, under his authority. The suit, now styled *Sierra Club, et al. v. Bruce Babbitt, et al.*, Civ. Action No. MO-91-CA-069 ("*Sierra Club* suit"), was filed in the Midland-Odessa Division of the United States District Court for the Western District of Texas.

12. The gravamen of the complaint in the *Sierra Club* suit was that the federal government had failed in its duty to protect certain endangered species. The plaintiffs' claim was premised on the failure to insure adequate water levels in the Aquifer in order to insure adequate natural spring flows, necessary to sustain certain species in and around Comal and San Marcos Springs. These springs are fed by the Aquifer.

13. In January, 1992, three state agencies -- the Texas Natural Resource Conservation Commission ("TNRCC" which includes its predecessor agency, the Texas Water Commission), the Texas Department of Parks and Wildlife, and the Texas Department of Agriculture -- were permitted to intervene and were aligned as defendants in the *Sierra Club* suit.

14. As the *Sierra Club* suit developed, the plaintiffs pressed their claim that the ESA required the United States Fish and Wildlife Service to determine the minimum

springflows necessary to preserve the endangered species at Comal and San Marcos Springs.

15. In February, 1993, following a bench trial and while the 73rd Texas Legislature was sitting in its biennial 180-day regular session, the district court in the *Sierra Club* suit issued comprehensive findings and conclusions. The court directed the Fish and Wildlife Service to develop and disseminate information about the springflows necessary to sustain the endangered species at Comal and San Marcos Springs. The court also directed the TNRCC to prepare a comprehensive management plan for the Aquifer. The TNRCC undertook and completed the task.

16. Due to the absence of an existing adequate plan as developed by any existing governmental entities, the *Sierra Club* court viewed itself as compelled to monitor the Aquifer until an adequate regulatory plan is in place. Examples (all with the court's original emphasis) of this view are present in the court's Amended Findings of Fact and Conclusions of Law of May 26, 1993, in which the court determined: (i) "the State has *still not established meaningful pumping controls*", FF 160; (ii) if the dire economic consequences feared by some ever come to pass, "it will be due to failure of State and local authorities and regional water users to take prompt and appropriate actions to develop pumping controls and reduce dependence on the Edwards before the 'blunt axes' of Federal intervention under ESA §§ 7 and 9 fall", FF 189; and (iii) "*[t]he next session of the Texas legislature offers the last chance for adoption of an adequate state plan before the 'blunt axes' of Federal intervention have to be dropped*", FF 196.

17. Aspects of judicial developments in the *Sierra Club* suit, as well as other activities concerning the Aquifer, prompted the 73rd Texas Legislature to develop comprehensive legislation intended to address the disparate issues of use and conservation concerning this unique and valuable state water resource which affects vastly different interests of different segments of Texas.

OUTLINE OF S.B. 1477

18. S.B. 1477 constitutes a major new step for Texas in the regulation of underground water resources. Its creation was the product of great legislative care to create consensus. Because of the impetus to create a regional entity with sufficient power over all users, all users had to be represented on the Authority's board in such a way to balance their interests. Also, its basic governing authority had to be different than a Chapter 52 district because the basics of its regulatory authority and governance was fundamentally different than existing Chapter 52 districts.

19. The principal thrust of S.B. 1477 is its creation of a governmental body, pursuant to Article XVI, § 59, of the Texas Constitution (the Conservation Amendment), known as the Edwards Aquifer Authority ("Authority"), which is to function as a conservation and reclamation district. The Authority is governed by a board of nine directors. The nine directors are appointed pursuant to directions set forth in section 1.09 of S.B. 1477. The seats are divided to approximate the proportionate usages of the various users of the resource. Roughly speaking, three of the appointees would come from the area west of Bexar County (within which lies the City of San Antonio), three of the appointees would come from Bexar County, and three of the appointees would come from areas east of Bexar County. Its area of governance covers all or part of the Texas counties of Atascosa, Bexar, Caldwell, Comal, Guadalupe, Hays, Medina, and Uvalde. According to the official 1990 decennial census, 1,368,402 people reside in the governed area; however, were it to have been constituted as an elective rather than appointive regulatory body, its status as a special conservation and reclamation district would have made inapplicable the constitutional principle of one person-one vote.

20. The powers of the Authority apply to underground water within or withdrawn from the Aquifer and do not extend to the regulation of surface water. These powers encompass all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the Aquifer and to increase the recharge of, and prevent

the waste or pollution of water in, the Aquifer. S.B. 1477 establishes an elaborate, complex system for the monitoring and regulation of groundwater from the Aquifer. In addition to administering a complex permitting system for water withdrawal from the aquifer, the Authority must address water conservation and reuse. It also is charged with developing comprehensive management and critical period management plans for the aquifer. Importantly, the Authority is funded by user fees to allocate the costs among the various users.

