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Citation Information

Caroom, Douglas G., "Litigation in Texas Re: The Edwards Aquifer and Water Rights" (1992). *Uncovering the Hidden Resource: Groundwater Law, Hydrology, and Policy in the 1990s (Summer Conference, June 15-17)*.

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LITIGATION IN TEXAS
RE: THE EDWARDS AQUIFER AND WATER RIGHTS

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INTRODUCTION

A summary of Texas groundwater law is necessary in order to fully appreciate the current controversies over the Edwards Aquifer.

A. Groundwater or underground water is water located under the surface of the land. The term can include percolating water, underground flow in confined channels, artesian water, and stream underflow. Groundwater is presumed to be percolating, unless proven otherwise.

Texas, unlike most other western states, has a general regulatory program for only surface water, not groundwater. In Texas, surface water is considered property of the state, while underground water is considered the property of the owner of the surface estate and treated much like a mineral or oil and gas.

B. The "Rule of Capture" prevails for the use of underground water.

(1) In Houston & T.C. Railway Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904), the Texas Supreme Court adopted the English common law rule of Acton v. Blundell, 12 M. & W. 324, 152 E.R. 1223 (Ex. 1843), that the owner of land might pump unlimited quantities of water from under his land, regardless of the impact that action might have upon his neighbor's ability to obtain water on his own land. Neither an injunction nor damages will lie to prevent such action.

(2) The Comanche Springs case, Pecos County WCID No. 1 v. Williams, 271 S.W.2d 503 (Tex. Civ. App. -- El Paso 1954, writ ref'd n.r.e.), applied the principles of the East case to the effect of groundwater uses of surface water supplies. The plaintiff, a statutory senior appropriator of surface water, complained that defendant's well had reduced springflow of Comanche Springs to such an extent that insufficient water was available for irrigation. The court ruled that the plaintiff's right to use the water attached only

after the water emerged from the ground. Prior to such emergence, the defendant could use any amount of water he chose, regardless of the impact upon others.

- (3) Groundwater need not be used on the premises of the surface estate. It may be sold for off-site use by a third party. Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273 (1927). The use of groundwater at a distant location, even though the majority may be lost in transportation, is permissible. In City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955), the Texas Supreme Court approved Corpus Christi's transportation of artesian well water 118 miles down surface watercourses to its diversion point, even though at times as much as two thirds to three fourths of the original supply was lost in transit to evaporation, seepage, and transpiration.
- (4) In the Kickapoo Springs case, Denis v. Kickapoo Land Company, 771 S.W.2d 235 (Tex. App. -- Austin 1989, writ den'd), an identifiable cavity (located 13 feet "upstream" of the spring orifice) did not qualify as an underground stream, nor did the fact that springflow made a sufficient addition to streamflow to be of benefit to downstream riparian owners.

C. Limitations and Exceptions to the General Rules on Groundwater Use.

- (1) Underflow of watercourse - "Underflow" is that portion of the flow of a surface watercourse occurring in sand and gravel deposits beneath the surface of the bed of the stream. Texas Co. v. Burkett, 117 Tex. 16, 296 S.W. 273. It is hydrologically connected to the surface flow of the stream. Underflow is considered to be property of the state and the principles governing allocation and use of surface water apply. Tex. Water Code Ann. §11.021 (Vernon Supp. 1985).
- (2) Underground streams in defined channels -- The principles discussed above (Paragraph I,B) apply to percolating underground water. Other western states have distinguished

between subterranean streams and percolating water, applying surface water principles to subterranean streams. 1 S.C. Weil, Water Rights in the Western States §1077 (3d ed. 1911). Importance of the distinction in Texas is uncertain. The rule of law for subterranean streams is not clear. No case has yet presented the issue squarely. Such a strong presumption exists, however, that groundwater is percolating water (Texas Co. v. Burkett, 117 Tex. 16, 196 S.W. 273; Pecos County WCID No. 1 v. Williams, 271 S.W.2d 503;) that the question may be largely academic.

