

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

WILDEARTH GUARDIANS,)
)
 Plaintiff,)
 v.)
 KENNETH SALAZAR, et al.,)
)
 Defendants.)

ORDER

No: CV08-689-PHX-NVW

Plaintiff and the Federal Defendants in the above-captioned case (hereinafter, “Parties”) respectfully request that this Court adopt this stipulated form of order as an order of the Court. The stipulated form of order reflects the agreement of the Parties to settle this case pursuant to a stipulated settlement agreement (Dkt No. 32).

IT IS HEREBY ORDERED:

1. Pursuant to 16 U.S.C. 1533(a)(3)(A), the United States Fish and Wildlife Service (“Service”) shall submit for publication in the Federal Register a new finding as to whether the designation of critical habitat for the Chiracahua leopard frog is prudent by December 8, 2010. If

the Service finds that it is prudent to designate critical habitat for the Chiracahua leopard frog, the Service shall also submit a proposed critical habitat designation to the Federal Register by December 8, 2010. If the Service submits a proposed critical habitat designation in accordance with this paragraph, the Service shall submit for publication in the Federal Register a final critical habitat determination by December 8, 2011.

2. Either party may seek to modify the deadline for any actions specified in Paragraph 1 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 Order, the parties shall use the dispute resolution procedures specified in Paragraph 3.

3. This Order may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Order, including the deadline for the actions specified in Paragraph 1, or in the event of a dispute arising out of or relating to this Order, or in the event that either party believes that the other party has failed to comply with any term or condition of this Order, the party seeking the modification, raising the dispute or seeking enforcement, shall provide the other party with notice of the claim. The parties agree that they will meet and confer (either telephonically or in-person) at the earliest possible time in a good-faith effort to resolve the claim before bringing any matter to the Court. If the parties are unable to resolve the claim themselves, either party may pursue relief from the Court.

4. Defendant agrees that Plaintiff is the “prevailing party” in this action, and agrees to pay Plaintiff reasonable attorneys’ fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C.

§ 1540 (g). Therefore, Defendant agrees to settle all of Plaintiff's claims for costs and attorneys' fees in the above-captioned litigation for a total of \$45,000. A check will be made payable in that amount to WildEarth Guardians and sent to the undersigned counsel at their designated address.

5. Defendant agrees 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 stipulation.

6. Plaintiff agrees to accept payment of \$45,000 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 Order.

7. Plaintiff agrees that receipt of this payment from Defendant shall operate as a release of Plaintiff's claims for attorneys' fees and costs in this matter, through and including the date of this Order.

8. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this Order arising from a need to enforce or defend against efforts to modify the underlying schedule outlined in Paragraph 1, or for any other continuation of this action.

9. 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.

10. Subject to the qualifications in Paragraph 11, no provision of this Order shall be interpreted as, or constitute, a commitment or requirement that Defendant take action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other law or

regulation, either substantive or procedural. Nothing in this Order shall be construed to limit or modify the discretion accorded to the Service 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, or as to the substance of any final determination.

11. No provision of this Order shall be interpreted as, or constitute, a commitment or requirement that Defendant is obligated to spend funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. On this issue, Plaintiff asserts that this Order does not create a conflict with the Anti-Deficiency Act because the duty to make critical habitat findings is required in non-discretionary terms by the ESA and because the Anti-Deficiency Act would not excuse compliance with a pre-existing court Order. Plaintiff intends to assert this position if the Service fails to comply with the terms of this Order for reasons of insufficient appropriations. Defendant reserves all legal and equitable defenses to any argument by Plaintiff that the Anti-Deficiency Act does not apply to non-discretionary duties required by the ESA.

12. The parties agree that this Order constitutes a settlement of claims that were denied and disputed by the parties. The parties do not waive any claim or defense as a result of this Order.


13. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Order and do hereby agree to the terms herein.

14. All counts of Plaintiff's Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1).

15. Notwithstanding the dismissal of this action, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this

Order and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

DATED this 6th day of May, 2009.



Neil V. Wake
United States District Judge