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RICHARD W. MIERING
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,
et al.

No. C 00-00927 WHA

Plaintiffs,

v.

**ORDER FINDING DEFENDANT
BUREAU OF LAND MANAGEMENT IN
VIOLATION OF CONSENT DECREE**

BUREAU OF LAND MANAGEMENT,

Defendant,

and,

DESERT VIPERS MOTORCYCLE CLUB,
et al.,

Defendant-Intervenors.

INTRODUCTION

This order finds the Bureau of Land Management in violation of the consent decree protecting the desert tortoise that was approved herein on January 29, 2001. Pending further efforts at compliance, the Court will not find the BLM in contempt at this time. The order elaborates on the findings and rulings made in open court on May 3, 2001.

STATEMENT

On January 26, 2001, plaintiffs Center for Biological Diversity, Sierra Club, and Public Employees for Environmental Responsibility, and defendant the Bureau of Land Management petitioned the Court to approve a stipulated consent decree. The consent decree was a partial

1 settlement of a lawsuit brought to enforce the Endangered Species Act, 16 U.S.C. 1531 et seq.
2 Plaintiffs had alleged, *inter alia*, that the BLM had not consulted with the Fish and Wildlife
3 Service as required by the ESA and that without the benefit of the FWS's opinion, the BLM had
4 permitted grazing activities within the California desert that were a threat to the continued
5 existence of the desert tortoise, an endangered species. Plaintiffs sought to enjoin all livestock
6 grazing in desert-tortoise habitat until the BLM finished consulting with the FWS, as required.

7 Plaintiffs withdrew their motion for an injunction before it was heard, however, pursuant
8 to an agreement with the BLM. In exchange, the BLM agreed to be bound by the consent
9 decree at issue here. It required the BLM to implement various measures to protect the desert
10 tortoise.

11 At the same hearing, a cattle rancher, Dave Fisher, sought a temporary restraining order
12 to prevent the implementation of closures required by the proposed consent decree. The decree
13 was phrased in the imperative, stating for instance, that the BLM "shall not authorize grazing"
14 in specified areas, and it set forth deadlines for compliance (e.g., Desert Tortoise Consent
15 Decree ¶ B(ii)(c)). He feared that the conditions of his grazing permit would be modified
16 without him having any opportunity to be heard. Other objectors present at the hearing shared
17 his fears. In response to these concerns, counsel for the BLM explained: "the way this was
18 negotiated, there was a term we insisted upon that the grazers maintain their appeal right"
19 (Tr. of Hearing on Jan. 26, 2001, at 15). While the decree did not mention third-party rights on
20 its face, counsel for both sides confirmed that the final consent decree in this action would have
21 a "catch-all savings clause," which would guarantee the due-process rights of third-parties, and
22 that this provision would apply to the Desert Tortoise Consent Decree (Tr. 23).

23 The parties explained the grazing restrictions required by the proposed consent decree
24 would be implemented as follows (Tr. 20-22):

25 Ms. Russell [BLM]: There are two types of decisions that the
26 Bureau can make. It can make a decision that goes out, and
27 there's a period of time before it goes into effect. And an appeal
happens first.

28 When the Bureau decides to take an emergency action, it goes
into effect immediately, and then the party can file an appeal. In

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filing that appeal is when the party would ask the administrative review board for a stay.

You know, unlike some decisions that aren't effective for some certain period of days, this one goes into effect now, but the party still has the right to seek, seek a stay, even though this is what's called a "full force and effect" action.

The Court: But — all right. I don't understand what Mr. Cummings is trying to say is the caveat.

Mr. Cummings [plaintiffs]: There is no caveat. The clarification of what my understanding of what Mr. Fisher's counsel stated was that they expected the administrative process where there would be a period to comment before it took full force and effect. Our understanding is that BLM will act under other administrative processes.

The Court: You mean the emergency?

Mr. Cummings: Yes.

The Court: All right. Well, it would be up to the administrative law judge to determine whether or not the invocation of the emergency powers was proper.

Mr. Cummings: Correct.

Ms. Russell: Absolutely.

Plaintiffs further explained how the provision protecting third-party rights was consistent with the consent decree's mandatory language (Tr. 19-20):

This stipulation commits the BLM to taking these acts. Those acts are appealable. If the IBLA [the administrative appeals board] rules that those acts by the BLM are arbitrary and capricious, the BLM will ask the Court to modify that. They will come to us, and we will try to renegotiate the settlement or the terms and conditions of that. . . . So we negotiated to find measures that BLM could take so that both parties, plaintiffs and BLM, would survive an IBLA review and to provide adequate protection for the tortoise.

