

THE RECORDER

117TH YEAR NO. 10

www.callaw.com

WEDNESDAY, JANUARY 15, 1993

ALM

TORTOISE'S RACE AGAINST TIME

If the state can't acquire a proposed dump site by inauguration day, it may never make the deal. The lawyers trying to protect the threatened desert tortoise know it.

By Todd Woody

RECORDER STAFF WRITER

Environmentalists are betting on the imperiled desert tortoise to beat a harried Wilson administration in its race to acquire land for a radioactive waste dump before Inauguration Day.

Fearing that the Clinton administration might scuttle the sale of federal land in the Southern California desert, the governor last week appealed to Interior Secretary Manuel Lujan Jr. to approve the transfer immediately. Lujan did so on Jan. 7, and U.S. Ecology, the prospective dump operator, wired a \$500,000 payment to Washington, D.C. But the next day, environmentalists -- arguing that the secretary had violated the Endangered Species Act -- obtained a temporary restraining order from U.S. District Judge Marilyn Hall Patel halting the transfer.

Patel scheduled a hearing on a preliminary injunction for Tuesday, which would leave the Bush administration less than 24 hours to complete the sale if she denies the injunction. But environmentalists already have asked to delay the hearing. The judge could respond today, and if she agrees, her ultimate ruling could be academic: By then Bruce Babbitt, the former Arizona governor and environmentalist, will be interior secretary and will review the sale.

In *Tortoise v. Lujan*, C-93-0114, plaintiffs' attorneys Hannah Bentley and Michael Lozeau wrote that Lujan's approval of the transfer "is entirely arbitrary and capricious and serves as a thin veil of the secretary's political motivations to transfer this land prior to handing over his authority to a new administration."

Environmentalists contend the sale would harm the threatened tortoise, whose Mojave Desert home includes the Ward Valley dump

site in San Bernardino County. Although state and federal biologists have listed the area as highly significant, Lujan has failed to fulfill the law's requirement that he identify critical tortoise habitat, according to the suit.

Such a designation would bar development of any project in the area without extensive federal review and approval. Environmentalists, local residents and some state officials long have opposed California's first low-level radioactive waste facility, fearing it could threaten the nearby Colorado River and expose the state to astronomical liability. Proponents, noting that federal law required that the dump be in operation by Jan. 1 to serve four states, contend that extensive studies prove the site is safe and argue that the failure to open the dump will cripple California's biotechnology industry, medical research efforts and companies that dispose of radioactive waste.

Assistant U.S. Attorney Patrick Bupara did not return phone calls seeking comment.

Attorneys for U.S. Ecology say Lujan's authority to make the transfer is clear. "Assuming there has been a failure by the secretary to designate critical habitat, that failure alone doesn't prohibit the secretary from undertaking land transfers," says Karl Lytz, a San Diego partner at Los Angeles' Latham & Watkins, adding that U.S. Ecology has designed measures to mitigate against the loss of tortoises.

"If the secretary of Interior, which controls about two-thirds of the Mojave tortoise area, were unable to make land decisions, projects all over the Southwest would grind to a halt," he said.

Under state law, California must own the site before a license can be issued to U.S. Ecology. A dispute over licensing U.S. Ecology has raged for years and currently is be-

fore a state appellate court.

BEAT THE CLOCK

The restraining order will expire on the last day of the Bush administration, prompting a high-stakes game of beat the clock. Today, Patel will consider the environmentalists' motion to delay Tuesday's hearing on the preliminary injunction. Her decision could determine whether the project proceeds or becomes bogged down in a fight over the endangered species law that could affect development throughout the Southwest.

Lytz says the environmentalists are playing politics with the endangered species law.

"Plaintiffs . . . now seek at the eleventh hour to restrain the secretary from fulfilling his legal obligation to transfer the land," Lytz wrote in a motion to intervene. "This thinly veiled attempt to preclude the secretary's action in the hope that a new secretary under a new administration will make a different determination which would prevent the facility from ever being built should not be condoned by this court."

If Patel does stick to Tuesday's hearing and then rules against the environmentalists, the government must complete the transfer in the remaining hours of the Bush administration. "I think it's clearly possible for that to happen," Lytz says.

But the motion to intervene -- filed by U.S. Ecology, along with a radioactive materials trade group and a cancer patients organization -- could backfire, according to attorneys representing the Bay Area Nuclear Waste Coalition, Desert Citizens Against Pollution, Don't Waste California and Abalone Alliance.

If Patel lets U.S. Ecology and the other groups join the suit, she might have reason to extend the restraining order into the Clinton administration so that she can consider the

parties' position, according to plaintiffs attorney Bentley, who like Lozeau is a San Francisco solo practitioner.

Says Lytz: "Hopefully that won't happen, but I'm just not going to answer that question."

Beyond the politics of the dump, the case offers a preview of what is shaping up to be a major endangered-species battle as ranchers, miners and others resist land-use restrictions designed to

protect the tortoise.

The federal government listed the desert tortoise as threatened in 1990 but has missed the two-year statutory deadline to designate the tortoise's critical habitat. Environmentalists not involved in the dump case have informed the government of their intent to sue to compel compliance with the law.

A 1990 report by the California Department of Fish and Game opposed the

use of Ward Valley for a dump site, characterizing the area as part of a tortoise habitat of worldwide significance. A 1990 study by the U.S. Fish and Wildlife Service concluded that the dump would not jeopardize the tortoise's existence but opposed the site. The impact on such high-quality habitat would violate the government's legal obligation to conserve listed species, according to the report.

HANNAH BENTLEY, ESQ.
1500 ROSECRANS AVE., SUITE 500
MANHATTAN BEACH, CA 90266
310-697-3996 OFFICE
310-706-4078 OFFICE FAX
310-496-1591 EFAX
BENTLEY.ESQUIRE@YAHOO.COM