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Endangered Species: The Edwards Aquifer Litigation

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ENDANGERED SPECIES
The Edwards Aquifer Litigation

presented by

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**UNCOVERING THE HIDDEN RESOURCE:
GROUNDWATER LAW, HYDROLOGY AND POLICY LAW
IN THE 1990s**

**Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado**

June 15-17, 1992

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EDWARDS AQUIFER LITIGATION

I. BACKGROUND OF WATER ISSUES AND EDWARDS AQUIFER

A. Description of Edwards

1. Edwards underlies portions of eight Texas counties: Atascosa, Bexar, Comal, Guadalupe, Hays, Kinney, Medina and Uvalde
2. Approximately 175 miles long
3. Edwards ecosystems because of Balcones Fault Zone and its limestone and dolomite composition
 - a. Distinguish Western and Eastern portions of Edwards
4. Springs which are natural surface outlets for the Edwards are located on major faults. Comal Springs and San Marcos Springs are the major outflows for Edwards. Landa Lake overlies the Comal Springs and Spring Lake overlies the San Marcos Springs.
5. Edwards is home to one of the most diverse subterranean aquatic ecosystems in the world: snails, worms, beetles, crustaceans, salamanders, darters and catfish

B. TWC attempts to solve water issues - Late John Birdwell's committee

C. Texas Legislature's attempt to solve water issue - Special Committee on Edwards Aquifer

1. 71 and 72 Legislative Sessions

II. ENDANGERED AND THREATENED SPECIES

- A. Fountain Darter (*Etheostoma fonticola*), lives in Comal and San Marcos Springs
- B. San Marcos Gambusia (*Gambusia georgei*), lives in San Marcos River downstream of Spring Lake
- C. Texas Wild-rice (*Zizania texana*), found in segment of San Marcos River downstream of Spring Lake
- D. San Marcos Salamander (*Eurycea nana*), Threatened Species, found at natural spring openings of Comal and San Marcos Springs

- E. Texas Blind Salamander (*Typhlomolge rathbuni*), found in Edwards.
- F. Three new species which are being considered for listing

III. CRITICAL HABITAT & SAN MARCOS RECOVERY PLAN

- A. Natural spring openings of the Comal Springs, Landa Lake, and Comal River downstream of Landa Lake to its confluence with the Guadalupe River all flowing with adequate continuous flows of thermally constant, clear, clean water from the Edwards
- B. Natural spring openings of San Marcos Springs, Spring Lake, and the San Marcos River downstream of Spring Lake to its confluence with Blanco River all flowing with adequate continuous flows of thermally constant, clear, clean water from the Edwards
- C. A relatively small segment of the Edwards near San Marcos Springs
 - 1. area outside the geographical area occupied by ES/TS that are essential for conservation of species are also considered critical habitats under ESA
- D. San Marcos Recovery Plan

IV. SIERRA CLUB V. LUJAN

- A. Sierra Club, pursuant to 16 U.S.C. § 1540(g)(2), filed notice of violations of ESA on April 12, 1990
- B. COUNT I - §1538(a)(1)(B), 1540(e)(1)
 - 1. 1540(e)(1) requires Secretary to enforce ESA
 - a. Secretary has failed to enforce ESA
 - 2. 1538(a)(1)(B) prohibits taking (harm/harass 50 CFR 17.3)
 - a. If water level in Edwards drops and springs cease to flow or have inadequate flow to sustain the species, taking occurs.
 - b. Secretary has allowed taking by not ensuring adequate water level in Edwards.
 - 3. Court should order Secretary to ensure flow of 350 cfs.

- C. COUNT II - 1538(a)(1)(B), (G) & 1540(e)(1) & 50 CFR 17.21(c), 17.31(a)
1. 1538(a)(1)(G) prohibits violating regulations promulgated by Secretary
 2. 17.21(c), 17.31(a) prohibit taking
 - a. drop in water level constitutes taking
 - b. Secretary has failed to prevent water level from dropping
 - c. Secretary violated 1538(a)(1)(G) by allowing taking in violation of these regulations
 3. Secretary has taken Endangered/Threatened Species by failure to enforce ESA
 4. Court should order Secretary to ensure flow of 350 cfps.
- D. COUNT III - 1538(a)(2)(B) & 1540(e)(1)
1. 1538(a)(2)(B) prohibits removing and damaging and destruction of species
 - a. Secretary's failure to enforce ESA amounts to removal, damage, and destruction of Texas Wild-Rice.
- E. COUNT IV - 1533(f) & 1540(g)(1)(c)
1. 1540(g)(1)(c) allows individuals to sue Secretary for not performing Non-discretionary duty
 - a. Secretary has failed to implement San Marcos Plan
 - b. Secretary has failed to develop recovery plan for Fountain Darter & S. Marcos Salamander living in Comal Spg.
 - c. Secretary has fail to develop recovery plan to Texas Blind Salamander living in Edwards Aquifer
 2. 1533(f) Secretary's Non-discretionary duty is to Develop & Implement Recovery Plan for conservation of species.
 3. Court should order Secretary to:
 - a. Implement San Marcos Recovery Plan
 - b. Develop & Implement recovery plan for Fountain Darter & S. Marcos Salamander (Comal Spg)
 - c. Develop & Implement recovery plan for Texas Blind Salamander (Edwards)

F. COUNT V - 1533(d) & 1540(g)(1)(c)

1. 1540(g)(1)(c)
2. 1533(d) requires Secretary to issue regulations necessary that will conserve (defined in 1532(3)) species.
 - a. Secretary has failed to issue regulations necessary to conserve San Marcos Salamanders (in Comal Spg.)
 - (1) Secretary has failed to regulate springflow
 - b. Secretary has failed to issue regulations necessary to conserve Texas Blind Salamander (in Edwards)
3. Court should order Secretary to issue regulations necessary for conservation of San Marcos Salamander and Texas Blind Salamander.

G. Lujan's Affirmative Defenses

1. Court lacks subject matter jurisdiction
2. Plaintiff fails to join all necessary and indispensable parties
3. Plaintiff lacks standing
4. Plaintiff fails to state a claim for which relief may be granted

H. Intervenors and Proposed Intervenors

1. Intervenor-Plaintiffs
 - a. Guadalupe-Blanco River Authority (GBRA)
 - b. State of Texas
 - c. Thelma Area Neighborhood Corporation (TANC)
 - d. City of San Marcos
 - e. City of New Braunfels
 - f. Green Valley Water Supply Corporation and Atascosa Rural Water Supply Corporations
 - g. Bexar Metropolitan Water District
2. Intervenor-Defendants
 - a. McFadin Et. Al.
 - b. Union Carbide Chemicals and Plastics Inc., Occidental Chemical Corp., EI DuPont de Nemours and Co., Inc., Central Power & Light Co., the Carbon/Graphite Group, Inc. and BP Chemicals
 - c. Living Waters (Catfish farm)

- d. City of San Antonio
- e. United Services Automobile Association (USAA), USAA Real Estate Products Co., Redland Stone Products Co., Southwest Research Institute, Southwest Foundation for Biomedical Research
- f. San Antonio Builders Association
- g. Edwards Underground Water District

I. Issues Suit Raises

1. Whether ESA can be used to regulate private property that is also habitat for endangered species?
2. Discretionary v. non-discretionary duty of federal government to enforce ESA.
3. Whether federal district court can weigh equities (e.g., economic effects) under ESA citizens enforcement suit?
4. Public interest exception to Fed. R. Civ. P. 19 requirements.

V. QUESTIONS

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