21. The Authority also is authorized to issue orders, including the assessment of administrative penalties, to enforce the terms and conditions of permits, orders, and rules it issues. It also may seek civil injunctions to enforce the provisions of the act. At the same time, the Authority is subject to a civil suit for mandamus by the TNRCC to compel it to perform its duties.

OTHER ASPECTS OF S.B. 1477

22. In section 1.41, S.B. 1477 repeals the state statutory authority for the existence of the District. The provision transfers the files and assets of the District to the Authority. The District's assets are estimated to equal approximately ten million dollars. Section 1.41 was to have taken effect on September 1, 1993.

23. A major impetus for the District's abolishment was the fact that the extensive regulatory powers of the new Authority, funded by user fees, made the District's imposition of property taxes, which fell most heavily on Bexar County, an unfair tax burden were it to continue in existence.

24. At the time of S.B. 1477's enactment, the District covered parts of the Texas counties of Bexar, Comal, and Hays, an area that, while overlapping, was smaller than the area covered by the Authority. According to the official 1990 decennial census, 1,261,179 people resided in the area governed by the underground water district.

25. Covered geographical area aside, the District's powers over water in or withdrawn from the Aquifer were substantially less than the powers allocated to the

Authority by S.B. 1477. Included among the categories of lesser powers for the District as compared to the Authority are permitting, conservation, and reuse. Importantly, unlike the Authority, the District has no power to issue administrative orders or administrative penalties carrying the force of law.

26. Through its enacting legislation, the District is governed by a board of twelve members. Four members are elected from single-member districts in Bexar County; two at-large from Bexar County; three at-large from Comal County; and three at-large from Hays County. At the time of the enactment of S.B. 1477 and continuing at least through the initial administrative denial of preclearance, the District was the subject of a federal lawsuit, styled *Williams v. Edwards Underground Water District*, Civ. Action No. SA-92-CA-0144, in the San Antonio Division of the United States District Court for the Western District of Texas, in which the claim was being made that the electoral system of the district violated section 2 of the Voting Rights Act.

27. In sections 2.01-2.07, S.B. 1477 validates the creation and boundaries of a preexisting governmental body in the state known as the Uvalde County Underground Water Conservation District.

ADMINISTRATIVE PRECLEARANCE ACTIONS AND RELATED ACTIVITIES

28. On June 30, 1993, Texas, through its Secretary of State, submitted S.B. 1477 to the United States Department of Justice ("DOJ") for administrative preclearance under section 5 of the Voting Rights Act.

29. On November 19, 1993, through its Acting Assistant Attorney General for Civil Rights, DOJ issued two letters in connection with Texas's section 5 submission of S.B. 1477. One letter interposed no objection to S.B. 1477 "insofar as it pertains to the creation of the Uvalde County Underground Water Conservation District . . . and thereby requires the District to use five single-member districts to elect the board of directors in Uvalde County," thus preclearing its creation.

30. The other DOJ letter of November 19, 1993, interposed an objection to S.B.

1477 "insofar as it replaces the previously elected governing body with an appointed board."

31. Texas was uncertain of the intended reach of the objection contained in the second DOJ letter of November 19, 1993, because it could not determine whether DOJ intended its objection to prohibit only S.B. 1477's repeal through section 1.41 of the operating authority of the elected District or whether DOJ intended its objection also to prohibit creation of the appointed Authority. The source of the uncertainty derived from the ambiguous wording of the objection letter itself combined with the governing state of the law as to the reach of section 5 insofar as transfers of governmental powers are concerned, which indicated that the allocation of power to the newly created Authority fell outside section 5's purview.

32. In light of the state's uncertainty, it requested and obtained a meeting on December 20, 1993, with members of the staff of the Voting Section of DOJ's Civil Rights Division. At that meeting, the state expressed an urgency in the need for clarification from DOJ and a view that the creation, existence, and operation of the Authority fell outside DOJ's section 5 purview. On December 30, 1993, Texas sent another letter to DOJ. The December 30th letter expressed in writing the basic views the state had expressed orally on December 20th, urging that S.B. 1477's creation of the Authority lay outside section 5's purviews, that DOJ's November 19th letter was unnecessarily ambiguous on this point, and that prompt action from DOJ was needed in light of continuing developments in the *Sierra Club* suit which might result in the imposition of federal court control over aspects of management of the Aquifer in the absence of the state being able to implement the part of S.B. 1477 creating the Authority.

33. DOJ has not given the state a written response to the matters raised either in the December 20th meeting or the December 30th letter from the Texas Secretary of State.

