

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

DEFENDERS OF WILDLIFE,)
1130 17th Street, NW)
Washington, DC 20036,)

SIERRA CLUB,)
85 2nd Street,)
San Francisco, CA 94105,)

THE HUMANE SOCIETY OF THE)
UNITED STATES,)
2100 L Street, NW)
Washington, DC 20037,)

NATIONAL PARKS)
CONSERVATION ASSOCIATION,)
1300 19th Street, NW, Suite 300)
Washington, DC 20036,)

THE FLORIDA BIODIVERSITY PROJECT,)
1060 Tyler Street)
Hollywood, FL 33019,)

THE WILDERNESS SOCIETY,)
1615 M Street, NW)
Washington, DC 20036,)

WILDLANDS CPR,)
126 E Broadway, Suite 25)
Missoula, MT 59802)

and)

BRIAN SCHERF,)
1060 Tyler Street)
Hollywood, FL 33019,)

Plaintiffs,)

vs.)

DIRK KEMPTHORNE,)
Secretary, U.S. Department of the Interior)

No. 8:07-cv-2332-T-307BM

07 DEC 21 PM 2:47
CLERK OF DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

RECEIVED

1849 C Street, NW)
 Washington, DC 20240,)
)
 MARY BOMAR,)
 Director, National Park Service)
 1849 C Street, NW)
 Washington, DC 20240,)
)
 and)
)
 DALE HALL,)
 Director, U.S. Fish and Wildlife Service)
 1849 C Street, NW)
 Washington, DC 20240,)
)
 Defendants.)
)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This suit challenges a decision by the National Park Service (“NPS”) in February 2007 to re-open off-road vehicle (“ORV”) trails in the Bear Island unit of Big Cypress National Preserve (“Big Cypress” or “Preserve”) in southern Florida. These trails were previously closed by NPS in 2000 in accordance with a recreational ORV Management Plan (“ORV Plan”) that NPS adopted to protect the Preserve from the extensive damage caused by dispersed ORV use, and to protect the threatened and endangered species that rely on the Park, including the Florida Panther (“Panther”). NPS’s reopening of trails that were closed under the 2000 ORV Plan – particularly given NPS’s failure to implement critical elements of the ORV Plan that were designed to reduce ORV damage to the Preserve, limit harm to the Panther, and determine sustainable levels of ORV use of the Preserve – is inconsistent with the original terms of the 2000 ORV plan, impairs the Preserve, and results in levels of “take” of the Panther that exceed that permitted under the Incidental Take Statement (“ITS”) issued with the Biological Opinion that accompanied the ORV Plan.

2. Big Cypress is an extraordinary and unique national treasure. The Preserve serves as a large natural reservoir and nutrient filter, permitting natural biological processes to nourish diverse ecological communities distinctive to South Florida. The Preserve also has an exceptional concentration of rare and protected species of plants and animals, including the Panther, which has been federally listed as “endangered” since 1967. Bear Island unit, an area within the Preserve, is heavily used by the Panther, and thus the unit’s management is particularly critical to the panther’s survival and recovery. United States Fish and Wildlife Service (“FWS”), Biological Opinion on Impacts of ORV Management Plan to Endangered Species in Big Cypress National Preserve (July 14, 2000). The NPS has recognized that “[t]he Florida Panther is perhaps the most sensitive natural resource in south Florida . . . any action that led to losses of individual panthers, their prey, or the quality of Panther habitat would contribute to the loss of the species as an ecological and genetic resource.” NPS, General Management Plan: Final Environmental Impact Statement, Vol. I, at 3 (1991) (“EIS”) at 259.

3. The 2000 ORV Plan resulted from a previous lawsuit filed in 1995 by Florida Biodiversity Project and Brian Scherf, plaintiffs in this litigation. In the 1995 case, the plaintiffs contended that the NPS’s unlawful management of ORVs in the Preserve – including allowing widespread dispersed use throughout the Preserve – was causing extensive damage to natural resources and harming threatened and endangered species, particularly the Panther. That same year, NPS entered into a settlement agreement with plaintiffs in which it agreed to develop a comprehensive ORV management plan for the Preserve, and also agreed that “[s]upplemental environmental analyses of the ORV Plan will be prepared in the future if the NPS makes substantial changes in the proposed action that are relevant to environmental concerns, or if the NPS determines that significant new circumstances or information exist relevant to

environmental concerns and bearing on the proposed action or its impacts.” The Florida Biodiversity Project v. Roger Kennedy, No. 95-50-CIV- FTM-24D (M.D. Fla. Oct. 25, 1995) (“1995 Settlement Agreement”), Exhibit A, at 6-7. The 1995 Settlement Agreement provides that the “public will be allowed to participate in such supplemental environmental analyses to the full extent required by NEPA, the CEQ regulations and the NPS regulations.” Id. The parties agreed that the Court would retain jurisdiction to enforce the terms of the Settlement Agreement, id. at 11, and the Court entered an order approving the 1995 Settlement Agreement and retaining jurisdiction to enforce its terms. Exhibit B.

4. Plaintiffs now challenge the NPS’s re-opening of the Bear Island units’ trails to ORV use because: 1) NPS breached its settlement agreement with The Florida Biodiversity Project, et al., and violated the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (“NEPA”), by failing to prepare any environmental analysis of the impacts of its action; 2) NPS violated the National Park Service Organic Act of 1916, 16 U.S.C. § 1, the Big Cypress Establishment Act, 16 U.S.C. §§ 698f and 698i, the 2000 ORV Plan, and the Administrative Procedure Act, 5 U.S.C. § 706 (“APA”), by failing to “conserve the scenery and natural and historic objects and the wildlife therein” and arbitrarily and capriciously re-opening the ORV trails in the Bear Island unit; 3) NPS violated Executive Orders 11644 and 11989 and the APA by reopening the Bear Island unit trails and thereby adversely affecting the Preserve’s natural, aesthetic, or scenic values; 4) FWS violated the Endangered Species Act, 16 U.S.C. § 1533 et seq., (“ESA”) and the APA by initially concurring with the NPS’s determination that reinitiation of consultation on the effects of re-opening the Bear Island ORV trails was not required, and then by arbitrarily and capriciously, and without observance of required procedure, purporting to amend the 2000 Biological Opinion accompanying the 2000 ORV Plan; and 5) NPS violated the

ESA by failing to insure that its action was not likely to jeopardize the continued existence of the Panther or result in unauthorized take, and by otherwise failing to conserve the Panther.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 1540 and 28 U.S.C. § 1331, and pursuant to the 1995 Settlement Agreement.

6. Pursuant to 16 U.S.C. § 1540(g), on June 14, 2007, plaintiffs provided defendants with a 60 day notice of its intent to sue for violations of the ESA.

PARTIES

A. Plaintiffs

7. Plaintiff Defenders of Wildlife (“Defenders”) is a national, non-profit membership organization headquartered in Washington, D.C., that is dedicated to the protection of all native animals and plants in their natural communities. Defenders maintains a field office in St. Petersburg, Florida, with two full-time employees. Defenders has approximately 540,000 members and supporters nationwide and more than 50,000 members in Florida. Defenders advocates new approaches to wildlife conservation and employs education, litigation, research, legislation, and advocacy to defend wildlife, species and their habitat. In this regard, Defenders and its members have worked to study and protect the Panther and its habitat, including in the Preserve and in the Bear Island unit. Defenders and its members derive scientific, educational, recreational, and other benefits from the preservation of Big Cypress National Preserve, including Bear Island in particular, and the protection of the Panther.

8. Plaintiff Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural

and human environment; and to using all lawful means to carry out these objectives. The Sierra Club works to protect endangered species and habitats as well as to ensure that our national parks and preserves are managed in a way that protects our natural heritage. The Sierra Club and its members lead group hikes throughout Big Cypress, including in Bear Island. The Bear Island unit is a favorite destination of Sierra Club members, who enjoy the tranquility of the area and its undisturbed vistas, and who enjoy looking for signs of Panthers and the possibility of observing a Panther. Hikes throughout the Bear Island unit have been reduced since the re-opening of ORV trails as the pristine wilderness quality of the land is no longer apparent and the passage of ORVs on the trails creates both noise and exhaust.

