

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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WildEarth Guardians,)
)
 Plaintiff,)
)
 v.)
)
 Federal Emergency Management Agency,)
)
 Defendant.)

CIVIL NO. 09-882-RB/WDS

STIPULATED SETTLEMENT AGREEMENT AND PROPOSED ORDER

Plaintiff, WildEarth Guardians, and Defendant, the Federal Emergency Management Agency ("FEMA"), by and through their undersigned counsel, state as follows:

WHEREAS, FEMA is the federal agency charged with administering the National Flood Insurance Program ("NFIP"), a federal flood insurance program created by Congress in 1968, and amended in 1973 and 1994 (42 U.S.C. §§ 4001, et seq.);

WHEREAS, on January 22, 2001, Plaintiff (then known as Forest Guardians), along with the Sierra Club and Southwest Environmental Center, filed Civil Action No. 01-0079-MCA/RLP ("2001 Action"), alleging that FEMA had violated Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, by not consulting with the United States Fish and Wildlife Service ("Service") on the impacts of the NFIP in New Mexico on threatened and endangered species then listed within New Mexico;

WHEREAS, the parties to the 2001 Action came to a settlement agreement, which the Court approved on April 25, 2002;

WHEREAS, on September 14, 2009, Plaintiffs in the 2001 Action filed a motion to enforce the settlement in that action, seeking an order that FEMA conclude formal Section 7 consultation by a date certain;

WHEREAS, on September 15, 2010, the Plaintiffs in the 2001 Action filed an unopposed motion to withdraw the above-referenced motion pursuant to D.N.M.LR-Civ. 7.7 in order to facilitate continuing settlement discussions relative to this case and relative to the disagreement as to FEMA's compliance with the settlement of the 2001 Action, and this motion to withdraw was granted;

WHEREAS, on September 14, 2009, Plaintiff brought this ESA lawsuit against FEMA, alleging that FEMA violated Section 7 of the ESA by not formally consulting with the Service on the impacts of the NFIP in New Mexico on species listed under the ESA, and habitat designated as critical habitat under the ESA, subsequent to January 22, 2001;

WHEREAS, on August 18, 2010, FEMA issued Procedure Memorandum 64, effective October 1, 2010, which provides that FEMA will process Conditional Letters of Map Change ("CLOMC") under the NFIP only after FEMA receives documentation from the requestor that demonstrates compliance with the ESA;

WHEREAS, Plaintiff takes no position at this time as to whether administration of the NFIP under Procedure Memorandum 64 complies with the ESA;

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiff's claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of (1) the disputes arising from implementation of the settlement agreement in the 2001 action and (2) the disputes set forth in Plaintiff's complaint in this action;

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

NOW, THEREFORE, the parties hereby stipulate and agree as follows:

1. Within 365 days of entry of an Order on this Settlement Agreement ("Agreement") FEMA shall provide the Director of the Service a written request to initiate formal consultation, pursuant to 16 U.S.C. § 1536(a)(2) and 50 C.F.R. § 402.14(c), on the impacts to ESA-listed species, as of the date of entry of the Order, within New Mexico,¹ and designated critical habitat, as of the date of the entry of the Order, within New Mexico, of:
 - (i) FEMA's implementation of 42 U.S.C. § 4102(c);
 - (ii) the mapping of floodplains and revisions thereof, 42 U.S.C. §§ 4101(a)(1), (a)(2), and
 - (iii) the implementation of the Community Rating System ("CRS"), a voluntary program through which Congress mandated that FEMA provide discounts on flood insurance premiums to communities that implement flood management regulations that exceed FEMA's minimum criteria, 42 U.S.C. § 4022(b)(1).
2. This Agreement does not limit the substantive outcome of consultation pursuant to Paragraph 1. To challenge the biological opinion resulting from the initiated consultation in accordance with this Agreement, Plaintiff will be required to file a separate action. FEMA agrees that it will not withdraw from consultation initiated pursuant to Paragraph 1.
3. Should the Service request additional information from FEMA pursuant to 40 C.F.R. §§ 402.14(c), (d), and/or (f), FEMA shall make a good faith effort to provide such

¹ The attached Exhibit 1 is a list of species the parties understand are present in New Mexico.

information, if available, to the Service, within sixty (60) days or by such time as the Service directs.

