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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

DEFENDERS OF WILDLIFE, *et al.*,

Plaintiffs,

v.

SALAZAR, *et al.*,

Defendants.

Civ. No. 09-15 EFS

**STIPULATED SETTLEMENT
AGREEMENT**

This Stipulated Settlement Agreement is entered into by Plaintiffs, Defenders of Wildlife, the Lands Council, Selkirk Conservation Alliance, and Center for Biological Diversity, and Defendants, Ken Salazar, Secretary of the United States Department of the Interior; Rowan Gould, Acting Director, United States Fish and Wildlife Service; Robyn Thorson, Director, Pacific Region (Region 1), United States Fish and Wildlife Service; the United States Department of the Interior; and the United States Fish and Wildlife Service (collectively “the Service”). By and through their undersigned counsel, the parties state as follows:

WHEREAS, the Service listed the Selkirk Mountains population of the Woodland Caribou as endangered under the Endangered Species Act (“ESA”) by an emergency rule issued on January 14, 1983;

WHEREAS, on February 29, 1984, following notice and comment rulemaking, the Service listed the Woodland Caribou as endangered, but did not designate critical habitat for the Woodland Caribou at that time, based on its finding that the designation would not be prudent, due to the serious risk of facilitating poaching;

WHEREAS, on December 6, 2002, the Plaintiffs petitioned the Service, pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(e), and

the ESA implementing regulations, 50 C.F.R. § 424.15(d), to designate critical habitat for the Woodland Caribou;

WHEREAS, in their petition, the Plaintiffs presented information that, in their view, shows that the Service's original rationale for the "not prudent" determination – the threat of increased poaching from publicizing the location of the Woodland Caribou's habitat – had since been undermined by extensive educational and sign-posting efforts by the Service and other federal and state agencies, which had the effect of alerting the public to the Woodland Caribou's presence in certain areas;

WHEREAS, the Service acknowledged receipt of Plaintiffs' petition by letter to Plaintiffs dated February 10, 2003, and in that letter, informed the Plaintiffs that "[the Service] do[es] not believe we will have sufficient section 4 funding this fiscal year (FY) to evaluate your petition," and that the Service was thus "not able to address your petition . . . at this time";

WHEREAS, in January, 2009, the Plaintiffs inquired of the Service as to the status of the petition, and received a response by facsimile dated January 7, 2009, that "[a]lthough its [sic] been 6 years since our response in 2003, our Regional Office staff indicated that our response would remain the same today. . . . Therefore, there remains insufficient funding to address the petition";

WHEREAS, Plaintiffs filed the Complaint for Declaratory and Injunctive Relief in this action on January 15, 2009, alleging that the Service unreasonably delayed a decision on Plaintiffs' petition in violation of the Administrative Procedure Act, 5 U.S.C. § 555(b), 706(1);

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

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. The Service agrees that, on or before 120 days from the date of the Court order approving this settlement agreement, Plaintiffs may supplement their petition by submitting to the Service any additional information and data.
2. The Service agrees to make a determination as to whether critical habitat for the Selkirk Mountains population of Woodland Caribou is prudent no later than November 20, 2011, after considering any supplemental information provided by the Plaintiffs in accordance with paragraph 1. If the Service determines that critical habitat designation is prudent, it will submit a proposed critical habitat rule to the *Federal Register* on or before November 20, 2011.
3. If the Service determines that the designation of critical habitat is warranted, the Service agrees to submit to the *Federal Register* a final critical habitat determination by November 20, 2012.
4. This Agreement only requires the Defendants to take actions by the deadlines specified in paragraphs 2 and 3, and does not limit the Service's authority with regard to the substantive outcome of any determinations. To challenge any final determination issued in accordance with this Agreement, Plaintiffs will be required to file a separate action. Plaintiffs do not waive their ability to challenge substantive decisions made by the Defendants pursuant to paragraphs 2 and 3, above, and

Defendants do not waive any applicable defenses.

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 deadline for the actions 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 (in-person not required) at the earliest possible time in a good-faith effort to resolve the claim before pursuing relief from the Court. If the parties are unable to resolve the claim after meeting and conferring, either party may pursue relief from the Court.

6. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute lawful designation of critical habitat, or a lawful timetable therefor, in any other proceeding involving the Service's implementation of the ESA or any other statute.

7. Defendants agree to pay Plaintiffs' reasonable attorneys' fees and costs, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Therefore, Defendants agree to settle all of Plaintiffs' claims for costs and attorneys' fees in the above-captioned litigation for a total of \$5,500.00. An electronic payment in that amount will be transmitted to Plaintiffs' undersigned counsel, Defenders of Wildlife, in accordance with OMB Form 1510 as completed by Plaintiffs.

8. Once the Court has issued an Order approving this Agreement, Defendants agree to submit all necessary paperwork for the processing of the attorneys' fee award to the relevant government account officials within thirty (30) days of receipt of OMB Form 1510 from the Plaintiffs.

9. Plaintiffs agree to accept payment of \$5,500.00 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in the above-captioned litigation, up to and including the date of this Agreement. Plaintiffs agree that receipt of this payment from Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and costs in this matter, through and including the date of this Agreement.

10. The parties agree that Plaintiffs reserve 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 2-3, or for any other unforeseen continuation of this action. By this Agreement, Defendants do not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' 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.

11. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing in this Agreement 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.

12. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Defendants are obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable appropriations law.

13. The parties agree that this Agreement was negotiated in good faith and constitutes a settlement of claims that were disputed by the parties. By entering into this Agreement no party waives 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 entry of this Agreement by the Court, all counts of Plaintiffs' Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1). 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 Defendants satisfy their obligations under the Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

IT IS SO STIPULATED this 29th day of May, 2009.

JOHN C. CRUDEN,
Acting Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
LISA L. RUSSELL, Assistant Section Chief

s/ Ethan Carson Eddy
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s/ Erin Lieberman (by E. Eddy, w/
permission)
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