9. Plaintiff The Humane Society of the United States (“The HSUS”) is the nation’s largest animal protection organization with more than 10 million members and constituents, and over 694,000 members and constituents in the state of Florida. Since its inception in 1954, The HSUS has been dedicated to protecting imperiled species and the habitats on which they depend. The HSUS accomplishes these objectives through public education, litigation, legislation, and research and investigations. The HSUS publishes bi-monthly newsletters, special reports, and activist alerts to inform its members and constituents of its activities and to request assistance in protecting endangered and threatened wildlife and their habitat. The HSUS also regularly submits comments to government agencies concerning proposed actions that would affect animals and their habitat, maintains a website for its members and the general public, and regularly disseminates information concerning the treatment of animals and wildlife, including government decisions that may adversely affect imperiled wildlife and their habitats. The HSUS has long been an active advocate for the protection and recovery of the critically endangered Panther and its habitat. Members of The HSUS enjoy visiting the Big Cypress National Preserve

and studying, photographing, and viewing wildlife habitat, including that of the Florida panthers.

10. Plaintiff National Parks Conservation Association (“NPCA”) is a non-profit organization based in Washington, D.C. Founded in 1915, the mission of NPCA is to protect our National Parks for future generations. In particular, NPCA advocates for the National Parks and the National Park Service, educates decision-makers and the public about the importance of preserving the parks, seek to uphold the laws that protect the National Park System, and assesses the health of the National Park System and its management to better inform its advocacy work. NPCA members frequently visit various units of the National Park System and those members’ enjoyment of the National Park System is diminished by the harm to those units caused by ORV use. NPCA represents over 330,000 members through its Washington, D.C. headquarters and 22 regional and field offices, including a regional office in Hollywood, Florida.

11. Plaintiff Florida Biodiversity Project (“FBP”) is a non-profit public interest membership organization incorporated in Florida. It is dedicated to the preservation of all native and wild plants and animals, communities of species, and naturally functioning ecosystems in Florida. FBP engages in educational, administrative and other activities to improve public awareness and attitudes and policies that impact natural ecosystems and wild flora and fauna. FBP has been extensively involved in issues concerning the Preserve, including by investing considerable organizational resources in ascertaining and attempting to prevent recreational ORV impacts on the Preserve. It was a plaintiff in the 1995 litigation, and is a party to the 1995 Settlement Agreement. For many years, FBP members, including Brian Scherf, have repeatedly visited Bear Island unit to enjoy its wild flora and fauna, to look for signs of the Panther and perhaps observe a Panther, and to experience the tranquility of the area.

12. Plaintiff The Wilderness Society (“TWS”) is a nonprofit membership

organization dedicated to protecting America's wildest places for our nation's health, wealth, and future generations. TWS has approximately 200,000 members nationwide and over 9,700 members in Florida. TWS employees and members work to protect America's wilderness and to develop a national network of wildlands through public education, scientific analysis, and advocacy. TWS's goal is to ensure that future generations will enjoy the clean air and water, wildlife, natural beauty, opportunities for recreation, and spiritual renewal that pristine forests, rivers, deserts, and mountains provide.

13. Plaintiff Wildlands CPR is the only national conservation organization in the U.S. that specifically targets off-road vehicle abuse of public lands and actively promotes wildland restoration, road removal and the prevention of new road construction. Wildlands CPR is based in Missoula, Montana, but works nationally. Its members come from throughout the United States, including Florida, and have recreated in Big Cypress National Preserve in the past, and will continue to do so in the future. Wildlands CPR members are interested in protecting the Preserve, and the wildlife that depend on the Preserve, from the impacts of off-road vehicles. They are also interested in protecting quiet, non-motorized recreational opportunities in the Preserve, such as hiking, camping, wildlife and bird watching, photography and other similar activities that have been degraded by off-road vehicle use.

14. The organizational plaintiffs have members who live near and regularly visit the Preserve, including Bear Island unit, for wildlife observation, hiking, camping, and other uses such as photography. They are drawn to the scenic beauty of the area, and enjoy the vistas of vast expanses of prairies and marshes with interspersed hammocks. They enjoy exploring the wilderness and trails of Big Cypress and Bear Island unit, as well as looking for, and the possibility of observing, rare, threatened or endangered species, or signs of such species,

including the Panther. They have hiked through the areas of Bear Island unit that were closed, and subsequently reopened, to ORV use. They have observed the damage to Bear Island unit soils and vegetation that results from ORV use, such as deep rutted soils and destroyed prairie and marsh grasses. They have observed the pooling of water and other forms of disrupted hydrological flows. They have also observed once natural prairies and marshes become defaced by authorized and unauthorized ORV trails running through prairies and marshes. They have observed ORV damage in the Bear Island unit increase rapidly after the Bear Island unit trails were re-opened in February 2007. Such damage causes plaintiffs' members sadness, frustration, a sense of loss, and anger, and it discourages them from visiting Bear Island unit. Plaintiffs' members have aesthetic, educational, health and spiritual interests that will be harmed by the environmental impacts, including impacts to the land, water, scenery and species in Bear Island unit, that will result from the NPS's re-opening of the trails within Bear Island unit to ORV use.

15. Plaintiff Brian Scherf is a resident of Hollywood, Florida, and has been a member of Florida Biodiversity Project since 1993. Since the mid 1980's, Mr. Scherf has hiked through the Preserve approximately six times a year, and through Bear Island unit approximately twice a year. He plans to do so again in the future. He has also hiked specifically through the areas of Bear Island unit that were closed, and subsequently reopened, to ORV use. He does so because he enjoys the natural beauty of the area and the expansive vistas, as well as looking for rare, threatened and endangered species, and signs of such species, including the Panther. On his most recent hike Mr. Scherf was very excited by the possibility of observing a Panther after encountering another hiker who reported he just encountered a Panther himself. On many occasions, Mr. Scherf has encountered vegetation and soil destruction that results from ORV use, such as deep ruts, large areas drained of water while other areas have deep pools of water,

and areas in which soils have lost their cohesion, turning into a muddy quagmire. Observing such damage to, and destruction of, Bear Island unit causes Mr. Scherf great sadness and anger and also harms his aesthetic enjoyment of the area as the expansive vistas are damaged and crossed with wide muddy, rutted ORV trails; vegetation is damaged; trails he was walked, and the soils they cross, become muddy bogs; and species and their signs that he hopes to see, such as the Panther, are less common.

B. Defendants

16. Defendant Dirk Kempthorne is the Secretary of the U.S. Department of the Interior (“DOI”). As the parent agency of the National Park Service and FWS, DOI is ultimately responsible for the administration, management, and protection of our Nation’s federal lands, including the National Park System.

17. Defendant Mary Bomar is the Director of the National Park Service (“NPS”), the agency within the U.S. Department of the Interior charged with the administration, management and protection of the National Park System, including Big Cypress National Preserve.

18. Defendant Dale Hall is the Director of the U.S. Fish and Wildlife Service, the agency within the U.S. Department of the Interior, and is charged with administration of the ESA.

STAUTORY AND REGULATORY FRAMEWORK

A. Big Cypress Establishment Act And The National Park Service Organic Act

19. Big Cypress was established by Congress in 1974 to “assure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed in the State of Florida and to provide for the enhancement and public enjoyment thereof.” 16 U.S.C. § 698f(a).

20. In establishing the Preserve, Congress stressed that “public uses and enjoyment would be limited to activities where, or periods when, such human visitation would not interfere with or disrupt the values which the area is created to preserve.” H. Rep. No. 502, 93rd Cong., 1st Sess. 7 (1973). One of the House sponsors of the legislation explained that the “ecosystem of the Big Cypress area is fragile indeed and must be given every protection if we are to avert the elimination of the wildlife forever.” 119 Cong. Rec. H32838 (Oct. 7, 1973) (Statement of Rep. Fuqua).

21. Congress further directed the Secretary of the Interior to administer the Preserve lands “as a unit of the National Park System in a manner which will assure their natural and ecological integrity in perpetuity” 16 U.S.C. § 698i(a). Of particular pertinence here, the statute directs the Secretary to develop “rules and regulations” which are “necessary and appropriate to limit or control” potentially destructive practices on the preserve, specifically including the use of “motorized vehicles” and “hunting, fishing, and trapping.” 16 U.S.C. § 698i(b).

22. As a part of the National Park System, the Preserve must be managed to achieve the fundamental purpose of the National Park Service Organic Act of 1916 (“Organic Act”). The Organic Act of 1916 requires the NPS to “conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. §1. The Organic Act was amended by the Redwood Act to further reinforce that NPS lands shall be managed in a manner that prioritizes the preservation of such lands. *Id.* at § 1 a-1.