- (3) **Artesian Water** -- Artesian water is groundwater confined under pressure by an impermeable geologic layer, capable of flowing to the surface without the necessity of pumping. Principles applicable to percolating water have been applied by Texas courts to artesian water. The only significant distinction is the existence of statutory provisions prohibiting the waste of artesian water. Texas Water Code §§11.201-11.207.
- (4) **Restrictions on pumping percolating water** -- Only two significant limitations exist on the landowner's right to capture and use percolating water. First, it cannot be done maliciously with the purpose of injuring a neighbor or amount to wanton and wilful waste of the resource. City of Corpus Christi v. City of Pleasanton, 276 S.W.2d at 801. Second, since 1978 an action for damage would lie for negligent pumping of groundwater which caused subsidence of neighboring land. Friendswood Development Co. v. Smith-Southwest Industries, Inc. , 576 S.W.2d 21, 30 (Tex. 1978).

General Overview:

The parties named by the Guadalupe-Blanco-River-Authority in their suit are itself, Texas Water Commission (TWC), Texas Parks & Wildlife Department (TPWD), and all those who own a well or who pump water from the Edwards, including municipal and industrial agencies.

The Original Petition, filed by GBRA, seeks relief through the District Court such that the State of Texas, through TWC, would regulate diversions from the Edwards in order to protect and maintain adequate flows from the Comal and San Marcos Springs. GBRA claims, for reasons to be outlined later, that the Edwards is an underground river and thus owned by the State of Texas in trust for the benefit of the public. Once the court enters declaratory judgment to that effect, GBRA further seeks an adjudication of all claims of rights to divert and use the State's water from the Edwards. This would mean that current users (pumpers) from the Edwards would no longer have valid rights under law to divert and use water, and they would have to seek the necessary rights by applying for water appropriation permits from TWC.

GBRA's stated needs for judicial action are as follows:

- (1) withdrawals from the Edwards, before the water reaches the Comal and San Marcos Springs, are massive and unregulated, and have an adverse impact on spring flows (specifically in Comal and San Marcos);
- (2) during 1984, well withdrawals reached approximately 530,000 acre-feet (173 billion gallons), and the number of wells, currently at 800, is increasing and is unregulated;
- (3) increased pumping from wells has a progressively adverse effect on the Comal & San Marcos Springs (during the worst drought of record from 1950-56, the Comal dried up

for about 5 months in 1956), and studies have shown that should past droughts recur, the Comal and San Marcos Springs could both dry up;

- (4) and finally, this interruption of natural flow from either Springs, even briefly, will cause severe environmental and economic damage in the Guadalupe River Basin.

In response to GBRA's notice of the suit, sent to all industrial and municipal well owners, over 200 defendants (including landowners, municipalities, agencies, Cities of San Antonio, Lytle, New Braunfels, Uvalde County, and several businesses) filed answers. Besides general and specific denials, defenses asserted include arguments that, as a matter of law, the Edwards has already been determined to be underground water, separation of powers, political question, taking of private property, and failure to join all necessary parties.

From a factual viewpoint, differing views on how the Edwards Aquifer should be classified (as underground water or an underground stream) depends upon the perception the parties have of the physical attributes of the Aquifer. In order for the Edwards to qualify as an underground river it must possess all the characteristics of surface watercourses. These include: well-defined banks; well-identified specific sources of supply; a well-identified specific destination; a significant current of water compared to surface watercourses; it or a portion of it must be identified as the location of a well-defined and known underground channel; and it must possess the same characteristics as a surface-water course. While GBRA contends that the Aquifer does possess these characteristics, the defendants deny the assertion, considering the Aquifer to be a rather complex underground storage reservoir.

The suit forced governmental entities to choose sides.

TWC and TPWD filed their Original Answers on 9/20/89 maintaining neutrality on the underground river issue, but giving an idea of what their responsibilities would be should the court declare Edwards Aquifer an underground river or stream. TWC volunteered to be the agency primarily responsible for implementing the court's decision and for continued regulation and supervision of the

Aquifer. TPWD volunteered to be responsible for protecting the State's fish and wildlife resources, including endangered and threatened plants and animals. Both would enforce water quality control regulations to the extent aquatic life and wildlife are affected.

It is interesting to note that at this point, TWC declares its neutrality: later it takes a much more aggressive and politically charged stance.