Subsequently, in response to the Court's concerns, the BLM explained that the acts required by the decree were within the BLM's statutory powers (Tr. 56-57):

The Court: Is there any part of this settlement that the agency is not authorized to do, absent this litigation?

Ms. Russell: Not to my knowledge, your honor. Every restriction on a permit or every fence, or anything else that will be done is within the agency's authority to manage its land, including its grazing allotment.

1 The Court: All right. Is there any part of this settlement that the
2 agency could only do after going through the public hearing and
public opportunity to comment process?

3 Ms. Russell: No, your honor, because the agency maintains its
4 emergency authority to do notice and comment after issuing a full
force and effect decision.

5 The Court: All right. But you're proposing that you're going to
6 go through and do this on an emergency basis?

7 Ms. Russell: Right. . . . The only thing I want to add so as not to
8 mislead the Court, is for structural things that might have to be
built, we might have to go through a National Environmental
Policy Act Analysis.

9 In its opposition to the objections to the approval of the consent decree, the BLM also stated
10 that implementing the closures mandated by the consent decree within the time frame allotted
11 was within its power (Joint Opp. to Objections to Stipulation Concerning Grazing in Desert
12 Tortoise Habitat, dated Jan. 16, 2001, at 12):

13 Under its grazing regulations, BLM has the authority to close
14 allotments or portions of allotments when resources on public
lands require immediate protection. 43 C.F.R. 4110.3-3(b).
15 Furthermore, "[n]otices of closure and decisions requiring
16 modification of authorized grazing use may be issued as final
17 decisions effective upon issuance or on the date specified in the
18 decision." 43 C.F.R. 4110.3-3(b). In this case, BLM has agreed
that until it has completed consultation with FWS, certain
19 closures are necessary to provide immediate protection to the
desert tortoise at the level mandated by the ESA.

20 Under normal circumstances, the BLM must allow public notice and comment before
21 issuing grazing decisions. Under one of its regulations, however, it may it may issue decisions
22 that take effect immediately. The foregoing references to the BLM's "emergency authority"
23 and to "decisions effective upon issuance," refer to this regulation, 43 C.F.R. 4110.3-3(b). It
provides in part:

24 When the authorized officer determines that the soil, vegetation,
25 or other resources on the public lands require immediate
protection because of conditions such as drought, fire, flood,
26 insect infestation, or when continued grazing use poses an
imminent likelihood of significant resource damage, after
27 consultation with, or a reasonable attempt to consult with,
affected permittees or lessees, the interested public, and the State
28 having lands or responsible for managing resources within the
area, the authorized officer shall close allotments or portions of
allotments to grazing by any kind of livestock or modify
authorized grazing use. . . .

1 Based on the submissions and representations of the parties, the Desert Tortoise Consent Decree
2 was approved without modification on January 29, 2001. The order approving the decree
3 noted: "This settlement and consent order will not and may not be asserted as legal authority
4 for any agency action over and above the BLM's existing statutory authority" (Order
5 Approving Consent Decree, dated Jan. 29, 2001, at 2).

6 * * *

7 Two provisions of the consent decree are presently at issue. Section 2(j) of the consent
8 decree requires that the BLM:

9 Shall not authorize grazing in 285,381 acres of tortoise critical
10 habitat from March 1 through June 15 and from September 7
through November 7 in the following five allotments:

- 11 (1) Cronese Lake 18,000 acres
- 12 (2) Harper Dry Lake 16,482 acres
- 13 (3) Ord Mountain 54,000 acres
- (4) Valley Wells 88,879 acres
- 14 (5) Lazy Daisy 108,020 acres

14 Section 2(l) of the stipulation requires that the BLM:

15 Shall not authorize grazing in 213,281 acres of non-critical
16 tortoise habitat from March 1 through June 15 and from
September 7 through November 7 in the following six allotments:

- 17 (1) Cady Mountains 88,320 acres
- 18 (2) Rattlesnake Canyon 6,600 acres
- (3) Rudnick Common 31,000 acres
- 19 (4) Horsethief Springs 47,581 acres
- (5) Walker Pass 32,100 acres
- 20 (6) Pahump Valley 7,680 acres

21 Both sides agree that the scheduled dates for these closures were important. "The time periods
22 agreed upon by the parties are the two seasons in which tortoises are primarily above ground"
23 (Opp. at 3). According to plaintiffs' experts, during these times, desert tortoises compete with
24 cattle for food, and grazing is particularly detrimental, especially to neonate tortoises (Connor
25 Decl. ¶¶ 15-16; Morafka Decl. ¶¶ 8B, 10).

