

September 6, 2001

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Re: Position on CCC Meetings in Barstow

Dear Erica, Temi & Lisa:

Thank you for your letter of August 31, 2001. You asked for more information on the Center's position concerning Judge Sweitzer's decision and the CCC meetings in Barstow. I write to provide such information and also to further exhaust the Center's obligation under the Consent Decree to attempt to negotiate disputes in good faith before seeking court enforcement.

Judge Sweitzer's Decision:

As we have previously discussed, the Center believes it is possible for the BLM to comply with both Judge Sweitzer's limited remand concerning CCC and the Federal Court Consent Decree entered by Judge Alsup. Even assuming, and it is a large assumption, that the livestock industry representatives wish to engage in a constructive dialogue with BLM on the contours of the seasonal closures, there is no reason such discussion could not be concluded between August 24, 2001 and September 7, 2001. The schedule for Judge Sweitzer's ruling was developed solely by Ms. Norton's counsel, Ms. Klee. It was presented to Judge Alsup as a workable schedule and accepted by Judge Alsup over the Center's objection that the decisions should be put in full force and effect. A limited administrative remand such as that which Judge Sweitzer entered was always a predictable possibility. BLM's current position, as expressed in statements from the Secretary's office, that the Klee schedule is an "unworkable" schedule imposed on the current Secretary by the outgoing administration is hypocritical in the extreme. Judge

Alsup specifically asked this administration to adopt the consent decree -- and it did so. Then when the current administration failed to comply with the Consent Decree, Judge Alsup asked how BLM proposed to fix the problem. The Department of the Interior and Ms. Klee put forth the current schedule as the solution. BLM should be prepared to explain to Judge Alsup why it put forth an "unworkable" schedule in its earlier efforts to avoid being found in contempt of court -- and why BLM now attempts to blame the unworkable schedule on departed officials -- when nothing of the sort is true.

Moreover, the sole potential excuse for BLM's failure to comply with the Consent Decree, the CCC failure, can only be assigned to BLM's own negligence in failing to follow its CCC regulations. While the Center fully believes, as is apparent from the record developed before Judge Sweitzer, that CCC is a futile endeavor in this case -- i.e. it is hard to "cooperate" with people who pointedly ask not to be contacted. The fact remains that BLM's only potential defense, in light of Judge Sweitzer's ruling rejecting the futility argument, is that BLM negligently failed to follow its own regulations and persist in its efforts to contact the hostile permittees. That is not much of a defense.

The Center will agree to no extension of the September 7, 2001 date provided in the Consent Decree. BLM should do now what it represented to the Federal Court it would do back in January 2001 - put the grazing decisions in full force and effect. Such a full force and effect decision is even more justified now given the balance of Judge Sweitzer's ruling.

If BLM fails to put the grazing decisions into full force and effect on September 7, 2001, the Center will seek to have BLM held in contempt of court and/or move for injunctive relief. Such an unfortunately necessary contempt motion may or may not be limited solely to the grazing issue, but may involve other issues where BLM is in violation of the various consent decrees and which have been brought to BLM's attention in previous correspondence with the Center.

As discussed above, BLM will be hard pressed to defend a contempt motion. However, even if Judge Alsup declines to find BLM in contempt of court based on a general reluctance to fine or imprison federal officials, he must find BLM is in violation of the consent decree -- as he has done in the past. Such a violation removes the Center's obligation not to seek further injunctive relief. Accordingly, the Center may move for board scale (i.e. much more extensive than the negotiated seasonal closures) injunctive relief concerning grazing in desert tortoise habitat. Given Judge Sweitzer's ruling, such a motion for an injunction will be impossible for BLM to defend. Judge Sweitzer's ruling represents the position of the Department of the Interior. Judge Alsup will accept it as an admission of a party opponent. Judge Sweitzer's ruling essentially removes any potential defense BLM might have had to a permanent injunction motion.

CCC in Barstow

CCC is the responsibility of the BLM, not the Center. The Center expects BLM to meet its CCC responsibilities and to do so before September 7th. As previously indicated, the

Center believes that in this case, given the previous statements of the permittees and their counsel, CCC is a complete waste of time. BLM already designed the seasonal closures for maximum permittee convenience. It is quite likely no more convenient closures are possible. The permittees simply object to the existence of any closures at all. We are long past that point. Nonetheless, the Center is available by phone to review any reasonable seasonal closure modification arrived at in Barstow. However, to be considered reasonable any such modified seasonal closure must comply with the Consent Decree in terms of the dates of closure and approximate total acreage. The Center will not accept any reduction in the amount of critical habitat protected, nor will the Center accept an "slide" of protected habitat to the Eastern Mojave. The Western Mojave is where the Tortoise is most imperiled.

Finally, the Center believes that BLM should conduct its CCC with the permittees on an individualized basis. The permittees are in an obvious conflict of interest with each other. Any acre given back to one permittee will likely be extracted from another. More importantly some permittee's might do better if the settlement collapsed. For example, Mr. Mitchell and Mr. Kemper have no critical habitat on their allotments. They might do better under an injunction of all grazing in critical habitat. On the other hand, Mr. Fisher and Mr. Blair would be worse off (losing greater percentages of their allotments) under an injunction of grazing in critical habitat. Whether or not these permittees have waived these obvious conflicts of interest (generally required in writing) is an issue between them and their counsel. However, BLM should at least point out to the permittees, on an individual basis, how they stand to be affected if the negotiated consent decree is not implemented and how they are negotiating against each other in what amounts to a "zero sum game." In my opinion, to do otherwise is unethical.

All that being said, if to our great surprise, the BLM and the permittees do come up with a proposal that essentially complies with the consent decree but varies somewhat as to specifics (boundary lines being the most obvious) the Center will consider it immediately. Please contact me to initiate any such discussions. I will be available all day today and Friday.

Cordially, Jay Tutchton, Counsel for the Center et al.