34. Through its latest order, dated February 25, 1994, the *Sierra Club* court has

appointed a monitor and imposed a regime of federal court regulation over the Aquifer. The order is occasioned in large part by the state's inability to implement the regulatory system established in S.B. 1477. The court's order, by its own terms, is to remain in effect "until such time as the State of Texas implements an adequate regulatory plan or system to prevent violations of the ESA or until such other time as the Court deems proper, whichever comes first." DOJ's approach to section 5 insofar as S.B. 1477 is concerned makes it impossible for the state to satisfy the ESA-based concerns of the *Sierra Club* court so as to avoid federal court regulation of a state resource.

ABSENCE OF DISCRIMINATORY PURPOSE OR EFFECT AND ACTIVITIES FALLING BEYOND SECTION 5'S PURVIEW

35. S.B. 1477 is intended to and has the effect of asserting the state's interest in regulating as a matter of state law the natural water resource known as the southern portion of the Edwards Aquifer. It is not motivated either principally or in any part (including its elimination of the District) by the purpose of discriminating against racial or language minorities. Furthermore, S.B. 1477, either as a whole or in any part, does not have the effect of discriminating against racial or language minorities.

36. Specifically concerning the elimination of the District through S.B. 1477's section 1.41, the section 5 principle of retrogression has no application and, therefore, the effects test component of section 5 is inapplicable. Therefore, only the purpose component of section 5 is applicable to the provision. Even if the retrogression principle is treated as being applicable to the elimination of the District, there is no retrogression of minority voting power either in the simple elimination of the District or in the comparison of its elimination with the creation of the appointive Authority. Minority voting power is enhanced, not lessened, through creation of the Authority because the power of minority voters in terms of electing those bodies with the power to appoint the nine members of the Authority is greater than the power of minority voters in terms of electing the twelve members of the District.

37. Even if the provision eliminating the District is covered by section 5 and the facts do not establish that the applicable components of section 5 are satisfied insofar as the elected district's elimination is concerned, the creation of the appointive Authority is beyond section 5's purview. Elimination of the District aside, S.B. 1477's delineation of the powers, duties, and geographical reach of the Authority establishes that it is a new governmental body with new powers, not comparable to the preexisting district, and, as an appointive body, not within the reach of section 5.

REQUEST FOR RELIEF

WHEREFORE, the plaintiff prays that this Court:

a. Assert jurisdiction in this matter and request the convening of a three-judge Court;

b. Issue a declaratory judgment preclearing under section 5 of the Voting Rights Act all the parts of S.B. 1477 not already administratively precleared;

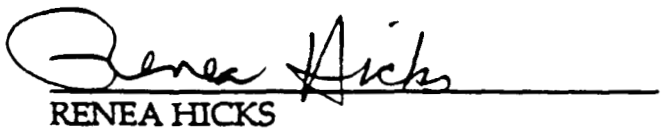
c. As an alternative to declaring precleared all the parts of S.B. 1477 not already administratively precleared, issue a declaratory judgment preclearing § 1.41 of S.B. 1477 and declaring all the remaining parts of S.B. 1477 which have not already been administratively precleared not subject to the preclearance requirements of section 5 of the Voting Rights Act; and

d. Grant such other and further relief as is deemed just and proper.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General



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ATTORNEYS FOR STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, *Plaintiff,*	§ § §	
vs.	§ §	Civil Action No. _____
UNITED STATES OF AMERICA *Defendant.*	§ § §	

ORDER

Before the Court is the State of Texas's Application for Three-Judge Court in the above-referenced cause. This action invokes the Court's powers to consider the issuance of declaratory relief under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Because section 5 requires the convening of a three-judge court, the provisions of 28 U.S.C. § 2284 are applicable. Instituting the procedures outlined in 28 U.S.C. § 2284(b)(1), the Court forthwith will notify the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit of the need to designate the other two members of the three-judge panel which must be convened in this action.

SIGNED and ENTERED this _____ day of March, 1994.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, *Plaintiff,*	§	94 0165
vs.	§	Civil Action No. _____
UNITED STATES OF AMERICA *Defendant.*	§	MAR 0 9 1994

MOTION FOR EXPEDITED ANSWER
AND EXPEDITED PRETRIAL CONFERENCE

The State of Texas ("Texas"), plaintiff herein, moves the Court to advance by forty days the date by which the United States, defendant herein, must answer or otherwise respond to the Complaint by Texas. Texas further moves the Court to expedite the convening of a pretrial conference to focus the issues in this case and to establish a schedule which would expedite moving through summary judgment and to trial as soon as reasonably possible. The grounds follow, with special attention called to the events outlined in ¶ 7:

1. As outlined in the Complaint filed contemporaneously with this motion, the purpose of this lawsuit is to enable the state to begin implementing a major new piece of state legislation, S.B. 1477, governing its precious groundwater resources. The legislation became state law last summer and nearly all of its provisions were scheduled to be effective on September 1, 1993.