26 On March 20, twenty days after the BLM was required to implement the closures,
27 Richard Crowe, a liaison from the BLM, wrote to plaintiffs to inform them of the BLM's
28 compliance with the decree. In response to the question "Are cattle on/off the target exclusion
areas of the following grazing leases," he wrote the word "No" next to the entries for Cronese

1 Lake, Harper Lake, Ord Mountain, Valley Wells, and Lazy Daisy (Cummings Decl., Exh. A).
2 The letter additionally reported that cattle were not off Cady Mountains, Rattlesnake Canyon,
3 Horsethief Springs, and Walker Pass, but were off Pahrump Valley and Rudnick Common. The
4 BLM does not dispute that it has failed to implement the closures required by the consent
5 decree (Opp. at 11, 12).

6 According to Tim Salt, the BLM's District Manager in charge of managing the areas
7 implicated in the consent decree, "immediately" after the hearing on January 26 (it is unclear on
8 what date), BLM representatives and counsel met with plaintiffs' representatives and counsel.
9 Mr. Salt "specifically discussed" his concern "that certain deadlines in the settlement agreement
10 might not be met depending upon the specific circumstances of the proposed closure action. In
11 addition, we discussed that it was unlikely that BLM could justify making grazing decisions
12 effective upon issuance . . . and that the issuance of proposed grazing decisions would make it
13 difficult to meet the deadlines in the settlement agreement" (Salt Decl. ¶ 5b).

14 According to Larry Morgan, the BLM's Range Program Leader in charge of oversight
15 of grazing management and administration, "after the hearing on January 26, 2001, we met with
16 plaintiffs and counsel in the cafeteria located on the second floor of the federal building in San
17 Francisco and discussed the statements made by the Court, the need for BLM to follow all
18 applicable regulations in implementing the proposed grazing decisions and its inability to use
19 the Court's approval of the stipulation as authority for the decisions. We discussed with
20 plaintiffs and counsel whether the fact that we had agreed to the stipulated dates was enough to
21 justify an emergency. We also discussed with them that in the absence of an emergency
22 proposed grazing decisions would be required" (Morgan Decl. ¶ 9a).

23 According to Daniel Patterson, the member of the Center for Biological Diversity in
24 charge of issues relating to the California desert, he met with Mr. Salt, Mr. Morgan,
25 Ms. Russell, and others after the hearing on January 26. "At this meeting, BLM did not indicate
26 that it would be unable to comply with the terms of the agreement. BLM did indicate that the
27 settlement agreement would present an increased workload for BLM staff and that they might
28 want to revisit some of the dates in the various stipulations. We indicated to BLM that we

1 would be flexible on certain other dates but that we expected BLM would do whatever needed
2 to be done over the subsequent five weeks to implement the grazing closures on time"
3 (Patterson Decl. ¶ 6).

4 On February 6, BLM staff from Washington D.C., and the state and district BLM offices
5 for California and others met to discuss implementing the consent decree. According to
6 Mr. Salt, they "discussed what would constitute an emergency situation justifying final
7 decisions effective upon issuance. . . . Based upon the factors known about the condition of the
8 range, and the existence of the BOs [earlier biological opinions from the FWS], we determined
9 that there was no emergency situation requiring the issuance of 'full force and effect' decisions,
10 and that BLM would proceed with the issuance of proposed decisions with a NEPA analysis"
11 (Salt Decl. ¶ 5d). At the meeting, the BLM concluded: "In light of the fact that the grazing
12 program has been conducted in compliance with the terms and conditions of approved BOs for
13 over ten years, and based upon current rainfall information which led us to anticipate a better
14 than average forage production year, no information indicated that continued grazing use would
15 pose 'an imminent likelihood of significant resource damage.' Since BLM could not conclude
16 that an emergency situation warranting full force and effect decisions existed, it determined that
17 proposed decisions would be issued" (*id.* ¶ 5e).

18 Under BLM regulations, decisions issued through the "proposed decision" process are
19 subject to the following procedures. First, the proposed decision must be served on affected
20 parties. 43 C.F.R. 4160.1(a). Any member of the public may protest the proposed decision
21 within 15 days. *Ibid.* The BLM must consider all protests before issuing its final decision.
22 43 C.F.R. 4160.3(b). There is no prescribed time period for how long the BLM may take to
23 consider the protests. The proposed decision then becomes a final decision. A final decision
24 may be stayed if an appeal is filed within 30 days. 43 C.F.R. 4160.3(c). The Office of Hearings
25 and Appeals then rules on the appeal. In addition to the foregoing regime, proposed decisions
26 must comply with the National Environmental Policy Act, 42 U.S.C. 4321 et seq. This requires
27 the BLM to conduct an environmental assessment ("EA"). An EA is a study of the
28

1 environmental impact of a proposed activity and alternatives to the activity. In controversial
2 cases, the BLM allows for public comment on the EA.