B. Executive Orders 11644 and 11989

23. In 1972, President Richard Nixon signed Executive Order (“EO”) 11,644, which sets forth the criteria that are to be employed in the designation of areas and trails for the use or

non-use of ORVs on federal lands. The EO provides that ORV use on public lands must be “controlled and directed so as to protect the resources of those lands,” and that “[a]reas and trails [for ORV use] shall be located to minimize damage to soil, watershed, vegetation, or other resources . . . [and] minimize harassment to wildlife or significant disruption of wildlife habitats.” EO 11,644 §§ 1, 3(a). Executive Order 11,644 also requires the NPS to “ensure adequate opportunity for public participation in the promulgation of [such regulations] and in the designation of areas and trails” for ORV use. *Id.* at § 3(b).

24. Reaffirming and strengthening Executive Order 11,644 five years later, President Jimmy Carter issued Executive Order 11,989, directing agencies to close areas or trails to ORV use when such vehicles were causing or might cause “considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas or trails of public lands.” Exec. Order No. 11,989.

C. Endangered Species Act

25. Recognizing that certain species of plants and animals “have been so depleted in numbers that they are in danger of or threatened with extinction,” Congress enacted the ESA to provide both “a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531. The ESA reflects “an explicit congressional decision to afford first priority to the declared national policy of saving endangered species.” Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978).

26. A species may be listed as endangered or threatened. An endangered species is one that is “in danger of extinction throughout all or a significant portion of its range” 16 U.S.C. § 1532(6). The Panther has been federally listed as endangered since 1967.

27. Section 9 of the ESA makes it unlawful for any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1). “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The term “harm” is further defined by FWS regulations to encompass habitat modification or degradation that injures an endangered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering, 50 C.F.R. § 17.3, and “harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.” Id.

28. Section 7 of the ESA directs all federal agencies, in consultation with the Secretary of Interior, to use their existing authorities to conserve threatened or endangered species. 16 U.S.C. § 1536(a)(1). “Conservation” means “to use and the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided pursuant to this chapter are no longer necessary.” Id. at § 1532(3).

29. Section 7 of the ESA further requires all federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species.” 16 U.S.C. at § 1536(a)(2). To carry out this obligation, an agency “consults” with the FWS when it undertakes an action that “may affect” listed species, unless the “federal agency determines . . . that the proposed action is not likely to adversely affect any listed species.” 50 C.F.R. § 402.14. The agency requesting consultation must, among other things, “provide the [FWS] with the best scientific and commercial data available or which can be obtained during the consultation.” Id. Consultation results in the issuance by the FWS of a Biological Opinion (“BO”).

30. In formulating a BO, FWS is required to “use the best scientific and commercial data available,” and determine whether the effects of the action, “taken together with cumulative effects,” are likely to result in jeopardy to the species. 50 C.F.R. § 402.14(g). Each BO must contain, among other things, “[a] detailed discussion of the effects of the action on listed species or critical habitat.” *Id.* at § 402.14(h)(2).

31. If a BO finds that the proposed action is not likely to jeopardize the continued existence of the species, but may result in the take of individual animals, FWS must prepare an incidental take statement (“ITS”) which permits an agency to “take” a specified number of individual members of a protected species if the taking is incidental to an otherwise lawful activity, 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 17.3, 402.14(i), and the agency complies with required terms and conditions of the ITS. 16 U.S.C. §§ 1536(c)(2), 1536(b)(4).

32. Re-initiation of consultation is required whenever “the amount or extent of taking specified in the incidental take statement is exceeded,” “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent that was not previously considered,” or “the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16.

D. The National Environmental Policy Act

33. The National Environmental Policy Act (“NEPA”) is the “basic national charter for protection of the environment.” Council on Environmental Quality regulations, 40 C.F.R. §§ 1500.1. NEPA directs federal agencies to take into account, and publicly disclose, the environmental consequences of their proposed actions before taking steps that may significantly affect the quality of the human environment.

34. NEPA requires each federal agency to prepare and circulate for public review and comment a detailed Environmental Impact Statement (“EIS”) prior to undertaking any major federal action significantly affecting the human environment. 42 U.S.C. § 4332(2)(C). The EIS serves two important purposes: it ensures that the agency will have available and will carefully consider detailed information concerning significant environmental impacts in reaching its decision, and it guarantees that the relevant information will be made available to the public and other governmental agencies that may play a role both in the decision-making process and in the implementation of the decision.

35. If, after preparing a draft or final EIS, the agency makes “substantial changes in the proposed action that are relevant to environmental concerns,” the agency must, following solicitation of public comment, prepare a supplemental EIS (“SEIS”) which analyzes the environmental implications of the changes. 40 C.F.R. § 1502.9(c).

36. Unless a proposed agency action is one that normally requires an EIS, or one that has such minor environmental consequences that it can be categorically excluded from consideration in an EIS, an agency must prepare an Environmental Assessment (“EA”) to determine whether the proposed action will have significant environmental impacts requiring preparation of an EIS. 40 C.F.R. § 1501.4. If the agency concludes on the basis of its EA that its action will not have significant impacts on the environment, the federal agency must document its decision and explain the reasons why the project’s impacts are insignificant in a “finding of no significant impact” (“FONSI”). 40 C.F.R. § 1508.13.

E. Administrative Procedure Act

37. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, provides for judicial review of agency action. Under the APA, the reviewing court must “hold unlawful and set aside

agency action, findings, and conclusions” found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A reviewing court must also set aside agency action, findings, and conclusions found to be without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

A. ORV Impacts on Big Cypress and the Florida Panther

38. The Florida Panther (*Felis concolor coryi*) population represents the last known members of a sub-species that once roamed much of the southeastern United States. The population is now isolated to southernmost Florida and is estimated at fewer than 100 adults and immature panthers. As a result of land development and road-building in the panther’s current range—an area smaller than five percent of its historic range—FWS has identified the Panther as a subspecies with a significant threat of extinction. FWS, Technical/Agency Draft Florida Panther Recovery Plan 5 (3rd rev. Jan. 2006). The conservation of remaining Panther habitat is crucial to the panther’s survival. The FWS has concluded that “[c]ontinued deterioration, fragmentation, loss of habitat, and further reductions in the current extent of the occupied range will likely reduce the south Florida population below the level necessary for demographic and genetic health.” FWS, Biological Opinion on Impacts of ORV Management Plan to Endangered Species in Big Cypress National Preserve (“BO”) (July 14, 2000).

39. Of the estimated 2.2 million acres of viable habitat for the Panther in southern Florida, over 25% lies within the 582,000 acres of Big Cypress. Panthers traverse the Preserve’s diverse terrain in search of prey and to den. Big Cypress is considered by Panther experts as the species’ “primary zone” – land that, if preserved, will contribute most to the long term persistence of the species in the wild. The Bear Island unit, located in the northwest corner of

the Preserve, has an especially high concentration of Florida panthers and has the highest proportion of preferred Panther habitat within the original Preserve boundaries.

40. The topography of Big Cypress, including Bear Island unit, consists of prairies, marshes and cypress swamps, with hardwood hammocks and pine flatwoods interspersed. Underlying the soils and vegetation is a layer of limestone. Water flows as a sheet across this landscape, through the prairies and marshes. The Bear Island unit itself consists largely of prairies and marshes, with hammocks and pine flatwoods essentially occurring as islands, some interconnected and some not, among the prairies and marshes. This is essential habitat for the Panther.

41. For many years, the NPS has been aware that natural and cultural resources of the Preserve are vulnerable to degradation from ORV use. E.g. ORV Plan at 19-21. However, for over three decades, the NPS has permitted thousands of ORVs – including street legal 4 x 4s, airboats, all-terrain vehicles, and homemade swamp-buggies – virtually unrestricted access into the Preserve, only rarely requiring the vehicles to stay on designated trails.

42. ORV use inflicts havoc on basic Preserve ecological functions: it causes soil and vegetation degradation and surface water channelization, and it threatens Panthers by increasing human activity in remote Panther habitat and displacing Panthers, by fragmenting habitat, and by facilitating hunting that reduces Panther prey, including for example white tail deer. The size, distribution, and abundance of available prey species are critical factors to the persistence of panthers in south Florida and often determine the extent of Panther use of an area. FWS, Florida Panther Recovery Plan (2006).

