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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL DIVERSITY
and CALIFORNIA NATIVE PLANT
SOCIETY,

Plaintiffs,

vs.

GALE NORTON, et al.,

Defendants.

CASE NO. 01-CV-2101-IEG (LAB)
CONSOLIDATED WITH

BUILDING INDUSTRY LEGAL DEFENSE
FOUNDATION,

Plaintiff,

vs.

GALE NORTON, et al.,

Defendants.

CASE NO. 01-CV-2145-IEG (LAB)

**ORDER GRANTING
DEFENDANTS' MOTION TO
MODIFY THE COURT'S JULY 1,
2002 ORDER**

[Doc. No. 91]

Presently before the Court is Gale Norton, Secretary of the Interior's (the "Secretary") and the U.S. Fish and Wildlife Service's ("FWS") (collectively, "defendants") motion to modify this Court's Order dated July 1, 2002. That Order sets forth a time line (the "July Time Line") for

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1 defendants to issue new proposed and final critical habitat determinations for several plant species.
2 (See July 1, 2002 Order). Defendants request a modification pursuant to Fed. R. Civ. P. 60(b) on
3 the grounds that FWS no longer has the requisite funding in fiscal year (“FY”) 2003 to carry out
4 the Court’s Order. Plaintiffs, on the other hand, argue that a professed lack of resources is not a
5 valid reason to grant modification of an order under Rule 60(b), and that, in any event, FWS’s
6 funding difficulties are its own doing.

7 BACKGROUND

8 On November 15, 2001 plaintiffs Center for Biological Diversity and California Native
9 Plant Society (collectively, “CBD”) filed suit against defendants in this Court alleging that
10 defendants violated the Endangered Species Act (“ESA”) and the Administrative Procedure Act
11 (“APA”) when they determined that designating critical habitat for eight plant species was not
12 prudent. Shortly thereafter, on November 21, 2001, plaintiff Building Industry Legal Defense
13 Fund (“BILD”) filed suit against the Secretary and FWS alleging primarily the same claims. At an
14 Early Neutral Evaluation Conference, held on March 19, 2002, the parties were able to agree that
15 (1) the critical habitat determination for the eight species would be remanded to FWS for
16 reconsideration of its “not prudent” determinations; and (2) that the two cases would be
17 consolidated. The parties could not agree, however, as to the appropriate time line for the issuance
18 of proposed and final critical habitat determinations on remand. To resolve this impasse, the Court
19 received briefs from the parties and issued the July 1, 2002 Order setting forth the July Time Line
20 as follows:

| | Proposed Rule | Final Rule |
|-----------------------------|---------------|------------|
| Pierson’s milk-vetch | 7/28/03 | 7/28/04 |
| Lane Mountain milk-vetch | 9/15/03 | 9/15/04 |
| Fish Slough milk-vetch | 11/15/03 | 11/15/04 |
| San Jacinto crownscale | 1/30/04 | 1/30/05 |
| Spreading navarretia | 1/30/04 | 1/30/05 |
| Munz’s onion | 5/30/04 | 5/30/05 |
| Coachella Valley milk-vetch | 11/30/04 | 11/30/05 |
| Thread-leaved brodiaea | 11/30/04 | 11/30/05 |

1 (See July 1, 2002 Order).

2 Since that time, defendants have been able to publish a proposed rule for the Pierson's
3 milk-vetch according to the July Time Line. (See Manson Decl. at ¶ 2). Defendants have also
4 made progress towards publishing proposed rules for the Lane Mountain milk-vetch and Fish
5 Slough milk-vetch. (Id. at ¶ 30). Nonetheless, defendants are now before the Court alleging that
6 because they have exhausted their funding for the current fiscal year, they will be unable to comply
7 with the remainder of the July Time Line. Consequently, on August 11, 2003, defendants filed the
8 present motion requesting a modification of the July 1, 2002 Order pursuant to Fed. R. Civ. Pro.
9 60(b). On August 28, 2003 plaintiffs filed their opposition. Finally, defendants filed their reply on
10 September 2, 2003.