3 On February 20, eight days before the closures mandated by the consent decree were
4 required to go into effect, Mr. Morgan met with BLM staff to begin preparing an EA analyzing
5 the effects of the closures required by the consent decree. According to Mr. Morgan, normally
6 an EA as complex as this one takes about two to three months (Morgan Decl. ¶ 10).

7 According to Mr. Salt, he spoke with Mr. Patterson several times after the hearing, but
8 he does not remember the dates (Salt Decl. ¶ 8). During these conversations, he informed
9 Mr. Patterson "that the BLM could not justify an emergency situation or the issuance of 'full
10 force and effect' grazing decisions, and that we would require sufficient time to satisfy the
11 requirements of NEPA before issuing the grazing decisions" (*ibid.*).

12 Mr. Patterson, on the other hand, states, "No BLM person ever gave me a definitive
13 answer as to whether BLM would meet the March 1st deadline. Mr. Salt indicated on several
14 occasions indicated [sic] that he felt 'uncomfortable' issuing full force and effect decisions, but
15 prior to March 1 he never indicated that BLM would not meet that deadline. Again, no BLM
16 person ever indicated that BLM would not comply with the agreement and BLM never
17 contacted Plaintiffs under the terms of the settlement agreement to 're-negotiate' any of the
18 applicable dates. On several occasions I requested that BLM put in writing what their
19 intentions were with the grazing settlement. . . . On March 17, 2001, I saw Tim Salt in person
20 at the Desert Tortoise Symposium in Tucson. We talked, and that was the first time BLM
21 explicitly informed me that they were not going to actually institute a Spring closure but were
22 instead going to issue proposed decisions. Finally, on March 19 Dick Crowe e-mailed me a
23 memo confirming that BLM knew cattle were on the protected areas and they had not been
24 monitoring the agreement because 'proposed grazing decisions' had not been issued" (Patterson
25 Decl. ¶¶ 8-9).

26 Negotiations between the parties broke down, and plaintiffs filed the present motion to
27 hold the government in contempt on March 29. After it finished preparing the EA, the BLM
28 issued its proposed decision for public comment on April 9.

ANALYSIS

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2 "The moving party has the burden of showing by clear and convincing evidence that the
3 contemnors violated a specific and definite order of the court. The burden then shifts to the
4 contemnors to demonstrate why they were unable to comply." *Stone v. City and County of San*
5 *Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992). Based on the affidavit and letter submitted
6 by plaintiffs and the BLM's own admissions (e.g., Opp. at 11), it is clear that the BLM has not
7 timely implemented several of the closures mandated by the consent decree.

8 The BLM argues that it has made all the efforts required by the consent decree and that
9 a defendant may not be held in contempt if it has "performed all reasonable steps within [its]
10 power to insure compliance with the court's orders." *Stone*, 968 F.2d at 856. The BLM
11 contends that the order approving the consent decree imposed a new and unforeseen condition
12 that required the BLM to make a finding as to whether it could issue a full-force-and-effect
13 decision. It was unable to make such a finding, it argues, and was therefore required to institute
14 the lengthier "proposed decision" procedures. It contends that it has expedited the proposed
15 decision process as much as possible.

16 The BLM's current position, however, directly contradicts numerous representations it
17 made to convince this Court that the proposed consent decree should be approved and promises
18 it made to plaintiffs in order to induce them to withdraw their motion for an injunction. Both
19 provisions of the consent decree at issue state that the BLM "shall not authorize grazing" in the
20 identified allotments "from March 1 to June 15." The BLM knew that this mandatory language
21 required it to implement the required closures through its full-force-and-effect authority,
22 because at the hearing on the approval of the consent decree, the BLM explained this to the
23 Court (Tr. 56-57):

24 The Court: All right, but you're proposing that you're going to go
25 through and do this on an emergency basis?

26 Ms. Russell: Right.

27 The BLM now claims that it did not anticipate having to make factual findings to
28 support issuing a full-force-and-effect decision, and that it was unable to make such findings.
At the hearing on the approval of the consent decree, however, the BLM represented that it had

1 a factual basis for making a full-force-and-effect decision. When asked if the full-force-and-
2 effect-closures required by the consent decree were within its statutory powers, the BLM stated
3 that they were (Tr. 56):

4 The Court: Is there any part of this settlement that the agency
5 could only do after going through the public hearings and public
opportunity to comment processes?