43. In 1991, the NPS found that “the decline of the Florida Panther has been attributed to the loss of habitat quality due to increased hunting [and] ORV use.” GMP at 231

(1991). This finding is supported by the facts that “panthers tend to leave the Bear Island unit in the preserve during hunting season,” and panthers found in the private lands north of I-75 where there is significantly less ORV use are “more abundant, heavier, and healthier than their counterparts south of I-75 in the preserve.” GMP at 179, 231.

44. A 1999 study further suggested the detrimental effects of ORV activity on the Panther, including adverse behavioral changes and a “lowering of the quality” of Panther habitat. Michael W. Janis & J.D. Clark, The Effects of Recreational Deer and Hog Hunting on the Behavior of the Florida Panthers 63 (May 1999). This study determined that the frequency of Panther use in the Bear Island unit decreases from 30 to 40 percent during the hunting season. While the decrease in Panther use of the Bear Island unit was historically thought to be balanced by an increase in use of private lands north of the Preserve, the study authors warned that “the consequences of this pattern of use will become more serious if future degradation of Panther habitat on these private lands occurs.”

45. Additional studies have found that ORV use in Big Cypress National Preserve has impacted wildlife populations and habitats through modifications to water flow patterns and water quality, soil displacement and compaction, direct vegetation damage, disturbance to foraging individuals and, ultimately, overall reduction in the suitability of habitats for wildlife. See U.S. Geological Services, Effects of Public Land Use on Indicator Species' Populations and Habitats in Big Cypress National Preserve at 2 (2001).

46. Degradation to soil and vegetation as a result of ORV traffic has been found to transform landscapes, especially in low elevation wetland terrains such as prairies and marshes. Soil disturbance is the most direct, visible, and lasting impact of ORV use in the Preserve. E.g. ORV Plan at 4. When the soils of Big Cypress are saturated or inundated with water, they

become especially susceptible to disturbance from vehicle traffic. Id. Prairies and marshes have been identified as the vegetation community in the Preserve most impacted by ORV use. E.g. ORV Plan at 31, 33. The NPS evaluated the suitability of six types of Preserve terrain for ORV traffic in the ORV Plan, and concluded that prairies and marshes were the only terrain having “low” substrate suitability. Id. at 33.

47. NPS has found that once ORV use displaces soils, there are no natural mechanisms capable of restoring the natural topography. Id. at 4. As a result, the damage can be permanent, effectively altering hydrology and promoting unnatural vegetation succession. Id.

B. The 1995 Settlement Agreement And The NPS’s Subsequent Issuance Of An ORV Plan.

48. The adverse impacts of ORV activity on Preserve wildlife and habitat were first addressed in 1995 when FBP and others challenged the NPS and FWS for failure to protect the fragile ecosystems of the Preserve from excessive ORV traffic. That litigation concluded in the 1995 Settlement Agreement requiring the NPS to develop an ORV management plan establishing a comprehensive system for management of ORV use in Big Cypress with the goal of assuring the natural and ecological integrity of Preserve resources in accordance with the BCNP Establishment Act. The 1995 Settlement Agreement required the NPS to perform “[s]upplemental environmental analyses of the ORV Plan . . . in the future if the NPS makes substantial changes in the proposed action that are relevant to environmental concerns, or if the NPS determines that significant new circumstances or information exist relevant to environmental concerns and bearing on the proposed action or its impacts.” 1995 Settlement Agreement, Attachment 1, at 6-7. The 1995 Settlement Agreement also provides that the “public will be allowed to participate in such supplemental environmental analyses to the full extent required by NEPA, the CEQ regulations and the NPS regulations.” Id. at 7.

49. Pursuant to its obligations under the 1995 Settlement, NPS promulgated the 2000 ORV Plan. The objective of the ORV Plan is to establish management “in a manner that will ensure the natural and ecological integrity of the preserve.” NPS, Record of Decision on the Final Recreational Off-Road Vehicle Management Plan/Supplemental EIS 3 (Sept. 2000) (“ROD”). In carrying out this objective, the ORV Plan provides for “methods for limiting and controlling ORV use to minimize impacts to resources in the preserve . . . methods of avoiding adverse impacts to wetlands and sensitive resources for ORV’s . . . and procedures and considerations for closing, opening and reopening areas to ORV use.” ORV Plan at 15-16. The ORV Plan adopts a “precautionary approach” to management. Id. at 29. “In all situations involving conflicts between resource protection and resource use, the National Park Service would decide in favor of resource protection.” Id. Research is to be undertaken to determine sustainable levels of use of the Preserve, and then levels of ORV use set according to the results of the research. E.g. id. at 28-29, 42-46, 59-65. The Plan also calls for the restoration to the extent possible of areas that were previously damaged, through natural means or through man-made intervention. Id. at 54.

50. Under the ORV Plan, in order to reduce the harm to resources associated with excessive ORV use, the NPS is required to create, manage, and maintain a system of ORV trails within Big Cypress National Preserve. More specifically, the 2000 ORV Plan mandates reducing approximately 23,300 miles of dispersed ORV use now occurring throughout the Preserve to 400 miles of designated primary trails. E.g. ORV Plan at 33. The 2000 ORV Plan defines primary trails as those “trails emanating from the designated access points and providing recreational access within the preserve.” “the principal ORV routes.” ORV Plan at 34. So called “secondary trails” “provide access to private property or specific destinations such as

campsites.” they “branch off of the primary trails and receive much less use,” “extend[ing] for a short distance from the primary trail.” Id.

51. According to the ORV Plan and its accompanying SEIS, Big Cypress prairies and marshes have low “substrate suitability,” are the most sensitive and most impacted areas of Bear Island unit, and thus ORV use is restricted from these areas. E.G. ORV Plan at vi, vii, 33, 90-98, 131. In addition, the ROD specifically states that “environmentally sensitive areas, such as prairies, will be closed to ORV use.” ROD at 5. Trails in prairies and marshes were also closed because trails through the areas lead to dispersed ORV use. Prairies and marshes lack woody vegetation that would otherwise function to limit ORV use to the trails. Id. at 31.

52. The 2000 ORV Plan establishes a phased implementation approach spanning 10 years with a schedule that specifically identifies the various elements of the ORV Plan, the priority of each element of the ORV Plan, and a specific timeframe for implementing each element of the Plan. For example, research to identify and analyze cumulative effects of ORV use on the Preserve, to analyze Florida Panther response to ORV use, and to determine the effects of ORV use on soils, vegetative communities, and surface water flows were designated as “HIGH” priority. ORV Plan at 62-63. These high priority research projects are included in “Phase I” of the ORV Plan. Id. at 64-65. Phase I projects were to be undertaken in the first year of the plan, and were deemed to be necessary for completion of subsequent actions. Id. at 7, 64-65.

53. In 2000, the NPS also conducted consultation with the FWS regarding the effect of the ORV Plan on federally listed endangered and threatened species. The consultation resulted in a BO evaluating the effects of the ORV Plan on endangered Panthers. The BO found that ORV activity authorized by the Plan causes the “take” of Panthers through harassment and

habitat modification. The binding Incidental Take Statement (“ITS”) for the 2000 BO specifies that “[i]n order to be exempt from the prohibitions of section 9 of the ESA, NPS must comply with [several] terms and conditions.” These include, but are not limited to: 1) NPS must conduct new research on the level of ORV use in Bear Island unit to determine the level that is acceptable and compatible with Panther use; 2) NPS must initiate a study similar to the earlier study by Janis and Clark to determine the impacts of ORV use and to evaluate Panther behavior in response to ORV use; and 3) NPS will implement studies required by the 2000 ORV Plan to preserve panthers and determine ORV carrying capacity in Big Cypress generally. BO at 38.

54. Immediately following completion of the ORV Plan and its BO, the NPS decided to close 30 miles of trails in the Bear Island unit, leaving approximately 24.43 miles of primary trails in Bear Island Unit, and 0.34 miles of secondary trails. As explained by then-Superintendent John Donahue, “the Bear Island trails that were closed were almost exclusively in prairies and other sensitive areas.” Letter from John Donahue, Superintendent, Big Cypress National Preserve, to Allen Egbert, Executive Director of Florida Fish and Wildlife Conservation Commission (Nov. 14, 2000).