11 DISCUSSION

12 A. Legal Standard

13 Federal Rule of Civil Procedure 60(b)(5) provides that a court may relieve a party from a
14 previous order if "it is no longer equitable that the judgment should have prospective application."
15 Fed. R. Civ. P. 60(b)(5). The Ninth Circuit follows the "flexible standard for all petitions brought
16 under the equity provision of Rule 60(b)(5)" as set forth in Rufo v. Inmates of Suffolk County Jail,
17 502 U.S. 367 (1992). Bellevue Manor Associates v. United States, 165 F.3d 1249, 1255 (9th Cir.
18 1999). According to the flexible standard, "a party seeking modification of a [court's order] bears
19 the burden of establishing that a significant change in circumstances warrants revision of the
20 [order]. If the moving party meets this standard, the court should consider whether the proposed
21 modification is suitably tailored to the changed circumstance." Rufo, 502 U.S. at 383. Thus, the
22 Court must engage in a two-part inquiry consisting of: (1) whether the moving party has
23 established a significant change in circumstances that justifies a modification to the order; and (2)
24 whether the proposed modification is appropriate given the new circumstances.

25 In addressing the moving party's initial burden, the Supreme Court noted that modification
26 "may be warranted when changed factual conditions make compliance with the [order]
27 substantially more onerous. . . , when a [court order] proves to be unworkable because of
28 unforeseen obstacles, or when enforcement of the [order] without modification would be

1 detrimental to the public interest.” Rufo, 502 U.S. at 384 (citations omitted) (cited by § v.
2 Coldicutt, 258 F.3d 939, 942 (9th Cir. 2001)). Additionally, courts have recognized that “an order
3 must be modified if compliance becomes legally impermissible.” Coldicutt, 258 F.3d at 942
4 (citing Rufo, 502 U.S. at 388). Modification of a court order is not appropriate, however, merely
5 because the moving party “finds it is no longer convenient to live with the terms of the order.” Id.

6 If the party is able to meet its initial burden and the Court is satisfied that a modification to
7 a previous order is warranted, the Court must then examine whether the proposed changes are
8 sufficiently tailored to the new circumstances. Rufo, 502 U.S. at 383. In the case of court orders
9 that place demand upon government bodies, the Supreme Court has suggested that “once a court
10 has determined that a modification is warranted. . . simple common sense require[s] the court to
11 give significant weight to the views of the [] government officials who must implement any
12 modification.” Id. at 393, n14.¹ Thus, if the moving party is able to meet its threshold burden, the
13 Court will provide a degree of deference to its proposed modifications.

14 B. Analysis

15 The changed circumstances that defendants allege as the basis for their modification
16 request arise from FWS’s current financial situation. Under the Fiscal Year 2003 Omnibus
17 Appropriations Act (the “Appropriations Act”), which covers FWS’s appropriations from October
18 1, 2002 through September 30, 2003, FWS is not authorized to spend more than \$6 million on
19 designating critical habitat. (See Manson Decl. at ¶ 3). However, as of July 28, 2003, FWS had
20 already spent \$5,922,866 of that total.² (Id. at ¶ 6).

21
22 ¹Although Rufo dealt with a federal court order against local government officials, thus
23 implicating principles of federalism as well, the Supreme Court’s mandate also suggests that a certain
24 amount of deference is properly afforded any governmental agency in making the determination of
25 whether a proposed modification is appropriate. The “common sense” that the Supreme Court referred
to undoubtedly includes the fact that the government agency is usually in a unique position to
understand what its resource constraints are and how to allocate those resources to best serve the
public interest.

26 ²Plaintiffs request that the Court grant them time to conduct discovery on this issue before the
27 present motion is decided. Specifically, plaintiffs wish to inquire into when FWS actually ran out of
28 funds, when FWS had to terminate its work efforts and why FWS did not seek additional funds from
Congress in a more timely fashion. For reasons discussed below, the Court finds that the subject of
plaintiffs’ discovery request is largely irrelevant to the instant motion. The Court therefore denies
plaintiffs’ request.

