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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

FT. FUNSTON DOG WALKERS, a membership
organization; SFDOG, a California limited
partnership; LINDA McKAY, an individual;
FLORENCE SARRETT, an individual; LINDSAY
KEFAUVER, an individual; and MARION
CARDINAL, an individual,

Plaintiffs,

v.

BRUCE BABBITT, Secretary of the Interior;
ROBERT STANTON, Director of the National Park
Service; JOHN REYNOLDS, Regional Director,
Pacific West Region, National Park Service; and
BRIAN O'NEILL, General Superintendent of the
Golden Gate National Recreation Area,

Defendants.

GOLDEN GATE AUDUBON SOCIETY, a
California Non-profit Membership Organization,

Intervenor-Defendant.

No. C 00-00877 WHA

**ORDER VACATING
PRELIMINARY INJUNCTION
AND ORDER TO SHOW CAUSE
(GRANTING MOTION AND
APPLICATION TO VACATE)**

It appears from the present record that the defendants have now remedied the violation of 36 C.F.R. 1.5(b) that led to the preliminary injunction last April 25, 2000. Defendants have held public hearings after notice and comment and allowed for public input and debate, all before issuing a new and final closure plan for Fort Funston in January 2001. The original complaint and original flaw in the administrative process have been cured, fully.

1 In opposition to the application and motion to vacate, plaintiffs allude to new theories
2 and fresh violations of law. None is properly before the Court. Despite conferences in which
3 the subject of possible amendments was discussed, plaintiffs have utterly failed to amend their
4 pleadings or to advance, even if an amendment were before the Court, any cognizable basis for
5 setting aside the new agency action taken in response to the procedural criticism originally
6 leveled by plaintiffs themselves. In short, plaintiffs wanted public hearings and comment. They
7 got it. The agency resolved the public policy debate. Plaintiffs may dislike the substantive
8 result, but the procedural infirmity was cured.

9 Plaintiffs argue that the new agency action is based on bad science concerning the best
10 way to protect the bank swallows when they are seasonally at home in the Funston cliffs.
11 Perhaps. Perhaps not. That is exactly the kind of judgment call Congress delegated to the park
12 professionals. No showing has been made that the agency's judgment and balance of competing
13 use demands was arbitrary and capricious within the meaning of the Administrative Procedure
14 Act, 5 U.S.C. 701-06, and/or unsupported by an administrative record, a record not even before
15 the Court. So too with issues of safety and re-vegetation assigned by plaintiffs as substantive
16 error. As for the new allegations of procedural error (e.g., late release of environmental data and
17 failure to complete an environmental impact statement), they are brand new charges. They are
18 not what led to the preliminary injunction in the first place. They were not pled in the
19 complaint. If plaintiffs wish to file a new lawsuit and to prove up new improprieties, they are
20 free to do so. The new accusations cannot, however, be used to prolong an injunction premised
21 on a wrong since cured.

22 Finally, plaintiffs argue that the new action is subject to a sixty-day stay pending
23 administration review issued by our new president for all pending regulations. There is an
24 outside chance that the new proposed closure will be vetoed in this internal review process.
25 That possibility poses some uncertainty. In these circumstances, the Court cannot rule out the
26 possibility of some future agency detour that would warrant relief under the original complaint
27 herein, remote though that seems.
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1 Meanwhile, the park professionals seek relief from the injunction based on the expected
2 return of the bank swallows in March, possibly within two weeks, if history is any guide. They
3 wish to begin preparing the closure intended for the swallows' protection, erecting fences,
4 placing signs, and so forth. They do not want to offend the preliminary injunction. The
5 imminent return of the swallows is a certainty. A veto by President Bush of the new closure is
6 not. The Court concludes that the defendants have now fully complied with 36 C.F.R. 1.5, that
7 the need for prompt protective action is genuine, and that the need overshadows the small risk
8 of rule veto.

9 The preliminary injunction is **VACATED** without prejudice to any new motion for
10 relief plaintiffs might bring in changed circumstances. At the hearing on February 22, 2001,
11 plaintiffs **SHALL SHOW CAUSE** why this action should not be dismissed as moot. The
12 application and motion to vacate the injunction, having been resolved by this order, are taken
13 off calendar.

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15 **IT IS SO ORDERED.**

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17 Dated: February 13, 2001.


18 **WILLIAM ALSUP**
19 **UNITED STATES DISTRICT JUDGE**
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