On 9/20/89, the Edwards Underground Water District (EUWD) intervened based on its perceived special interest regarding the conservation, protection and recharge of the Edwards Aquifer. (EUWD is a conservation and reclamation district created by the Texas Legislature in 1959 to conserve, protect and recharge the underground water-bearing formations, and to prevent waste and pollution of the underground water.) In its original answer, it denied that the Edwards Aquifer is an underground river, that it is a tributary of any river and that it is owned by the State of Texas and therefore subject to regulations by TWC.

History of the Case:

GBRA filed its Original Petition on 6/15/89. In response, several hundred well owners or effected parties answered or intervened.

On 8/17/89, the United States Army and Air Force filed a Notice of Removal, removing the GBRA suit to the US District Court for the Western District of Texas, Austin Division. A few days later, the court appointed a Special Master to this case due to its complexity and far reaching implications for water users. Agricultural interests, on 9/14/89, filed to have the case remanded to state district court. During this time, other defendants were filing their original answers. On 11/20/89, the State, in a letter to Judge Nowlin, requested that the case be remanded to state court for its stare decisis effect.

On 10/18/89, the Special Master denied all motions to have the case remanded back to the District Court. By the end of October, 1989, the trial date was set for 4/23/90.

In reversal of the Master's ruling, on 11/22/89, Judge Nowlin abstained from exercising jurisdiction, remanded the case to state court, ruled that federal immunity had been waived, and released the Special Master. He stated that the most persuasive reason for his action was "the political question". The Texas Constitution showed a commitment for its legislature to formulate policy for the State's water resources, and pursuant to this, the Texas Legislature promulgated the Texas Water Code and delegated its responsibility for managing the State's water to TWC. The Legislature also created EUWD to manage the Edwards Aquifer, and in 1988, a drought management plan was approved and adopted by EUWD with the protection of Comal and San Marcos listed as a goal. However, it stopped short of stating measures to be taken to prevent Comal from going dry, and Nowlin declared that federal court did not wish to decide a question which it seems the Texas Legislature had made at least partial provision for answering.

Judge Nowlin ordered the case remanded to state court, on Burford abstention grounds. See Burford v. Sun Oil Co., 63 S.Ct. 1098 (1943). The federal defendants had filed a motion for dismissal as defendants, on grounds of sovereign immunity; they appealed the refusal of the district court to dismiss them. Appellees argued in response that if Judge Nowlin had erred, it was in failing to have returned the case to state court on mandatory remand grounds (which would have resulted in a statutory preclusion of federal defendants' appeal), rather than on discretionary (abstention) grounds.

While the appeal was pending, the Supreme Court decided another case involving removal under similar circumstances. It held that the express terms of the removal statute did not authorize removal by federal *agencies*, but only federal officers who had been sued for actions taken by them under color of office. See Int'l Primate Protection League v. Administrators of the Tulane Educ. Fund, 111 S.Ct. 1700 (1991). Since the removal in this case was by federal defendant agencies (Army and Air Force) who had no right of removal under the statute, on August 2, 1991, the Fifth Circuit vacated Judge Nowlin's order

with instructions to remand the case to state court on mandatory (28 U.S.C. § 1446(c)) grounds for failure of subject matter jurisdiction. No action has been taken in the case since that time.

PART TWO: SIERRA CLUB V. LUJAN; CAUSE NO. MO-91-CA-069; IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, MIDLAND/ODESSA DIVISION

General Overview:

On May 17, 1991, the Sierra Club filed a complaint against Manuel Lujan, Jr. in his official capacity as Secretary, Department of the Interior, and the United States Fish and Wildlife Service. It alleges that defendants have failed to properly restrict withdrawals of water from the Edwards Aquifer in violation of the Endangered Species Act (ESA). This alleged failure leads to withdrawals at such a rate that Comal and San Marcos Springs will cease flowing entirely, or will flow at rates so inadequate that the San Marcos Gambusia, Fountain Darter, and Texas Wild Rice (all endangered species), and the San Marcos Salamander (threatened) that live at and downstream of the springs will be destroyed.

Plaintiffs request that defendants be enjoined to restrict withdrawals from the Edwards at any time the instantaneous spring flow from the Comal Springs measured at the Comal gauge is less than 350 cubic feet per second, thereby preserving endangered/threatened species at and downstream of the two springs. Plaintiffs also request that defendants be ordered to develop and implement a recovery plan as required by the ESA.