1 Because it was dangerously close to exceeding its spending limit for these activities, FWS
2 took a number of actions. First, it requested an additional \$2 million dollars, which is now before
3 Congress in the form of presidential request for a technical amendment to the Appropriations Act.
4 (*Id.* at ¶ 8; Ex 5). Second, FWS reviewed all the pending court orders that it was under and made
5 determinations as to which listing projects would be pursued with the limited funds remaining, and
6 which orders FWS would seek extensions on. (*Id.* at ¶ 8). At this point, defendants argue, the
7 bottom line is that FWS cannot continue to work on the listing deadlines set forth in the July Time
8 Line because it has run out of money. (See Defs' Mem. at 9; Manson Decl. at ¶ 27 (“[W]e expect
9 there will be no funds available in an appropriation to fund any further critical habitat work this
10 fiscal year.”)).

11 Based on the current circumstances, defendants' primary contention is that the Court must
12 modify its July 1, 2002 Order because the time line as it now stands would force FWS to spend
13 more than Congress has appropriated for the current fiscal year, in violation of the Anti-Deficiency
14 Act. That act explicitly prohibits FWS from “mak[ing] or authoriz[ing] an expenditure or
15 obligation exceeding an amount available in an appropriation.” 31 U.S.C. § 1341(a)(1). As the
16 Supreme Court recognized, a court order “must of course be modified if, as it later turns out, one
17 or more of the obligations placed upon the parties has become impermissible under federal law.”
18 Rufo, 502 U.S. at 388. Thus, defendants argue that changed circumstances (i.e., the fact that FWS
19 is now unable to spend more funds critical habitat designations) warrant a modification of the July
20 1, 2002 Order because compliance with that Order would require FWS to spend additional funds,
21 in violation of the Anti-Deficiency Act.

22 Plaintiffs respond to this argument by alleging that any budgetary shortfalls the FWS now
23 experiences are of its own making. (See Pla's Opp'n. at 3-5). Specifically, plaintiffs argue that
24 FWS has persistently asked Congress for less money than it actually needs to complete all of its
25 critical habitat listing obligations. (*Id.* at 3). Defendants, in turn, assert that Congress has more
26 often than not appropriated less money than FWS has requested, and thus the actual amount that
27 FWS requests makes little difference. More importantly, however, defendants correctly point out
28 that whether FWS is responsible or not for its current lack of funds is wholly irrelevant to

1 defendants' argument that being forced to comply with the July Time Line would force FWS to
2 violate a federal law (namely, the Anti-Deficiency Act). The fact remains that FWS is currently
3 under order by this Court to issue a proposed rule regarding the Lane Mountain milk-vetch by
4 September 15, 2003. Clearly, if FWS is required to abide by that time line, it would have to
5 expend funds from its fiscal 2003 appropriation, thus violating the Anti-Deficiency Act.

6 Plaintiffs also argue that a District Court should not "stay suits seeking to compel critical
7 habitat designations based on the FWS's professed lack of resources." (Plas' Opp'n. at 6). To
8 support this contention, plaintiffs cite Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir.
9 1999)). Plaintiffs' argument in this regard is also unavailing. As an initial matter, Forest
10 Guardians involved a district court's stay of an action to obtain an injunction against the Secretary
11 of the Interior. Here, however, defendants are seeking a modification to an order pursuant to Rule
12 60(b)(5). Thus, the Court must apply standards for modifying a previous order, not staying an
13 entire action. Second, Forest Guardians did not address the issue presently before the Court
14 regarding whether compliance with a court's order would force the FWS to violate the Anti-
15 Deficiency Act.

