

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
MIDLAND-ODESSA DIVISION

**FILED**  
MAY 26 1993  
CHARLES W. VAGNER, Clerk  
By *SM* 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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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

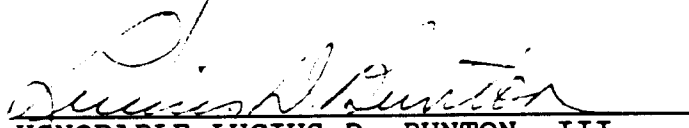
state law or because of inadequacy of the State's implementation under that law.

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 20<sup>th</sup> day of May, 1993.

  
HONORABLE LUCIUS D. BUNTON, III  
SENIOR DISTRICT JUDGE