

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

_____	)	
WILDEARTH GUARDIANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:10-cv-00283-RWR
	)	
GARY LOCKE, in his official capacity as	)	
Secretary of the United States Department	)	
of Commerce,	)	
	)	
Defendant.	)	
_____	)	

**STIPULATED SETTLEMENT AGREEMENT AND [PROPOSED] ORDER**

This Stipulation is entered into by and between Plaintiff WildEarth Guardians (“Plaintiff”) and Defendant Gary Locke (“Defendant”), in his official capacity as Secretary of the United States Department of Commerce.

WHEREAS, on December 2, 1970, the fin whale (*Balaenoptera physalus*); the sperm whale (*Physeter macrocephalus*); and the sei whale (*Balaenoptera borealis*) were listed as endangered species under the Endangered Species Conservation Act of 1969, a predecessor statute to the Endangered Species Act (“ESA”); and

WHEREAS, on February 19, 2010, Plaintiff filed a complaint for declaratory and injunctive relief challenging the National Marine Fisheries Service’s (“NMFS”) alleged failure to develop recovery plans, pursuant to section 4(f) of the ESA, 16 U.S.C. § 1533(f), for the fin whale, the sperm whale, and the sei whale; and

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

WHEREAS, the parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

NOW, THEREFORE, the parties hereby stipulate as follows:

1. On or before August 15, 2010, NMFS shall submit for publication in the Federal Register a notice of availability of a final recovery plan for the fin whale.

2. On or before February 15, 2011, NMFS shall submit for publication in the Federal Register a notice of availability of a final recovery plan for the sperm whale.

3. On or before December 31, 2011, NMFS shall submit for publication in the Federal Register a notice of availability of a final recovery plan for the sei whale.

4. This Agreement requires Defendant to take the actions described above by the deadlines specified in paragraphs 1, 2 and 3. The Agreement shall not (and shall not be construed to) limit or modify the discretion accorded to the Service by the ESA, the Administrative Procedure Act ("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. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendant take any action in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural.

5. The Order entering this Agreement 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 Agreement, including the deadlines specified in paragraphs 1-3, or in the event of a dispute arising out of or relating to this Agreement, 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 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 seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court.

6. Except as otherwise provided in paragraph 5, Plaintiff's sole remedy for any alleged violation by NMFS of the terms of this Agreement shall be a motion to enforce the terms of this Agreement. This Agreement shall not be enforceable through a proceeding for contempt of court.

7. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable time line for developing or implementing a recovery plan under 16 U.S.C. § 1533(f) in any other proceeding regarding the Service's implementation of the ESA.

8. Defendant agrees to pay Plaintiff's reasonable attorneys' fees and costs pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540 (g). Defendant therefore agrees to settle all of Plaintiff's claims for costs and attorneys' fees in this matter for a total of \$7,643. A check will be made payable in that amount to WildEarth Guardians, c/o Mona Kay, 312 Montezuma Ave., Santa Fe, NM 87501. 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 order approving this Agreement.

9. Plaintiff agrees to accept payment of \$7,643 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiff is entitled in this matter through and including the date of this Agreement.

10. 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 Agreement.

11. The parties agree that 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 paragraphs 1-3 or for any other continuation of this action. By this Agreement, 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 Agreement as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

12. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Defendant is obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 USC 1341, or any other appropriations law.

13. The parties agree that this Agreement was negotiated in good faith and that it constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.

14. 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 Agreement and do hereby agree to the terms herein.

15. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying the Agreement.

16. Upon approval of this Agreement by the Court, all counts of Plaintiff's complaint shall be dismissed with prejudice. 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 Agreement and to resolve any motions to modify such terms, until the Federal Defendants satisfy their obligations under the Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

Dated: June 25, 2010

Respectfully submitted,

/s/ Samantha Ruscavage-Barz  
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