16 In Environmental Defense Ctr. v. Babbitt, the Ninth Circuit held that because of a
17 moratorium placed on FWS spending, the district court was required to modify its order requiring
18 the listing of critical habitats by a certain date, which would have required FWS to spend funds in
19 violation of that spending moratorium. See Environmental Defense Ctr., 73 F.3d 867, at 872 (9th
20 Cir. 1995). The situation here is analogous, although not identical since there is no longer an
21 explicit moratorium on FWS's spending.³ Here FWS, if it were to abide by the July Time Line,
22 would have to expend funds this fiscal year to issue the proposed rule regarding the Lane Mountain
23

24 ³The district court in Center for Biological Diversity v. Norton addressed this distinction and
25 found it insubstantial. Specifically, that court found that while it was "technically true that the
26 moratorium is now gone, there is still little difference in the financial situation facing [FWS]; there
27 is still too little money to meet overwhelming demand. . . [T]he Court [therefore] stands by its citation
28 to the Ninth Circuit's recognition [in Environmental Defense Ctr.] that a government agency cannot
act without funding." Center for Biological Diversity v. Norton, 208 F. Supp. 2d 1044 at 1051 (N.D.
Cal. 2002). The Court agrees with Center for Biological Diversity. Whether FWS is forced to violate
a specific moratorium on spending or the more general prohibitions in the Anti-Deficiency Act is of
little consequence. The fact remains that complying with the July 1, 2002 Order would force FWS to
"act without funding."

1 milk-vetch. As set forth above, defendants have demonstrated that the expenditure of additional
2 funds for habitat designations at this time would violate the Anti-Deficiency Act. Therefore, the
3 Court finds that defendants have met their initial burden of demonstrating changed circumstances
4 that warrant a modification to the July 1, 2002 Order under Rule 60(b)(5).

5 Aside from the impending violation of the Anti-Deficiency Act, the Court also finds that
6 modification of the July 1, 2002 Order is justified because FWS's funding shortfall and subsequent
7 halt in work has made the July 1, 2002 Order "unworkable" and "enforcement of the [order]
8 without modification would be detrimental to the public interest." Rufo, 502 U.S. at 384.
9 Plaintiffs are correct when they argue that only the deadline regarding the Lane Mountain milk-
10 vetch (the proposed rule is currently due September 15, 2003) is technically affected by FWS's
11 current lack of funding. This is because, presumably, Congress will pass a new appropriation for
12 fiscal year 2004, which will become effective October 1, 2003 and will provide FWS with funding
13 to continue its critical habitat listing programs.

14 The Court finds that the changed circumstances (FWS's current lack of funding in this
15 fiscal year) nonetheless justify modification of deadlines into the next fiscal year. Plaintiffs
16 themselves acknowledge that proposed rules regarding the next three species after the Lane
17 Mountain milk-vetch are due within the first few months of the next fiscal year under the July 1,
18 2002 Order.⁴ (See Plas' Opp'n. at 8, n.2). Moreover, defendants have shown that FWS is
19 currently required, under various court orders, to issue nine other proposed or final habitat
20 designations between now and the end of January, as well as others that are currently past-due and
21 must be postponed until after the beginning of the next fiscal year. (See Manson Decl. at ¶ 17). In
22 light of FWS's present back-log caused by the lack of funding and accompanying freeze of the
23 habitat designation program, the Court finds that it would be unworkable and against the public
24 interest to require defendants to remain bound by the July Time Line as it now stands. In
25 particular, leaving that time line unmodified as to the deadlines for the Fish Slough milk-vetch,
26 San Jacinto crownscale and Spreading navarretia would place an unjustified burden on FWS and
27

28 ⁴Specifically, the Fish Slough milk-vetch proposed rule is due by November 15, 2003, and
proposed rules for the San Jacinto crownscale and Spreading navarretia are due by January 30, 2004.

1 possibly lead to hastily-manufactured habitat designations that are not in the public's interest.