55. Upon information and belief, since adoption of the ORV Plan, ORV use in the Preserve has not been limited to the 400 miles of designated trails. Rather, dispersed ORV use in the Preserve continues to be widespread, and few if any trails in other management units of the Preserve, besides Bear Island Unit, were closed. Through 2007, NPS has not completed, or even initiated, any of the studies of ORV impacts on the Panther that were called for in the 2000 BO.

56. Notwithstanding the 2000 ORV Plan and BO, in early 2007, and perhaps as early as 2006, NPS began taking action to re-open the trails in Bear Island unit, including by

convening a meeting dominated by ORV users that focused on where the NPS should re-open trails within Bear Island unit. The NPS did not seek public input on whether it should re-open trails within Bear Island unit at all, nor did it conduct any supplemental environmental analyses or NEPA review in connection with its decision.

57. On February 15, 2007, the NPS submitted a memorandum to FWS regarding the designation of trails in Bear Island unit. The NPS's memorandum requested confirmation from FWS that re-opening ORV trails in Bear Island unit would be consistent with the terms and conditions of the 2000 BO. Despite NPS's proposal to re-open trails closed in accordance with the 2000 ORV Plan, and NPS's ongoing failure to complete the studies required as terms and conditions to the 2000 BO's ITS, FWS responded on February 16, 2007, by asserting that the NPS's actions were in accordance with the 2000 BO.

58. On February 21, 2007, the NPS announced that nearly 20 miles of the 30 miles closed in 2000 in order to protect the Panther and safeguard particularly sensitive areas in the Bear Island unit, including prairies, would be re-opened to ORV use, effective February 28, 2007. NPS did not issue any formal record of decision or other document explaining the basis for its action, nor did it prepare an environmental analysis under NEPA or the Settlement Agreement of the effects of its action on the Preserve.

59. On June 14, 2007, plaintiffs sent their notice of intent to file suit for violations of the ESA, NEPA and various other statutes. Plaintiffs have never received any written response to that notice. On August 9, 2007, NPS wrote FWS asking for an "amendment" to the 2000 BO accompanying the 2000 ORV Plan. The NPS stated that new information existed that warranted amending the 2000 BO, but the NPS did not formally request that the FWS reinstate consultation on the ORV Plan pursuant to the ESA and its implementing regulations, nor did the

NPS furnish the FWS with the detailed biological information necessary for the FWS to conduct consultation.

60. On September 19, 2007, FWS purported to “amend” the 2000 BO based upon new information and stated that its actions with NPS constituted reinitiation of consultation. Among other things, the new document issued by FWS purports to retroactively: 1) eliminate the requirement that NPS undertake studies of the level of ORV use in Bear Island unit to determine the level of ORV use that is acceptable and compatible with Panther use in Bear Island unit; and 2) eliminate the requirement that NPS undertake a study similar to the Janis and Clark study, concurrent with the ORV carrying capacity and level of use study, to better understand the effect various levels of ORV use have on Panther behavior. In place of such studies, FWS stated that NPS must simply review historical data. In addition, the new document purports to eliminate the requirement that NPS conduct studies to determine the ORV carrying capacities for various management units in the Preserve.

61. The 2000 “amendment” purports to authorize the NPS to allow increased use of ORVs in Bear Island unit, although it concedes that ORV use has detrimental impacts on the Panther. It recognizes that, according to the Janis and Clark study, Panthers may be displaced to adjacent public lands, but contains no analyses of the present or future condition of those lands. The 2007 “amendment” contains no analyses of the effects of ORV associated hunting on prey availability for Panthers. Nor does it analyze other important potential effects such as the potential for increased intraspecies mortality resulting from the displacement of Panthers from their territory into other Panthers’ territory.

62. As a result of the NPS’s reopening of the trails in February 2007, NPS will increase the miles of primary trails from 24.43 miles to 34.96 miles in Bear Island Unit. NPS

will therefore increase primary trails in Bear Island unit by over forty percent.

63. As a result of the NPS's reopening of the trails in February of 2007, the NPS will increase the miles of secondary trails in Bear Island unit from 0.34 miles of secondary trails to 9.41 miles of secondary trails. NPS will therefore increase secondary trails in Bear Island unit by over 2000 percent.

64. The trails reopened in Bear Island Unit include trails with segments that pass through prairies and/or marshes.

65. ORV use of the reopened trails, where they pass through prairies and/or marshes, has displaced soils and damaged vegetation in the prairies and/or marshes. In such areas where the soil has been displaced, the surface of the soils is rutted. In such areas, the soils, and vegetation, are generally depressed, or lower, than unaffected soils in the surrounding area. Water collects and pools and flows along such areas of the trails. In such areas, the ORVs have widened trails to muddy trails that are over fifty feet wide.

66. The areas where the trails pass through prairies and/or marshes lack woody vegetation. In areas where the reopened trails pass through prairies and/or marshes, ORVs have left the designated trails and dispersed into the prairies and/or marshes.

67. ORVs that have traveled on the trails that were reopened have severely damaged the sensitive soils and vegetation. Because of the damage, NPS has been forced to suspend use on certain trails and/or portions of trails that it had reopened.

68. Some reopened "secondary trails" do not lead to a designated feature, such as, for example, a campsite. Some reopened "secondary trails" lead to barriers placed in the middle of a prairie. Some reopened "secondary trails" lead to barriers placed in the middle of a marsh.

69. Some reopened secondary trails officially end at barriers, after which ORV tracks

in fact extend to, and connect with, other trails.

PLANTIFFS' CLAIMS FOR RELIEF

First Claim for Relief: NPS's Violation of the 1995 Settlement Agreement

70. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

71. The 1995 Settlement Agreement requires that NPS conduct “[s]upplemental environmental analyses of the ORV Plan . . . in the future if the NPS makes substantial changes in the proposed action that are relevant to environmental concerns, or if the NPS determines that significant new circumstances or information exist relevant to environmental concerns and bearing on the proposed action or its impacts.” 1995 Settlement Agreement at 6-7. It also provides that the “public will be allowed to participate in such supplemental environmental analyses to the full extent required by NEPA, the CEQ regulations and the NPS regulations.”

72. NPS violated the 1995 Settlement Agreement by failing to conduct supplemental NEPA analyses of the ORV Plan despite: 1) the fact that it has contended there is significant new information and/or circumstances adequate to warrant seeking an “amendment” to the 2000 BO; and 2) it is in fact substantially changing the 2000 Plan by, among other things, allowing significant ORV use in Bear Island unit, without conducting the studies required in 2000. NPS also violated the 1995 Settlement Agreement by failing to provide for public participation to the full extent required by NEPA, the CEQ regulations and the NPS regulations.

Second Claim for Relief: NPS's Failure to Prepare an Environmental Impact Statement or an Environmental Assessment

73. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

74. In re-opening 20 miles of Bear Island trails to ORV use, NPS failed to conduct an environmental analysis pursuant to NEPA. NPS did not prepare an EA, did not issue a FONSI, did not prepare an EIS, and did not prepare an SEIS supplementing its 2000 EIS issued in

conjunction with its adoption of the 2000 ORV Plan. NPS did not disclose the likely environmental impacts of its proposed action to the public in any manner.

75. NPS's decision to re-open 20 miles of trails in the Bear Island unit of the Preserve to ORV use may have significant environmental impacts, including rutting, compaction, and displacement of the sensitive soils and bedrock in the prairies and marshes in Bear Island unit, damage and destruction of vegetation, permanent alteration of surface water flows and hydrology, and disturbance to wildlife, including the endangered Panther, and destruction of wildlife habitat. NPS's action will thus significantly affect the quality of the human environment.

76. NPS's failure to consider and disclose the potential environmental impacts of its proposal to re-open 20 miles of trails in the Bear Island unit to ORV use in an EIS, or in a SEIS, violates NEPA, 42 U.S.C. § 4332(2)(C), and is arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C § 706.

77. NPS's failure to at least consider and disclose the potential environmental impacts of its proposal to re-open 20 miles of trails in Bear Island unit to ORV use in an EA, in order to determine whether it should prepare an EIS or SEIS, and its decision to proceed with its proposed action without issuance of a FONSI documenting why its action will not have significant impacts on the human environment, violates NEPA and the CEQ regulations, 40 C.F.R. §§ 1501.4, 1508.13, and is arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C § 706.