2. The major focus of the state legislation was to establish a new regime of water resource management in a critical, unique natural underground water reservoir known as the Edwards Aquifer. This aquifer serves nearly 1.4 million people in urban and rural areas in Central Texas, including the metropolis of San Antonio. This new regime of natural resource management was to be effectuated primarily through a

newly-created governmental entity called the Edwards Aquifer Authority ("Authority"), which would be governed by an appointive board of nine members. The appointing authorities for the board ultimately are all elective bodies.

3. S.B. 1477's enactment implicated section 5 voting rights issues because one part of the statute would repeal the statutory authority for the existence of a preexisting elective body known as the Edwards Underground Water District ("District"). The District covers a smaller geographic area than the Authority, has fewer non-geographic powers concerning the Edwards Aquifer, and, as compared to the Authority, has far less effective enforcement mechanisms for the limited powers it does have. Nonetheless, section 5 case authority suggests that the elimination of the District was a covered change subject to section 5's preclearance requirements. In recognition of that fact, the state submitted S.B. 1477 for administrative preclearance shortly after its enactment last summer.

4. At the same time that the state was undertaking the enactment of S.B. 1477 and awaiting a Department of Justice ("DOJ") decision on the administrative preclearance issues, it was faced with critical proceedings in an endangered species lawsuit – the *Sierra Club* suit – in federal district court in the Western District of Texas. See Complaint ¶ 11. The proceedings in the lawsuit raised the specter of a federal court takeover of state regulation of the Edwards Aquifer. The *Sierra Club* court had ordered the state's principal environmental agency, formerly named the Texas Water Commission and now named the Texas Natural Resource Conservation Commission, to prepare a state management plan for the Edwards Aquifer. One of the unavoidable conclusions underlying this directive from the federal court was that the state's existing arrangement, which rested primarily on the actions of the District, were proving insufficient to protect the resource in a way satisfactory to the court as it evaluated the Endangered Species Act claims before it. Consequently, as the appropriate agency developed the court-ordered plan, the Texas Legislature began work on a legislative

solution to the looming problem.

5. The result of the legislature's effort was enactment of S.B. 1477, which assigns protection of the aquifer to the newly-created Authority . Nonetheless, the state has never been able to implement this historic natural resource legislation. On November 19, 1993, DOJ issued a section 5 objection letter to the state's S.B. 1477 submission. On December 30, 1993, the state wrote a letter expressing its understanding that the November 19th reached elimination of the elective District but not the creation of the appointive Authority and the assignment to it of regulatory duties and powers. DOJ has yet to respond to the state's December 30th letter, and the Authority's existence under section 5 remains under a cloud.

6. The state, therefore, is stymied in its efforts to implement S.B. 1477. Consequently, it cannot satisfy the concerns of one powerful federal authority – the federal district court in the *Sierra Club* suit – due to the actions (or inactions) of another powerful federal authority – DOJ in its administrative preclearance role. The state thus faces a federal court takeover of the preeminently state resource of groundwater.

7. Through an order dated February 25, 1994, entitled "Order Appointing Joe G. Moore, Jr., As Monitor," the district court in the *Sierra Club* suit has imposed a regime of federal court regulation over the Edwards Aquifer. It is clear from the terms of the February 25th order that it is occasioned in large part by the state's inability to implement the regulatory system established in S.B. 1477. This regulatory system would be implemented primarily through the Authority. Early in its ten-page order (in footnote 1 on page 2), the *Sierra Club* court remarks that "[o]ne year after the original Judgment and Findings of Fact and Conclusions of Law were entered . . . . , the State of Texas still does not have in effect a regulatory system for the Edwards Aquifer[.]" The court appointed a monitor and outlined his duties, reserving the power to "add to or otherwise modify" them. The order concludes with two paragraphs of special relevance to this motion to expedite. First, on page 9 of the order, the court orders (with emphasis

added) that "this Order shall remain in full force and effect ***until such time as the State of Texas implements an adequate regulatory plan or system to prevent violations of the ESA*** or until such other time as the Court deems proper, ***whichever comes first.***" Then, on page 10, the court schedules a status conference in the case for April 15, 1994, at which the issue of new state laws relative to the Edwards Aquifer is among the issues to be addressed. The *Sierra Club* court has tied its regulation of the Edwards Aquifer to the outcome of this lawsuit concerning preclearance and section 5's scope as they relate to S.B. 1477.