2 Having found that defendants have carried their burden of showing changed circumstances
3 that warrant a modification to the July 1, 2002 Order, the Court must now determine if defendant's
4 proposed changes are sufficiently tailored to the present circumstances. Defendants first suggest
5 that the Court stay all pending deadlines in the July 1, 2002 Order pending FWS's receipt of its
6 2004 appropriation. In support of this drastic change to the July Time Line, defendants again rely
7 on Environmental Defense Ctr. Although the Ninth Circuit in that case did order that FWS's
8 compliance should be stayed "until a reasonable time after appropriated funds are made available,"
9 the court there was dealing with a spending moratorium whose duration was unknown.
10 Environmental Defense Ctr., 73 F.3d at 872. Because FWS knows that it will receive funding to
11 continue the critical habitat designations at the start of the next fiscal year (albeit, the exact amount
12 is unknown), a stay of all deadlines under the July 1, 2002 Order is not sufficiently tailored to the
13 present circumstances.

14 In the alternative, defendants ask that the Court adopt the following modified time line as to
15 four of the eight species:

| | Proposed Rule | Final Rule |
|--------------------------|---------------|------------|
| Lane Mountain milk-vetch | 4/1/04 | 4/1/05 |
| Fish Slough milk-vetch | 6/1/04 | 6/1/05 |
| San Jacinto crownscale | 10/1/04 | 10/1/05 |
| Spreading navarretia | 10/1/04 | 10/1/05 |

21 (See Defs' Mem. at 21). According to defendants, progress has already been made towards
22 proposed rules for the Lane Mountain milk-vetch and Fish Slough milk-vetch, but FWS has yet to
23 begin work on the San Jacinto crownscale and spreading navarretia. (Manson Decl. at ¶ 30).
24 Aside from the four species listed above, it appears as if defendants expect to be able to abide by
25 the rest of the July Time Line. (See Manson Decl. at ¶ 2).

26 Plaintiffs argue that Congress has provided specific time tables for FWS to issue proposed
27 and final rules regarding the designation of critical habitat, and that these proposed modifications
28 to the July 1, 2002 Order would not be consistent with those time tables. However, the only hard

1 time line that plaintiffs refer to is the requirement that FWS publish final rules one year after
2 proposed rules are issued. As for the listing of critical habitat in the first place, Congress has only
3 required that it be done "to the maximum extent prudent and determinable." 16 U.S.C. §
4 1533(a)(3). As stated above, the Court also grants some deference to the determinations of FWS,
5 as a government agency, as to what modifications are necessary and appropriate at this juncture.
6 Additionally, plaintiffs have not provided any specific reasons regarding why the proposed
7 modifications might not be appropriate given the current situation. Defendants, on the other hand,
8 have provided sufficient evidence, in the form of declarations and exhibits, for the Court to
9 conclude that the proposed modified time line is both consistent with Congress' mandates and
10 "suitably tailored to the changed circumstance[s]." Rufo, 502 U.S. at 383.

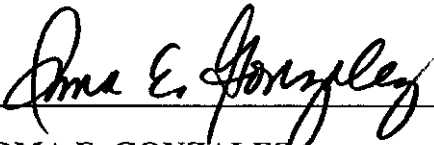
11 **CONCLUSION**

12 For the reasons stated above, the Court **GRANTS** defendants' motion to modify the July 1,
13 2002 Order pursuant to Fed R. Civ. P. 60(b)(5). Consequently, that Order is hereby modified as
14 follows: the Court now **ORDERS** FWS to publish a proposed critical habitat designation or non-
15 designation for the Lane Mountain milk-vetch by April 1, 2004; for the Fish Slough milk-vetch by
16 June 1, 2004; for the San Jacinto crownscale by October 1, 2004; and for the Spreading navarretia
17 by October 1, 2004. Additionally, the Court **ORDERS** that within one year of the publication of
18 each proposed designation or non-designation, FWS publish a final rule in the Federal Register
19 regarding critical habitat designation or non-designation for the species. Any portion of the
20 Court's July 1, 2002 Order not specifically modified by this Order is to remain in effect.

21 **IT IS SO ORDERED.**

22
23 Dated: _____

9/8/03

24 
25 **IRMA E. GONZALEZ**
United States District Judge

26 cc: Magistrate Judge Burns
27 all parties
28