Third Claim for Relief: NPS's Violation of the Big Cypress Establishment Act, the National Park Service Organic Act of 1916, And The 2000 ORV Plan

78. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

79. NPS's authorization of expanded ORV use within the sensitive Bear Island unit

will have substantial, and irreversible, impacts on the soils, hydrology, and wildlife of the Preserve and it will impair recreational use of the Preserve. It therefore violates NPS's mandates under the Big Cypress Establishment Act and the Organic Act of 1916, and is arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706. It is especially arbitrary and capricious and contrary to the mandates governing Big Cypress for the NPS to authorize ORV use that will impair prairies, marshes, and sensitive resources given that in 2000 the NPS had found those resources required protection, and that it had sought to protect them by significantly limiting ORV use through reducing the miles of designated trails in the Bear Island unit to twenty-three miles of primary trails and less than one mile of secondary trails, and by closing those trails that were in sensitive habitat. NPS's February 2007 decision to expand usage in the Bear Island unit – especially without conducting the studies called for in 2000, including the studies on impacts on Panthers – violates the 2000 Plan and represents an arbitrary and capricious reversal of the NPS's 2000 decision on how to fulfill its statutory duties.

80. The 2000 ORV Plan sought to effectuate the mandates of the Big Cypress Establishment Act and the Organic Act. It provides “methods for limiting and controlling ORV use to minimize impacts to resources in the preserve . . . methods of avoiding adverse impacts to wetlands and sensitive resources for ORV's . . . and procedures and considerations for closing, opening and reopening areas to ORV use.” ORV Plan at 35. It mandates reducing approximately 23,300 miles of dispersed ORV use to 400 miles of designated primary trails. In the particularly sensitive Bear Island unit, it calls for reducing the miles of primary trails, for example, to approximately 30 miles, with the express purpose of minimizing impacts to Panthers and sensitive substrates. Trails in sensitive habitats such as prairies and marshes were closed, and studies, including carrying capacity studies, were to be undertaken in specific time frames,

and management decisions made thereon. The NPS's re-opening of the trails in prairie and marshes of Bear Island unit are contrary to the provisions and intent of the 2000 ORV Plan that implements the mandates of the Big Cypress Establishment Act and the Organic Act, and are arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. §706.

**Fourth Claim for Relief: NPS's Violations of
Executive Orders 11644 and 11989**

81. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

82. NPS's action in reopening 20 miles of Bear Island trails in sensitive habitat failed properly to control and direct ORV use so as to protect the resources of the Preserve, to minimize damage to soil, water flow, vegetation, wildlife, wildlife habitat, or other resources such as cultural or historic resources, to minimize harassment to wildlife or significant disruption of wildlife habitat, and to provide adequate opportunity for public participation. NPS's actions are therefore in violation of the requirements of Executive Orders 11,644 and 11,989, and are arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

Fifth Claim for Relief: FWS's Violations of the ESA and the APA

83. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

84. In light of the adverse impacts caused by NPS's reopening of 20 miles of Bear Island trails in sensitive Panther habitat and NPS's failure to conduct the studies, including the Panther research, required by the 2000 BO, FWS's February 2007 determination that the trail reopening did not warrant re-initiation of consultation under the standards set forth in 50 C.F.R. § 402.16, and its September 2007 "amendment" of the 2000 BO and the terms and conditions of the ITS therein, are arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706. The "amended" BO is also arbitrary and capricious because it lacked observance of required procedure, was not based on the best available data, and failed to analyze

various ways in which the NPS's authorization of extensive ORV use in Bear Island unit may adversely affect the Panther.

Sixth Claim for Relief: NPS's Violations of the ESA and the APA

85. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

86. Opening nearly twenty miles of trails in the environmentally sensitive habitat of the Bear Island unit will increase take of the Florida Panther through harassment and habitat modification. Information on habitat usage within and outside the Bear Island unit shows that the Panther may be affected by ORV use of these trails to an extent and in ways not previously considered. The reopening of Bear Island trails represents a modification to the management of ORV use in the Big Cypress Preserve in a manner that was not previously addressed in the 2000 BO. NPS's failure to formally consult with FWS regarding its proposed re-opening of trails in the Bear Island unit, or to reinitiate such consultation regarding its ORV Plan, is therefore arbitrary, capricious, and otherwise contrary to law, in violation of 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.16, and the APA, 5 U.S.C. § 706.

87. The ITS issued by FWS in the 2000 BO specified that “[i]n order to be exempt from the prohibitions of section 9 of the ESA, NPS must comply with [several] terms and conditions.” BO at 38. The terms and conditions imposed by the ITS include requirements that NPS study the level of ORV use in Bear Island unit to determine the level that is acceptable and compatible with Panther use, and that NPS study Panther behavior associated with known levels of human activity. *Id.* NPS has not completed the studies and taken other steps required by the 2000 BO. NPS's authorization of ORV use in the Preserve, including its authorization of ORV use on the newly re-opened trails in the Bear Island unit, without complying with the ITS, has resulted and continues to result in the unauthorized take of endangered Florida panthers, and is

arbitrary, capricious, and otherwise contrary to law, in violation of 16 U.S.C. § 1538(a), and the APA, 5 U.S.C. § 706.

88. NPS's re-opening of the Bear Island trails violates the agency's affirmative duty to carry out measures to conserve the Panther and other endangered species under 16 U.S.C. § 1536(a)(1), and is arbitrary, capricious, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

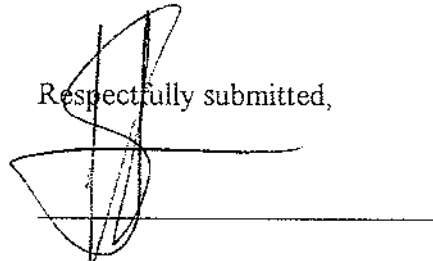
(1) Declare that, in re-opening nearly 20 miles of trails through sensitive habitat in the Bear Island unit of Big Cypress National preserve to ORV use, and failing to conduct necessary studies to determine appropriate areas and levels of use and setting ORV use thereon, the NPS violated the 1995 Settlement Agreement by changing the 2000 ORV plan without environmental analyses or adequate opportunity for public participation, violated NEPA by failing to consider and disclose in any manner the environmental impacts of its re-opening of the trails; violated the ESA by failing to consult or re-initiate consultation with FWS; violated the ESA by failing to provide for the conservation of the Panther and other endangered species; violated the ESA by allowing the unauthorized take of Florida panthers; violated the Big Cypress Enabling Act, National Park Service Organic Act of 1916, the 2000 PRV Plan, and Executive Orders 11644 and 11989 by reopening the ORV trails without appropriately considering or providing for the protection and conservation of Preserve resources; and violated the APA by acting arbitrarily, capriciously, and not in accordance with the law with regard to each of these statutory duties.

(2) Declare that the FWS violated the ESA and APA by concurring in the NPS

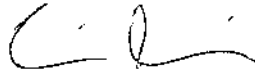
determination that re-initiation of consultation was not required in February 2007, and by arbitrarily and capriciously amending the 2000 BO in September 2007;

- (3) Order Defendants to re-initiate consultation pursuant to the ESA;
- (4) Order NPS to complete an appropriate analysis pursuant to NEPA of the environmental impacts caused by the re-opening of ORV trails in the Bear Island unit;
- (5) Enjoin NPS from permitting use of the re-opened trails in the Bear Island unit by ORVs until Defendants comply fully with all applicable laws;
- (6) Award Plaintiffs their costs and reasonable attorney fees and litigation costs in this action; and
- (7) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Joshua Stebbins
D.C. Bar No. 468542

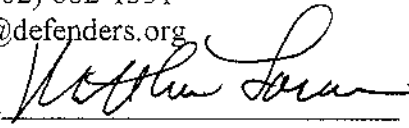


Eric Glitzenstein
(D.C. Bar No. 358287)

Meyer Glitzenstein & Crystal
601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
Telephone: (202) 588-5206
Facsimile: (202) 588-5049
jstebbins@meyerglitz.com
eglitzenstein@meyerglitz.com

Erin Lieberman

Defenders of Wildlife
1130 Seventeenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 682-9400
Facsimile: (202) 682-1331
ELieberman@defenders.org

Trial Counsel 
Matthew Farmer
Farmer and Fitzgerald, P.A.
708 East Jackson Street
Tampa, FL 33602
(813) 228-0095
(813) 224-0269 (fax)
mattfarmer1@aol.com
FL Bar. No. 0793469

Counsel for Plaintiffs

Dated December 21, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

THE FLORIDA BIODIVERSITY PROJECT,)
et al.,)
)
Plaintiffs,)
)
v.) No. 95-50-CIV-FTM-24D
)
ROGER KENNEDY, et al.,)
)
Defendants.)