8. At the same time, deadlines crucial to the regulatory system established in S.B. 1477 are beginning to pass with the state helpless to do anything about them -- other than file this suit and seek expedited action. For example, one provision of the act required those wishing to establish historic uses of aquifer water, which in turn will play a crucial role in the permitting system to be established by the Authority, to file such uses with the Authority no later than March 1, 1994, on forms prescribed by the Authority. Of course, that deadline now has passed, and DOJ still has not offered the state any explanation or clarification of whether it views the scope of its November 19th objection to S.B. 1477 to extend to operation of the Authority. In the face of this brooding silence by DOJ, the Authority is understandably hesitant to start acting, for fear that the very first step its takes be struck down as violative of such an important piece of federal legislation as the Voting Rights Act.

9. The state is anxious to comply with section 5 of the Voting Rights Act. It does *not* view the elimination of the elective District to be problematic under section 5's strictures against purposeful or effective discrimination; it does *not* view creation of the Authority as even covered by section 5. Nonetheless, it is taking every step it can to insure full compliance before going forward with its new system of regulation for the Edwards Aquifer.

10. Texas's effort through this motion is two-fold. First, it is trying to get as

prompt a resolution as possible of the reach of section 5 insofar as the Authority's existence and operation is concerned. Each day that passes further disrupts the legislatively mandated schedule of regulation. Each disruption further subjects the state to a federal court effectively regulating one of its crucial natural resources. This situation is the one that prompts the state to file this motion to expedite the movement of this case. It is important to have expedited resolution of whether the elimination of the District is permissible under section 5, especially inasmuch as the inability to transfer the District's financial resources to the Authority (as required under the statute) threatens the full and effective functioning of the Authority even if it is permitted to operate soon. A still more immediate crisis is the frozen nature of the Authority.

11. Requiring an expedited answer from DOJ and setting up an expedited pretrial schedule (so that, for example, partial summary judgment on the Authority coverage issue can be handled quickly) could enable the state to meet the directives, implicit or explicit, of the *Sierra Club* court in a reasonable time.

12. Expediting the deadline for an answer from DOJ does not disadvantage the United States under the circumstances of this case. In the course of carrying out its administrative preclearance duties in connection with Texas's S.B. 1477 submission, DOJ already has devoted considerable time to reviewing the very factual and legal issues raised by this suit and is fully familiar with this matter.

Based on the foregoing matters, especially the events outlined in ¶ 7, Texas urges the Court to grant this motion, thereby requiring the United States to file an answer to the state's complaint within twenty days of service, and shortly thereafter scheduling a pretrial conference.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

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First Assistant Attorney General

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ATTORNEYS FOR STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, *Plaintiff,*	§ § §	
vs.	§ §	Civil Action No. _____
UNITED STATES OF AMERICA *Defendant.*	§ § §	

ORDER

On this day came before the Court the motion filed by the State of Texas, plaintiff herein, urging the Court to advance by forty days the date by which the United States, defendant herein, must answer or otherwise respond and urging that a pretrial conference be scheduled shortly after the expedited deadline for the answer of the United States. After giving due consideration to the motion, the Court determines that it is well taken and it is hereby

ORDERED that the State of Texas's Motion for Expedited Answer and Expedited Pretrial Conference is GRANTED. The United States shall file its Answer or other appropriate responsive pleading no later than twenty days after it is served with summons and a copy of the complaint. A pretrial conference is scheduled to commence at ___ _.m. on the _____ day of _____, 1994.

SIGNED and ENTERED this _____ day of March, 1994.

_____
UNITED STATES DISTRICT JUDGE

AGENDA ITEM NO. 17c

TO: San Antonio Water System Board of Trustees

FROM: Joe A. Aceves, P.E., President/Chief Executive Officer

SUBJECT: STATUS REPORT ON EDWARDS AQUIFER CONDITIONS

Board Action Date: February 1, 1994

BACKGROUND

The purpose of this report is to present information concerning the current conditions of the Edwards Aquifer and to project future water levels based upon the continuation of current weather patterns of average to below average rainfall.

- In 1993 San Antonio Water System met its goal for water conservation of 160 gallon per capita per day. This goal was accomplished in spite of the weather conditions during 1993.

- The rainfall in 1993 was much greater than average in the first half of the year **(total of 27 inches versus 14 inches average)** and much less than average in the second half of the year **(5 inches versus 14 inches averages)**. This resulted in the longest period of no rain on record (63 days).

- The weather in January 1994 has proven to be as dry as the previous months. The Climate Analysis Center (National Weather Service) extended forecast for the period January to February is for drier than normal weather and slightly wetter than normal for March. The analysis from the weather specialist at the TNRCC is somewhat more pessimistic. That office forecasts continued dry weather through mid Spring.

- The 1993 water levels reflect the decrease in rainfall beginning in June and the continued dry conditions through the end of the year.

