

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE COUNCIL)	
)	Civ. No. 10-299
Plaintiff,)	
)	
v.)	
)	
KEN SALAZAR, Secretary, U.S.)	
Department of the Interior, <u>et al.</u>)	
)	
Defendants.)	
)	

STIPULATED SETTLEMENT AGREEMENT AND ~~PROPOSED~~ ORDER

This Stipulated Settlement Agreement is made between Plaintiff Natural Resources Defense Council and Defendants Ken Salazar, Secretary of the Interior, and Rowan Gould, Acting Director, United States Fish and Wildlife Service (“Service”).

WHEREAS, on December 8, 2008, Plaintiff submitted to Defendants a petition to list whitebark pine (*Pinus albicaulis*) as an endangered species under the Endangered Species Act (“ESA”) (“Petition”).

WHEREAS, by letter dated December 11, 2009, Plaintiff provided written notice of its intent to sue for Defendants’ failure to issue a 90-day finding on the Petition;

WHEREAS, on February 24, 2010, Plaintiff filed a Complaint challenging Defendants’ failure to issue a 90-day finding on the Petition;

WHEREAS, Plaintiff seeks an order finding Defendants in violation of the ESA for failing to issue the 90-day finding according to the timeframe established by the ESA and an order requiring Defendants to make the required 90-day finding by a date certain;

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiff's claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiff's Complaint, and the parties agree that settlement of this action in this manner is in the public interest;

ACCORDINGLY, THE PARTIES AGREE AND STIPULATE AND IT IS HEREBY ORDERED AS FOLLOWS:

1. No later than July 15, 2010, the Service shall deliver to the Office of the Federal Register for publication a determination whether the Petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted ("90-day finding"), with respect to the whitebark pine. See 16 U.S.C. § 1533(b)(3)(A).

2. If the Service issues a positive 90-day finding, no later than July 15, 2011, the Service shall deliver to the Office of the Federal Register for publication a determination whether the petitioned action is warranted, not warranted, or warranted but precluded by other listing activity ("12-month finding"). See 16 U.S.C. § 1533(b)(3)(B).

3. Either party may seek to modify the deadlines for the actions specified in Paragraphs 1 and 2 for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes that the other party has failed to comply with any term or condition of this Settlement Agreement ("Agreement"), the parties shall use the dispute resolution procedures specified in Paragraph 4 below. This Stipulated Settlement Agreement may be modified or amended only by order of this Court.

4.

In the event that either party seeks to modify the terms of this Agreement, including the deadline for the actions specified in Paragraphs 1 or 2, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute or seeking enforcement, shall provide the other party with written notice of the claim. The parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the claim before pursuing relief from the Court. If the parties are unable to resolve the claim within a reasonable time, either party may seek relief from the Court.

5. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for making a 90-day finding or 12-month finding in any other proceeding regarding Defendants' implementation of the ESA.

6. Defendants agree to settle all of Plaintiff's claims for costs and attorneys' fees in this matter for a total of \$4,800.00. Payment will be made payable in that amount to Natural Resources Defense Council. Defendants agree to submit all necessary paperwork for the processing of the attorneys' fee award to the Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the court order approving this Agreement. Plaintiff agrees to accept payment of such amount in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiff is entitled in the above-captioned litigation, through and including the date of this Agreement. Plaintiff agrees that receipt of this payment from Defendants shall operate as a release of Plaintiff's claims for attorneys' fees and costs in this matter, through and including the date of this Agreement.

7. Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this agreement arising from a need to enforce or defend against efforts to modify the underlying schedule outlined in Paragraph 1, or for any other unforeseen continuation of this action. Defendant does not waive any right to contest fees claimed by Plaintiff or Plaintiff's counsel, including the hourly rate, in any future litigation, or continuation of the present action. Further, this stipulation as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

8. Plaintiff's Complaint shall be dismissed with prejudice upon approval of this Stipulated Settlement Agreement by the Court. The parties respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

9. This Settlement Agreement contains all of the agreements between the Parties, and is intended to be the final and sole agreement between the Parties. The Parties agree that any prior or contemporaneous representations or understanding not explicitly contained in this written Settlement Agreement, whether written or oral, are of no further legal or equitable force or effect.

10. Nothing in this Settlement Agreement shall be construed or offered in evidence in any proceeding as an admission or concession of wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Settlement Agreement. Defendants do not waive any defenses they may have concerning the claim settled under this Settlement Agreement or any similar claims brought in the future by any other party. This Settlement Agreement is executed

solely for the purpose of compromising and settling Plaintiff's Complaint and nothing herein shall be construed as precedent in any other context.

11. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendant takes action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Stipulated Settlement Agreement shall be construed to limit or modify the discretion accorded to the Defendants by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein other than as set forth in paragraphs 1 and 2, or as to the substance of any final determination. To challenge any final rule issued in accordance with this Agreement, Plaintiff will be required to file a separate action. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that the Federal Defendants are obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.

12. Each of the parties' undersigned representatives certifies that they are fully authorized to enter into and execute the terms and conditions of this Stipulated Settlement Agreement, and do hereby agree to the terms herein.

Respectfully submitted,

Dated: June 18, 2010

/s/ Rebecca Riley (by KBF with permission)
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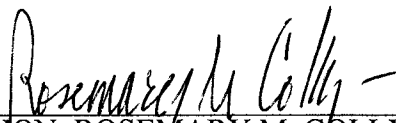
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Counsel for Defendants

IT IS SO ORDERED:

Dated: 18 June 2010



HON. ROSEMARY M. COLLYER
UNITED STATES DISTRICT JUDGE