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ALM

SLOW AND STEADY TORTOISE WINS RACE AGAINST CLOCK

By **Todd Woody**

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Time ran out Tuesday on the Bush administration's eleventh-hour drive to transfer land for a radioactive waste dump to the state before Bill Clinton's inauguration.

Angered by Interior Secretary Manuel Lujan Jr.'s refusal to allow her to resolve a jurisdictional question, U.S. District Judge Marilyn Hall Patel extended until next week a temporary restraining order halting the sale of 1,000 acres in Southern California's **Ward Valley**. Environmentalists contend the transfer will harm the imperiled desert tortoise.

"It's irresponsible, given the secretary's duties [under the Endangered Species Act]," Patel said to a crowded courtroom.

The ruling, coming as California Controller Gray Davis and others filed a new challenge to the transfer, nukes Gov. Pete Wilson's efforts to speed up the long-delayed sale before it comes under control of new Interior Secretary Bruce Babbitt, an environmentalist. And given Patel's comments Tuesday, the order may initiate a major endangered species fight that could affect development throughout the Southwest.

The ruling capped a morning of legal maneuvering and spin-doctoring. While Patel attempted to reconcile her belief that the environmentalists had made their case for a preliminary injunction with doubts about her jurisdiction, Birkenstocked environmentalists competed for the ears of reporters with Hill and Knowlton public relations experts,

corporate attorneys and scientists.

The environmentalists contended that Lujan violated the Endangered Species Act by missing a statutory deadline to identify the desert tortoise's critical habitat. State and federal biologists consider **Ward Valley** part of a high-quality habitat for the tortoise, which was listed as a threatened species in 1990.

Lujan agreed to transfer the land Jan. 7 at the request of the governor. Environmentalists obtained a temporary restraining order from Patel the next day blocking the sale. The plaintiffs, however, had sued before the end of a 60-day notice period, claiming an emergency exemption for which Patel said she could find no authority.

Equally troubling, the judge said, was Lujan's apparent failure to comply with the Endangered Species Act, the political motivations behind the sale and the possibly irreversible harm to the tortoise if the transfer were to go forward.

"I'm very troubled by . . . the subversion of the statute," Patel said. "On the other hand, the jurisdiction . . . has to be interpreted fairly narrowly."

After listening to plaintiffs attorneys Hannah **Bentley** and Michael Lozeau make a technical case for jurisdiction and U.S. Assistant Attorney Patrick Bupara argue for the necessity of transferring the land before Bill Clinton takes office, Patel called a recess.

At Patel's urging, Bupara tried to secure a stipulation from Lujan to waive his jurisdictional defenses so that Patel could consider

issues beyond the plaintiffs' standing.

"I think the secretary should be made aware of the fact that there's a substantial likelihood that plaintiffs will be successful . . . and that the government will incur the cost of the litigation," Patel said.

But the Bush administration's failure to make such an agreement may well have doomed its efforts to secure a ruling before today's inauguration, plaintiffs attorneys said. While it's unknown whether Patel would have ruled Tuesday -- or in favor of the government -- she clearly had rejected the environmentalists' jurisdiction arguments. By failing to agree to her request, Lujan provoked the judge's ire.

Bupara declined to comment.

After extending the temporary restraining order for 10 days, Patel asked for briefing on the issue of whether the land sale could be reversed if the environmentalists eventually succeed. She'll then issue a ruling on the plaintiffs' request for preliminary injunction.

Still unclear is how the incoming Clinton administration will handle the dispute, especially because Babbitt has yet to be confirmed as interior secretary.

Whatever the outcome, the legal morass surrounding California's first low-level nuclear dump will continue, attorneys say. The prospective dump operator, U.S. Ecology, and a trade group that unsuccessfully tried to intervene in the case on Friday might appeal, their attorneys said.

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