- Assuming the present rate of water use and continued less than average rainfall, the Edwards Aquifer water levels are projected to be 665 to 670 feet by mid February. Agricultural irrigation prewatering begins in February and is expected to be extensive due to the lack of soil moisture. Urban usage historically begins to increase in late March.

- These water use factors may combine in greater than average water use in February and March.

- Increased demand and reduced recharge resulting from reduced rainfall will result in more rapid water level declines than normal.

EXHIBIT "C"

- Conditions in 1993 and the start of 1994 are similar to those in 1987 and 1988. In 1988 water levels started at 685 and dropped to 650 in the summer. If conditions for 1994 track 1988 conditions, water levels may drop to approximately 640 feet by mid year since levels are starting at 675 in 1994. Conditions could be somewhat worse if other pumping is increased or if rainfall is much less than 1988.

SUMMARY

It is projected that if the dry weather conditions track those of the recent time period from mid 1987 to mid 1990, the following Edwards Aquifer water levels can be expected:

ACTUAL		PREDICTED	
Jan 1988 - **685** ft	July 1988 - **650** ft	Jan 1994 - **675** ft	July 1994 - **640** ft
Jan 1989 - **665** ft	July 1989 - **628** ft	Jan 1995 - **660** ft	July 1995 - **625** ft
Jan 1990 - **655** ft	July 1990 - **623** ft	Jan 1996 - **650** ft	July 1996 - **620** ft

A repeat of the 1987 to 1990 weather pattern would result in water level conditions as indicated above. Concerns are raised when Aquifer levels drop below the point where the Comal Spring flow will be below the level of a "take" of endangered species such as would be projected for mid 1994. Also the continuation of these conditions would result in Comal Spring flow dropping below "jeopardy" levels in both mid 1995 and mid 1996. In both of these years, the Comal Springs would be severely stressed. Projections such as these depend upon many factors and are based upon the repeat of similar conditions of pumping and rainfall. Any change in these conditions would improve the forecast or could result in even lower water levels.

RECOMMENDATIONS

The following actions should be taken:

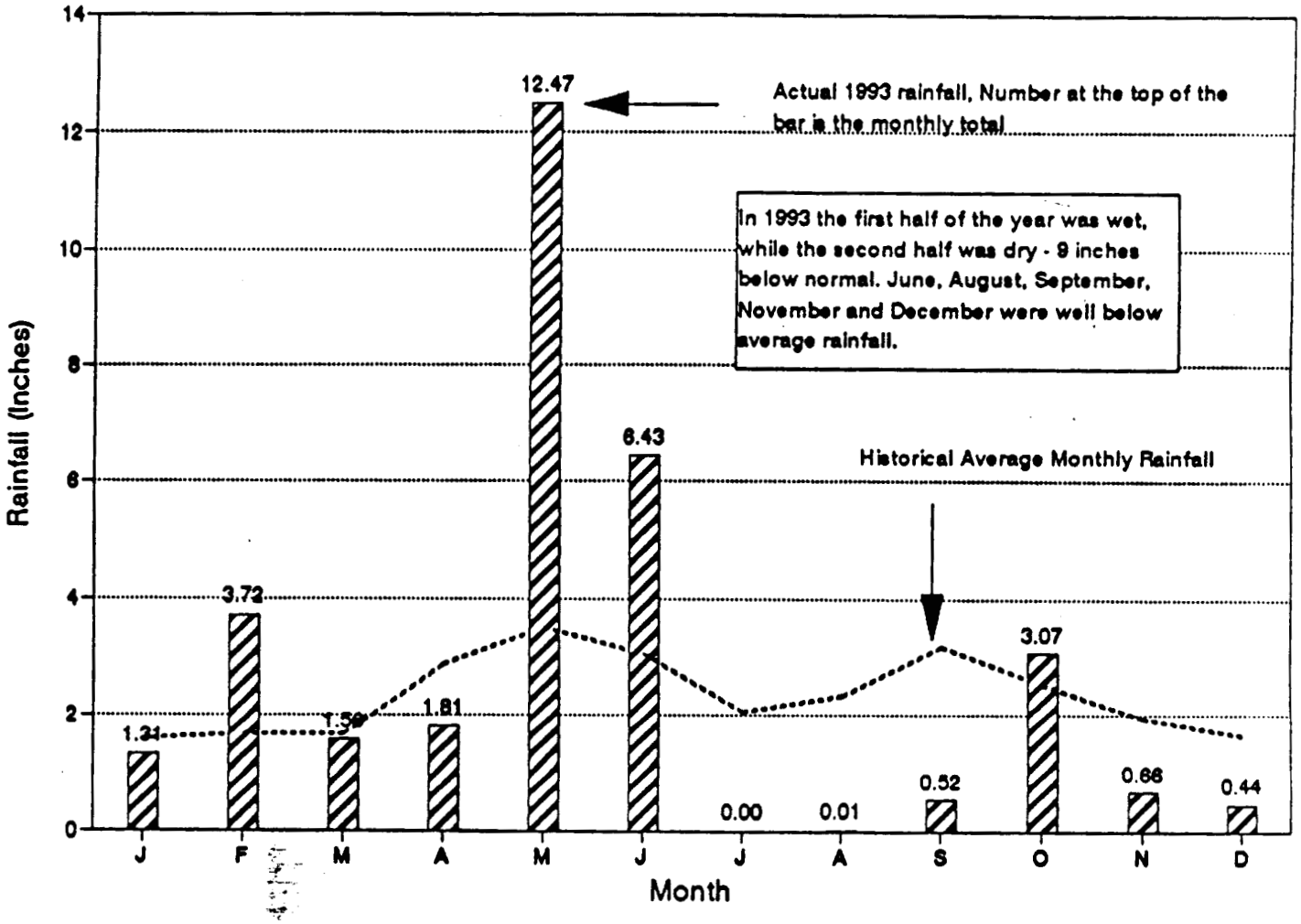
- Publish information encouraging the public to be especially conservative during the current period in order to minimize the water level declines this summer.
- Continue monitoring and increase information activity as conditions warrant.
- Revise the Drought Ordinance to change the initial level from 644 to 650 ft.