6 Ms. Russell: No, your honor, because the agency retains its
7 emergency authority to do notice and comment after issuing a full
force and effect decision.

8 For a full-force-and-effect decision to be within the BLM's statutory authority, the BLM would
9 necessarily have to believe that it could substantiate that either a resource needed "immediate
10 protection" or that continued grazing posed an "imminent likelihood of significant resource
11 damage."

12 The BLM knew that the full-force-and-effect decisions that it planned would be
13 challenged at administrative hearings, and it flatly told the Court that it had a factual basis to
14 support them (Tr. 16-17):

15 The Court: But I want to make one thing clear: you would not be
16 arguing to the administrative law judge, "the judge out there in
San Francisco has already blessed all of this, so you should give
17 deference to it?"

18 Ms. Russell: No, we would argue in the administrative hearing
19 the facts, why we think that these measures are important and
20 necessary to protect the tortoise.

21 The BLM's moving papers further demonstrate that it believed it had made the findings
22 necessary to implement full-force-and-effect closures (Joint Opp. to Objections to Stipulation
Concerning Grazing in Desert Tortoise Habitat, dated Jan. 16, 2001, at 12):

23 Under its grazing regulations, BLM has the authority to close
24 allotments or portions of allotments when resources on public
lands require immediate protection. . . . *In this case, BLM has*
25 *agreed that until it has completed consultation with FWS, certain*
closures are necessary to provide immediate protection to the
desert tortoise at the level mandated by the ESA.

26 (emphasis added).

27 Simply put, the January 29 order did not require the BLM to make any findings beyond
28 the ones that the BLM represented, in open court and in its filings, that it had already made or

1 was already prepared to make. The January 29 order does not extenuate the BLM's
2 noncompliance with the clear terms of the consent decree, because this order did not modify the
3 consent decree. Rather, the order approving the decree was issued based on the BLM's
4 representations that it could comply within the parameters of the law. At the hearing on
5 plaintiffs' motion to find the BLM in violation of the consent decree, the BLM conceded that its
6 refusal to implement full-force-and-effect decisions was not based on newly discovered
7 information. While counsel attempted to take the blame for the BLM's prior representations
8 that it could issue full-force-and-effect decisions, the BLM is bound by the consent decree to
9 which it agreed. There is nothing in the record justifying the BLM's complete about-face from
10 the position it adopted in order to gain approval of the consent decree, i.e., that full-force-and-
11 effect closures were factually supported and thus it could meet the deadlines set forth in the
12 consent decree. Under such circumstances, the BLM has no excuse for its failure to comply.

13 The BLM also argues that Paragraph 9 of the consent decree allows noncompliance in
14 unforeseen circumstances. This paragraph reads:

15 Plaintiffs and BLM agree that the terms of the Stipulation are
16 enforceable. BLM represents that it intends to make every effort
17 to comply with its terms in good faith. If, however, through
18 unforeseen circumstances, events should change after the
19 agreement is executed, BLM will notify the Plaintiffs as soon as
20 reasonably possible of the change and the reason therefore. The
21 parties agree to work reasonably toward a mutually acceptable
22 solution. If the parties are unable to agree, Plaintiffs reserves
23 [sic] the right to renew its motion for injunctive relief with regard
24 to the allotment in question.

25 According to the BLM, two unforeseen circumstances occurred. First, the BLM claims that the
26 timing requirements in the consent decree were based on its expectation that the consent decree
27 would be entered on December 19, 2000, after it was submitted, rather than on January 29,
28 2001, after a public hearing (Opp. at 11). Given the number of objectors in this case, this
expectation was at best unreasonable. It is further belied by the proposed order setting a
hearing for the approval of the stipulated consent decree at issue, which was filed by the BLM
on December 26, 2001, concurrently with the consent decree. This proposed order set the
hearing date for approval of the consent decree on January 25, 2001. This excuse is entirely
unavailing.

1 The BLM has offered to attempt to meet with plaintiffs to come up with a plan to bring
2 the BLM into compliance. A status conference is hereby scheduled for May 17, 2001, at 11
3 a.m., where the issue of the BLM's future compliance will be addressed.
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5 **IT IS SO ORDERED.**
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7 Dated: March 7, 2001.


8 WILLIAM ALSUP
9 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Northern District of California
May 7, 2001

dt

* * CERTIFICATE OF SERVICE * *

* Case Number: 3:00-cv-00927

Center for Biologica

vs

Bureau of Land Mgmt

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 7, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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