Much of the Sierra Club's initial motion is very similar to GBRA's initial motion "In Re: Adjudication of Rights to Water In the Edwards Aquifer". The Sierra Club lists five counts showing defendants' violations of the ESA by not complying with the prohibition against the taking of any listed wildlife species. The definition of "take" as per the ESA is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect, or attempt to engage in any such conduct". This can include significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential

behavioral patterns (such as breeding, feeding, sheltering). The Sierra Club alleges that defendants have failed to enforce the ESA and to ensure adequate water levels in the Edwards and natural springflows in the Comal and San Marcos Springs. Also, by failing to enforce the ESA, defendants have 'taken' endangered and threatened species. The Sierra Club claims that defendants must enforce the provision of the ESA by ensuring instantaneous natural spring flow at Comal of about 350cfs. They also claim that the Secretary of the DOI (Lujan) failed to carry out his duty to perform non-discretionary acts eg: to develop and implement recovery plans for conservation and survival of endangered and threatened species under the ESA.

The relief requested by the Sierra Club and Guadalupe-Blanco River Authority is truly mind-boggling from the viewpoint of an underground water user. The Sierra Club requests that springflow from Comal Springs be maintained at a level of 350cfs. Any springflow discharge less than this amount, the Sierra Club argues, will result in a degradation of the habitat of Fountain Darters in the vicinity of the upper springs outlets at Comal Springs. This habitat degradation amounts to a "taking" of the Fountain Darters which must be prohibited under the terms of the Act.

To put the 350cfs minimal flow into perspective, one need only recall that Comal Springs went dry during the drought of the 1950s. Thus, even the aquifer pumpage levels existing in the mid 1950s were too much of a demand on the aquifer to allow maintenance of the springflows during an extremely serious drought. Thus, if the Court grants the relief requested by the Sierra Club, total aquifer pumpage must be reduced to less than 25% of its current level.

History of the Case:

On 8/12/91, the defendants filed an answer denying such allegations. Agricultural interests filed a motion on the same date to intervene as a defendant (since any limitation on groundwater withdrawals

imposed as a result of Plaintiff's complaint would affect their farming operations). It was granted a week later. Two days later, the court issued a scheduling order setting the trial date for 12/23/91.

Other parties intervening as plaintiff included the Guadalupe-Blanco River Authority, the City of San Marcos, the City of New Braunfels and New Braunfels Utilities, and the State of Texas on behalf of the Texas Water Commission and the Texas Parks and Wildlife Department.

GBRA, even more than the Sierra Club, appears to be the motivating force behind the litigation. If not working directly with the Sierra Club, GBRA has provided at least substantial assistance, both with the notice of suit and pleadings.

New Braunfels and San Marcos, two central Texas municipalities, depend upon Comal Springs and San Marcos Springs respectively, for significant environmental, recreational and economic benefits to their communities.

Intervention by the State of Texas (TWC and TPWD) as plaintiffs was a maneuver which took many of the litigants by surprise, since the State had adopted a neutral position in the prior underground river litigation. Questions were raised as to the State's ability to participate as a plaintiff in light of the fact that it, also, had taken no action to regulate withdrawals from the Aquifer. Ultimately, Judge Bunton realigned the State as defendants in the suit. The realignment, however, appears to have made no difference in the positions being advocated by TWC and TPWD.

Intervenors on the defendant's side include agricultural interests, the City of San Antonio and San Antonio Industrial/Commerce interests. The Edwards Underground Water District has been recognized as having a neutral status and allowed to participate as an active amicus.

Early in January of 1992, defendant-intervenors' motion to dismiss the suit was filed, basically stating that the court lacked jurisdiction since the ESA does not create a remedy to redress alleged failures of the federal defendants to regulate the conduct of private parties, either through rulemaking or enforcement actions, and it does not create a remedy by which private citizens can compel the federal

defendants to perform non-discretionary acts. The federal defendants also filed a motion to dismiss on this date.

Trial, initially scheduled for December 23, 1992, was delayed in order to accommodate dismissal motions and discovery. On March 2, 1992, Judge Bunton scheduled the case for trial on May 4, 1992. Discovery and trial preparation proceeded for that goal until the Texas Water Commission, on April 15, 1992, adopted Emergency Administrative Rules declaring that the Edwards Aquifer was an underground river, subject to state regulation. Upon the basis of these rules, TWC requested a continuance of trial until after August 3, 1992. In response to this Motion, the Court has rescheduled trial for August 10, 1992.