SETTLEMENT AGREEMENT

INTRODUCTION

A. Plaintiffs' Complaint seeks declaratory and injunctive relief against the federal defendants regarding the use of recreational off-road vehicles ("ORVs") in the Big Cypress National Preserve ("BCNP"). Plaintiffs assert that the federal defendants have violated a number of federal statutes in connection with the use of ORVs in BCNP, including section 404 of the Clean Water Act, 33 U.S.C. § 1344 ("CWA"), the Endangered Species Act, 16 U.S.C. § 1531 et seq. ("ESA"), and the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA").

B. Defendants deny that they have violated any federal statutes, including section 404 of the CWA, the ESA and NEPA, in connection with the use and/or management of ORVs in BCNP. Defendants oppose plaintiffs' request for declaratory and injunctive relief and assert that plaintiffs are not entitled to such relief.

C. Without making any concession as to the correctness of the legal positions taken by plaintiffs and the federal

defendants (hereinafter the "parties"), and in consideration of the terms outlined below, the parties believe that it is in their mutual interest to enter into this Settlement Agreement.

Accordingly, it is hereby agreed that:

1. The National Park Service ("NPS") shall, in consultation with the Environmental Protection Agency ("EPA") and other appropriate federal Agencies, develop an ORV Management Plan ("Plan") accompanied by a Supplemental Environmental Impact Statement ("SEIS"). The documents prepared shall be made available to the public. To the extent consistent with applicable statutory and regulatory provisions, NPS intends to consult with the EPA and the United States Army Corps of Engineers ("Corps"), among other interested federal agencies, in developing the Plan.

2. Subject to the requirements of NEPA and its regulations, NPS will issue (1) a draft ORV Management Plan and SEIS in draft form within two and one-half years of the date on which this settlement agreement is executed, and (2) a final ORV Management Plan and Final SEIS within three years and three months of the date on which the agreement is executed.

The SEIS will analyze the cumulative environmental effects of implementing an ORV Management Plan, including environmental impacts associated with a "no action" alternative to the extent required by NEPA, and will build upon the analysis of issues and impacts previously set forth in the Big Cypress National Preserve General Management Plan and Final Environmental Impact Statement

(GMP/FEIS). Supplemental analysis of issues and impacts previously considered in the FEIS will be conducted to the extent required by NEPA or other federal laws, in light of newly available data, information submitted by members of the public through the SEIS process, and all other information available to NPS.

The overall objective of the ORV Management Plan will be to establish a comprehensive system for management of ORV use in BCNP with the goal of assuring the natural and ecological integrity of BCNP resources in accordance with the BCNP Establishment Act. Any decision by NPS which will modify the management of ORV use from that described in the GMP will be based upon all available information, including that analyzed during the SEIS process. Except where such modification is appropriate (under NEPA and the BCNP Establishment Act) to accomplish the objective of the ORV Management Plan, nothing in this agreement shall be construed as requiring reconsideration by NPS of other aspects of or final decisions set forth in the GMP/FEIS.

Subject to the requirements of NEPA and its regulations and in accordance with the provisions set forth above, the SEIS shall analyze the following plan elements:

- a. Current ORV policies and practices within BCNP as a whole and for each management unit within BCNP;
- b. Methods of limiting and controlling ORV use to minimize impacts to BCNP resources, including soil, hydrology,

- vegetation, recreational resources, and wildlife, including threatened or endangered species;
- c. Methods of avoiding adverse impacts to wetlands and sensitive resources from ORVs, and alternative methods of minimizing unavoidable adverse impacts, to the maximum extent practicable, in a manner which will assure the natural and ecological integrity of BCNP resources in accordance with the BCNP Establishment Act;
 - d. Best management practices ("BMPs") designed to avoid and/or minimize impacts from ORV use on BCNP's resources, including soil, hydrology, vegetation and wildlife, in a manner which will assure the natural and ecological integrity of BCNP resources in accordance with the BCNP Establishment Act;
 - e. Criteria for the development of a comprehensive designated trail system and/or use areas for ensuring the natural and ecological integrity of BCNP resources in accordance with the provisions of the BCNP Establishment Act;
 - f. Management practices for particular vehicle types in order to avoid and/or minimize impacts to BCNP's resources, including soil, hydrology, vegetation and wildlife;
 - g. Methods of monitoring impacts of ORV use in BCNP and mechanisms for taking remedial action based on the

results of such monitoring efforts. Methods of monitoring impacts may include, among other things, the use of control areas as a baseline;

- h. Procedures and considerations (including but not limited to ecology and recreational factors) for closing, opening and reopening areas and closing, relocating, opening and reopening trails to ORV use.

3. Consistent with BCNP Establishment Act, the NPS Organic Act, NEPA, and other applicable federal law, and in an effort to manage impacts associated with ORV use, the ORV Management Plan will address at least the following items: use of best management practices; use of a comprehensive designated trail system and/or use areas for ORV use within BCNP; use of particular vehicle types; a method of monitoring and enforcement of Plan requirements; a procedure and considerations for closing, relocating, opening and/or reopening trails and areas to ORV use.

4. In developing and issuing the Plan, NPS shall abide by the BCNP Establishment Act, the Big Cypress National Preserve General Management Plan/EIS and will fully consider the directives and standards set forth in Executive Orders 11644, 11989, and 11990 (each as amended and set forth in a note at 42 U.S.C. § 4321).

5. As part of the ORV Management planning process, the NPS will:

- a. Within sixty (60) days of the dismissal of this action pursuant to paragraph 12 of this agreement, transmit to

the Federal Register for publication a notice soliciting public input to develop an ORV management plan. The notice will identify the proposed plan elements, including those set forth in paragraph 3 of this Agreement.

- b. Make a draft of the Plan available for at least ninety days for written public comments;
- c. Include consultation with, and otherwise obtain input from, interested federal and state agencies. In particular, the NPS shall engage in consultations with the United States Fish and Wildlife Service ("FWS") pursuant to section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1563(a)(2), and its implementing regulations regarding the Plan. NPS shall also obtain input from EPA and the Corps, to the extent required by statute and regulation. To the extent required by statute and regulation, NPS shall also consult with pertinent federal and state officials in accordance with the Fish and Wildlife Coordination Act, 16 U.S.C. § 661, *et. seq.* and the National Historic Preservation Act, 16 U.S.C. § 470 *et. seq.* All documents which are generated as part of such consultations shall be made available for public review.

6. The ORV Plan will be reviewed on a continuing basis. Supplemental environmental analyses of the ORV Plan will be prepared in the future if the NPS makes substantial changes in

the proposed action that are relevant to environmental concerns, or if the NPS determines that significant new circumstances or information exist relevant to environmental concerns and bearing on the proposed action or its impacts. The public will be allowed to participate in such supplemental analyses to the full extent required by NEPA, the CEQ regulations and the NPS regulations. If interested parties submit written comments raising issues which may be considered substantial changes in the Plan or significant new circumstances or information, NPS will make its best efforts to respond to such comments within a reasonable amount of time.

7. NPS anticipates that during the time in which the ORV management plan is being developed it will issue approximately the same number of permits as in the recent past (1986-1994), which has been less than the permit limit established in the GMP/FEIS Record of Decision. If, during plan preparation, the NPS issues more than the number of permits than it has issued in the recent past, plaintiffs reserve the right to seek a modification of this agreement in accordance with ¶ 11 of the agreement. Nothing in this agreement prevents the NPS from adopting more stringent restrictions on ORV use during preparation of the Plan on any basis that the NPS deems appropriate.