Rebecca Quintanilla Cedillo
Vice President Planning Group

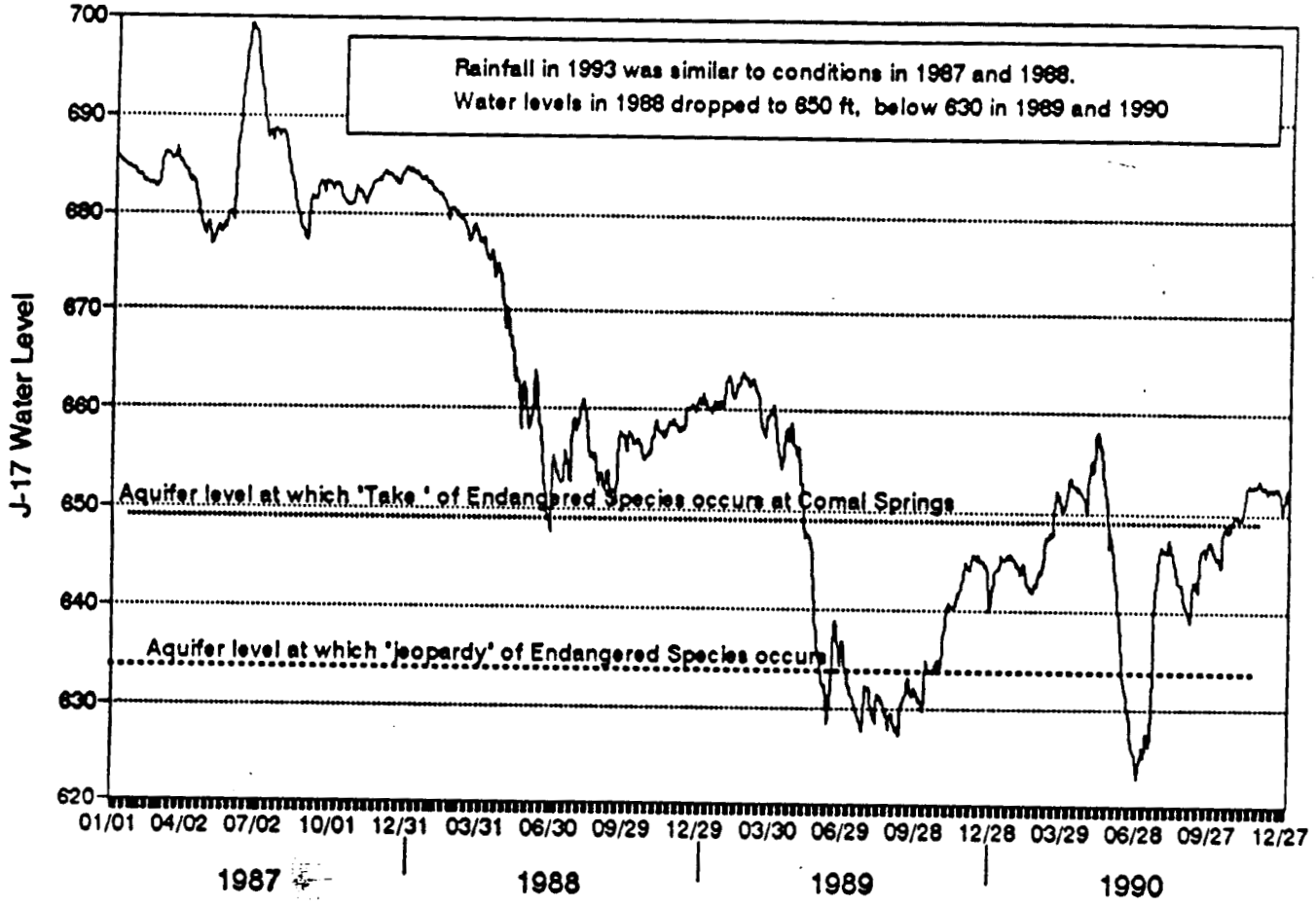
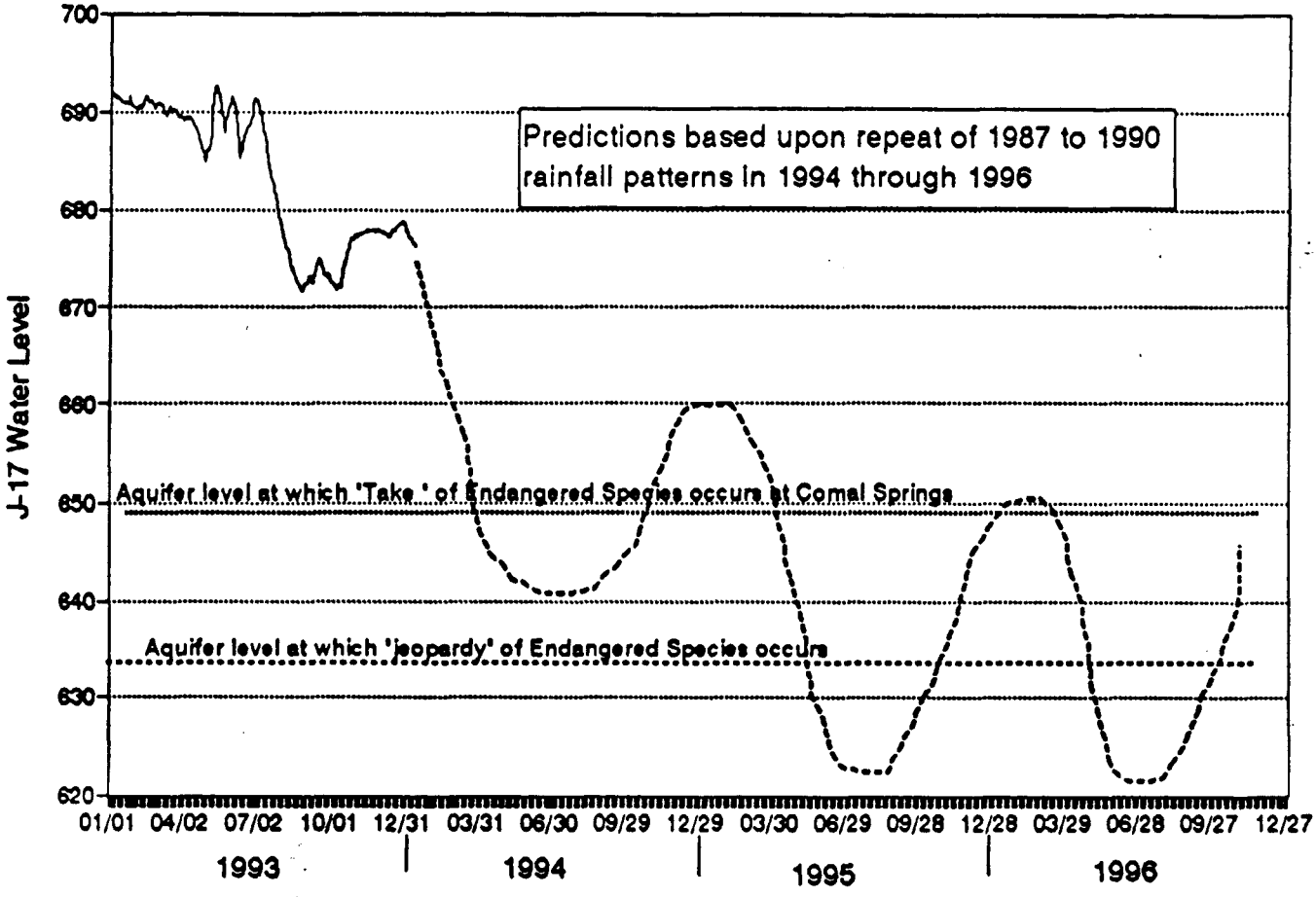
APPROVED:

Joe A. Aceves, P.E.
President/Chief Executive Officer

Historical Monthly Rainfall Compared to
1993 Monthly Rainfall



Edwards Aquifer Water Level
1987 Through 1990



Measured and Predicted Water Level
1993 Through 1996