PART THREE: TWC ADMINISTRATIVE DECLARATION OF AN UNDERGROUND RIVER, 31 TAC § 298.01, et seq. (17 Tex. Reg. 2913)

General Overview:

Throughout the Endangered Species litigation, the Texas Water Commission has worked to achieve a negotiated settlement of aquifer management issues. On April 2 of this year, TWC sent a letter to "all the parties interested in the management of the Edwards Aquifer" offering for their consideration and approval an agreement to manage the Aquifer. The groups offered an opportunity to sign-up as parties to the agreement were the City of San Antonio, EUWD, Medina Underground Water Conservation District, City of Uvalde and Uvalde County, and the Industrial Water Users Association. (A related agreement was apparently being sought with GBRA.) This agreement was intended as an interim plan until additional water could be brought on line, but represented a commitment to springflow of 100cfs at Comal for at least 80% of the time; a commitment to proceed with water conservation and reuse programs; a commitment to implement a regional drought management plan; a commitment to local implementation and enforcement of the interim plan; funding support for finally establishing the feasibility

of artificially augmenting spring flow; and support for and participation in the process of establishing a comprehensive, long-term water management plan for the south-central region of Texas. TWC demanded for this agreement to be signed by April 14th.

No one signed TWC's proposed agreement.

Therefore, on April 15, 1992, the Texas Water Commission concluded that an emergency existed requiring it to take immediate action in order to avoid federal intervention and regulation of Texas groundwater. In response to this emergency, the Texas Water Commission adopted rules declaring its conclusion that the Edwards Aquifer was an underground river and, therefore, subject to its regulatory jurisdiction as state water. In order to avoid turning all existing well owners into criminal (by virtue of their now illegal/unpermitted pumping of state water), the Water Commission temporarily authorized continued use at existing and historic levels. At the same time, however, TWC declared a moratorium on the drilling of all new wells in the Aquifer.

Litigation arising from TWC's "underground rules" is described below, to the date of writing this paper. Additional developments, and in all likelihood, additional lawsuits, will have occurred by the time of the conference.

Shortly after adoption of emergency rules, TWC proposed permit rules to govern use of water from the Edwards Underground River. TWC anticipates holding numerous hearings on these rules, prior to adopting permanent rules this summer.

TWC's proposed rules may be summarized as follows:

A. General Provisions.

- 1 The Edwards Aquifer is declared to be an underground stream and defined to be state water.
2. Since no claims were filed under the Water Rights Adjudication Act (1969 deadline), none of the existing uses of the aquifer are legal—except livestock and domestic uses.

3. Since it is state water, the needs of in-stream flow, senior water rights, and springflows may be considered (public trust doctrine) and any rights of use authorized may be subject to restrictions to satisfy these needs.
 4. Boundaries include only that portion of the Edwards east of a hydrologic divide near Brackettville in Kinney County and south of another hydrologic divide near Kyle in Hays County.
- B. Permitting Uses from the Underground River.
1. TWC is issuing new permits, not adjudicating existing rights.
 2. All permit applications received by Sept. 1, 1992, will have a priority date of Sept. 1, 1992. [i.e., if you don't file by then, your right will be junior to everyone who does.]
 3. Permits may be for a term of years or seasonal, instead of permanent. Permits will be subject to conditions requiring conservation, springflow preservation, in-stream flows, etc.
 4. Permits will generally be based upon historic use, but will require submission of a conservation plan to be approved by TWC; conservation and efficient use will be a major focus of TWC permitting and supervision. Per capita use goals and irrigation efficiency requirements will be imposed.
- C. Conveying Rights in the Underground River.
1. Contractual sales of water for 3 years or less must be filed with the Commission and approved. Permanent sales must also be filed and will present another opportunity for imposition of conservation requirements.
 2. WAGSTAFF ACT--The Wagstaff Act, as interpreted by this TWC rule, authorizes a municipality to reappropriate water previously appropriated for a lesser use without compensation. [It applies to all state water appropriations since 1931, and has never been implemented because of the legal uncertainties.]
 - (i) "Further appropriation" under the Wagstaff Act is prohibited, except as approved by TWC.
 - (ii) TWC, upon application, will authorize "further appropriation" under the Wagstaff Act for municipalities demonstrating a genuine need, lack of other alternative supply, and implementation of adequate conservation programs.
- D. Water Use Measurement and Reporting--Meters are required by December 31, 1992, with annual reports of water use during the prior calendar year to the TWC by March 1.