8. With regard to the BCNP "Addition Lands," which NPS may acquire pursuant to P.O. 100-301, it is the parties' understanding that, independent of this settlement, NPS and FWS

have reached an understanding that certain actions will take place in an effort to ensure that future recreational activities on the Addition Lands do not jeopardize the Florida panther. As set forth in correspondence between the FWS and NPS, those actions include:

- a. NPS will coordinate with the Florida Game and Fresh Water Fish Commission to obtain quantitative data on types and levels of human activities in the Preserve Addition and the activities' compatibility with panther habitation. NPS has contracted with the National Biological Service in pursuing a study.
- b. As set forth in a September 2, 1992 letter from the Regional Director of NPS to the Regional Director of FWS, NPS and FWS anticipate that the Addition Lands will not be opened to hunting or recreational ORV use for a two-year period, commencing when the NPS assumes "custodial responsibility" and can "effectively administer closure" of the area. During this time, baseline inventories and panther monitoring will take place to enable assessment of recreational activities when the area is open to use.
- c. As set forth in NPS's September 2, 1992 letter, NPS and FWS anticipate that during the second year of the two-year period (referenced above), NPS, in cooperation with the Florida Game and Fresh Water Fish Commission, will initiate consultation with the U.S. Fish and

Wildlife Service for the purpose of determining the allowable levels for hunting and recreational ORV use within the Addition Lands. NPS and FWS also anticipate that this consultation will take into account the result of the National Biological Service study referred to in ¶ 8(a) and the baseline inventories and public monitoring referred to in ¶ 8(b).

- d. As set forth in NPS's September 2, 1992 letter, NPS and FWS anticipate that no recreational ORV use will be permitted in the Addition Lands until NPS prepares a comprehensive Recreation Vehicle Trail Plan for the Addition Lands.
- e. While recognizing that NPS and FWS anticipate taking the foregoing actions with regard to the Addition Lands, plaintiffs do not necessarily agree that these actions will satisfy all of defendants' obligations under the ESA, CWA and other federal statutes with regard to the Addition Lands, and they reserve the right to seek judicial review of any actions taken by defendants with regard to the Addition Lands. Defendants agree to respond on a timely basis to inquiries from plaintiffs and the public regarding the management of the Addition Lands.
- f. NPS agrees to inform plaintiffs when NPS has assumed "custodial responsibility" of the Addition Lands and

has determined that it can "effectively administer closure" of the area, as provided in ¶ 8(b).

9. The defendant Corps shall consider applications for permits sought pursuant to section 404 of the CWA to discharge dredge and fill material into wetlands in connection with the construction of access areas at old mile markers 38 and 49 off of Interstate 75 in accordance with the statutory and regulatory requirements for such issuance, including ESA and NEPA. Before approving any such permits, the Corps shall analyze the cumulative direct, indirect, and secondary environmental impacts, including any impacts to the Florida panther, that would be associated with the construction and maximum use of all proposed access areas for the Addition Lands, as well as the discussion of all feasible alternatives to the proposed action areas.

10. Defendants shall inform the plaintiffs if they encounter difficulties in complying with the terms of the Agreement and, in such instance, shall precisely state the nature of those difficulties. Upon request of the plaintiffs, NPS will provide the status on actions being taken by NPS pursuant to this Agreement within a reasonable period of time after Plaintiffs' request.

11. (a) Any of the provisions of this Agreement may be modified for good cause shown, and (b) modification of the terms set forth in this Agreement shall be by written consent of plaintiffs and federal defendants.

12. Following execution of this settlement agreement, the parties agree that their respective counsel will expeditiously prepare, execute and file with the court a stipulation and order for dismissal of all claims except for Plaintiffs' claim for attorneys' fees and costs, over which the Court will retain jurisdiction. The dismissal shall be without prejudice to the bringing of a subsequent action by Plaintiffs if necessary to enforce the terms of the Settlement Agreement. The stipulation will provide that the Court retains jurisdiction to enforce the terms of this Agreement. If the federal defendants take actions in substantial conformity with the terms of this agreement, plaintiffs agree that they will not reinstate an action while the ORV Management Plan is being developed.

13. Plaintiffs agree to give the federal defendants thirty (30) days prior written notice of their intent to reinstate an action pursuant to Paragraph 12 above.

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to execute this Settlement Agreement.

15. This Settlement Agreement includes and embodies the entire terms and conditions of the agreement between the parties.

16. Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to the federal defendants by the statutes they administer or by general principles of administrative law. Nothing in this Settlement Agreement shall be construed to limit or modify the right of


plaintiffs to challenge final agency action taken by NPS in connection with the final ORV Management Plan to the extent permitted by law.

17. Nothing in this Settlement Agreement shall be construed to require any of the federal defendants to obligate or pay funds or in any other way take action in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law, or limit the discretion of the NPS to allocate funds among priorities in within the national park system. Defendants shall make all reasonable efforts to obtain the resources necessary to carry out the terms of the agreement and to have those funds allocated to BCNP.


18. This Agreement is effective as of the date it is executed by plaintiffs and federal defendants.

Executed this 25th day of October,
1995. Approved by Counsel for plaintiffs and federal defendants:

BY:
Dated: 10/25/95


KIMBERLEY K. WALLLEY
(D.C. Bar No. 445869)
(Admission pro hac vice granted)

Dated: 10/21/95


ERIC R. GLITZENSTEIN
(D.C. Bar No. 358287)
Meyer & Glitzenstein
1601 Connecticut Avenue N.W.
Suite 450

Washington, D.C. 20009
(p) (202) 588-5206
(f) (202) 588-5049

THOMAS W. REESE
2591 61st Avenue South
St. Petersburg, FL 33712-4539
(813) 867-8228

ATTORNEYS FOR PLAINTIFFS

Dated: 10/25/95

~~Alice L. Mattice~~
ALICE L. MATTICE, Chief Trial
Counsel
SANDRA ZELLMER
ELLEN KOHLER
Attorneys
U.S. Department of Justice
Environment and Natural Resources
Division
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-2327
FAX (202) 514-2584

SUSAN ROARK WALDRON
Assistant United States Attorney
500 Zack Street, Suite 400
Tampa, Florida 33602
USA No. 003
(813) 274-6334
FAX (813) 274-6200

ADDENDUM

1. Wherever the foregoing agreement provides for notice of developments pertaining to the settlement, the plaintiffs and defendants agree that they shall also provide such notice to counsel for intervenor-defendants Florida Wildlife Federation, et al., at the same time the notice is provided to the other party. In particular:

a. Plaintiffs shall provide notice to intervenors of any inquiries Plaintiffs make regarding the management of the Addition Lands in accordance with ¶ 8(e), and NPS shall provide intervenors copies of any NPS response;

b. NPS will provide intervenors with copies of its notice to plaintiffs pursuant to ¶ 8(f) that NPS has assumed "custodial responsibility" of the Addition Lands and has determined that it can "effectively administer closure" of the Area;

c. Defendants shall provide intervenors with copies of any notices to plaintiffs pursuant to ¶ 10 regarding any difficulties they encounter in complying with the terms of the Agreement, and the parties shall provide intervenors with copies of any subsequent correspondence;

d. Plaintiffs agree to provide intervenors with a copy of notice pursuant to ¶ 13 of their intent to reinstate an action.

2. NPS shall respond on a timely basis to inquiries from intervenors regarding the management of the Addition Lands.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT
FORT MYERS

THE FLORIDA BIODIVERSITY PROJECT,
et al.,

Plaintiffs,

vs.

Case No. 95-50-CIV-FTH-24(D)

ROGER KENNEDY, Director, National
Park Service, et al.,

Defendants.

ORDER

This cause comes before the Court for consideration of the Plaintiffs and Federal Defendants' Joint Motion for Dismissal (Doc. No. 68, filed October 27, 1995). Defendant-Intervenors filed a Response and Memorandum in Opposition to Joint Motion for Dismissal (Doc. No. 72, filed November 1, 1995). Plaintiffs filed a Reply Memorandum (Doc. No. 78, filed November 8, 1995), and Federal Defendants filed a Reply Memorandum (Doc. No. 79, filed November 15, 1995).

The Court having considered the motion, the opposition thereto, and being otherwise fully advised, it is ORDERED AND ADJUDGED that:

(1) Plaintiffs and Federal Defendants' Joint Motion for Dismissal (Doc. No. 68) is GRANTED.

(2) The settlement agreement attached to the parties' motion is approved by the Court.

(3) This case is DISMISSED, except that, in accordance with paragraph 12 of the agreement, the Court retains jurisdiction to enforce the terms of the agreement and to review and approve any

modifications to the agreement, and retains jurisdiction over any claim Plaintiffs may file for attorneys' fees and costs.

(4) The Clerk is directed to CLOSE this case.

DONE AND ORDERED at Tampa, Florida, this 27 day of February, 1995.


SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record