E. Regulation of Diversion.

1. Waste is prohibited.
2. Diversions authorized by the permit are subject to limitation or curtailment by order of TWC to maintain springflow, protect in-stream uses, protect bays and estuaries, etc.

F. Ten-Year Interim Plan.

1. Although a longer permit is authorized, the rules seem to contemplate that permits will have a ten year term.
2. Total authorized diversions under the permits issued, with the September 1, 1992, priority will be 400,000 af/yr, less anticipated domestic and livestock diversions.
3. TWC can declare an emergency (to springflow, aquatic habitat, etc.) and further limit diversions, taking into account the economic well-being of the region.

G. Local Government.

1. Upon request by a local government, TWC may delegate responsibilities under this chapter.
2. In determining how much of the 400,000 af/yr to allocate to a particular region over the river, TWC will consider the recommendations of local governmental entities.
3. TWC may set up one or more watermasters to implement these requirements.

H. Permanent Management Plan

1. An advisory council is established consisting of TWC, TPWD, TWDB, EUWCD, GBRA, SARA, NRA, and the Medina County Underground Water Conservation District.
2. It will study all the issues pertaining to aquifer management and report to TWC by September 1, 1994. TWC will review and act on recommendations by January 1, 1995.

Status of Current Litigation

On April 15, 1992, immediately prior to the Commission action adopting emergency rules, agricultural interests filed suit under the Texas Open Meetings Act to challenge the Commission action and prevent violations of the Act's provisions requiring posting of notice seven (7) days prior to action by an agency of statewide jurisdiction. McFadin, et al. v. Texas Water Commission, et al., Cause No.

92-05214; In the District Court of Travis County, Texas. The Court denied the requested injunctive relief due to the inability of named plaintiffs to demonstrate irreparable harm from the Commission's emergency rules. The lawsuit remains pending. Should the Court conclude that the agency violated the Open Meetings Act and adoption of emergency rules, they may be declared void.

The day following adoption of emergency rules by the Commission, GBRA filed suit requesting a Declaratory Judgment of the rule's validity and confirming the Aquifer's status as an underground river. Guadalupe-Blanco River Authority v. Texas Water Commission, et al.; Cause No. 92-05226; In the District Court of Travis County, Texas. Presumably in order to provide some adversity to the litigation, GBRA amended its initial pleadings to name both agricultural interests and the City of San Antonio as defendants in addition to TWC.

On May 15, 1992, the City of San Antonio and San Antonio Industrial interests each filed suit in the District Court of Travis County, Texas challenging the validity of Texas Water Commission Underground River Rules. City of San Antonio v. Texas Water Commission; Cause No. 92-07029; In the District Court of Travis County, Texas. Redland Stone Products, Inc., Southwest Research Institute, and United States Automobile Association v. Texas Water Commission; Cause No. 92-07042; In the District Court of Travis County, Texas. Additionally, Medina County has authorized suit against TWC to contest the rules.

Although not filed at the time of this writing, rumblings can be heard from Medina and Uvalde County property owners -- rumblings about clouds on title to real property and taking of private property for public use without compensation.

PART FOUR: CONCLUSION / PROSPECTS

Perhaps the only conclusion upon which all parties to the current controversies agree is that the current situation cannot continue. The litigation needs to stop, if for no other reason than the unproductive costs.

Even if the Aquifer is determined not to be an underground river, and the Endangered Species Act is determined not to best groundwater regulatory authority in the federal government, a serious problem remains. Current and foreseeable demands on the Aquifer may well exceed its supply capability. Under drought conditions, absent successful springflow augmentation or other mitigation, endangered species are likely to suffer.

If there is a "win-win" solution to Edward Aquifer problems, the parties have been unable to discover it to date. Likewise, a reasonable intermediate negotiative solution has eluded the parties to date. As the litigation continues, incentives grow to find a solution.