4. Within forty-five (45) days of entry of an Order on this Agreement, FEMA shall begin to notify all participating communities in New Mexico of this settlement agreement in writing by sending them a letter materially similar to that attached hereto as Exhibit 2 and will diligently continue notifying communities by letter materially similar to that attached hereto as Exhibit 2 until all participating communities have received such notification.
5. During the pendency of FEMA's consultation with the Service, FEMA shall implement the following change to the administration of the NFIP in New Mexico:
 - a. FEMA shall ensure that floodplain modeling incorporates on-the-ground data as is readily available to increase the accuracy of maps depicting the floodplain. In addition, FEMA will use a 2-dimensional model in estuarine floodplains and in other areas as applicable.
 - b. FEMA shall process Conditional Letters of Map Change (CLOMC) caused by proposed manmade alterations only when the proponent has factored in the effects on channel and floodplain habitat function for ESA-listed species, and has demonstrated that the proposed alteration avoids habitat functional changes, or that the proponent has mitigated for the habitat functional changes resulting from the proposed alteration with appropriate habitat measures, such that the proposed alterations do not cause a net loss of habitat function and value.

Any challenge to any determination made by FEMA pursuant to this paragraph shall be reviewed under the standard of review set out in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A).

6. Either party may seek to modify the terms of the Agreement specified in Paragraphs 1-5 for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes the other party has failed to comply with any term or condition of this Agreement, the parties shall use the dispute resolution procedures specified in Paragraph 7 below.
7. This Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by (i) written stipulation between the parties filed with and approved by the Court, or (ii) upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadlines specified in Paragraphs 1 and 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 (telephonically or in-person) at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court.
8. In the event that Plaintiff believes FEMA has failed to comply with a term of this Agreement and has not sought to modify it, Plaintiff's first remedy shall be a motion to enforce the terms of this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.
9. No party shall use this Agreement or the terms herein as evidence that FEMA is required to initiate consultation with the Service or any other agency on the impacts of any portion of

the NFIP, in any other proceeding involving FEMA's implementation of the NFIP or compliance with the ESA.

10. FEMA agrees that Plaintiff is the "prevailing party" in this action, and agrees to pay to Plaintiff reasonable attorneys' fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540 (g). The parties agree to attempt to resolve Plaintiff's claims for fees and costs expeditiously and without the need for Court intervention. The Court shall retain jurisdiction over the case for the purpose of resolving any dispute between the parties regarding Plaintiff's claims for an award of fees and costs. If the parties are unable to resolve attorneys' fees and costs among themselves, Plaintiff shall file any motion seeking such award within 45 days of the order adopting this Stipulated Settlement Agreement. By this Agreement, FEMA does not waive any right to contest fees claimed by Plaintiff, including the hourly rate, in any continuation of the present action or any future litigation.
11. Subject to the qualifications in Paragraph 13, no provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that FEMA 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 FEMA 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. This Agreement is being entered into so as to avoid further litigation of the Plaintiff's pending lawsuit. Nothing in this Agreement shall be construed to constitute an admission of any issue of fact, law or liability by any of the parties. Except as expressly provided in

this Agreement, none of the parties waives or relinquishes any legal rights, claims or defenses it may have.

13. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that FEMA is obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law.
14. The parties agree that this Agreement was negotiated in good faith and that this Agreement constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.
15. 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.
16. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying the Agreement.
17. Upon approval of this Agreement by the Court, Plaintiff's Second Claim for Relief that FEMA has violated the requirements of the ESA and its implementing regulations by failing to initiate and/or complete consultation with the Service shall be dismissed with prejudice. Plaintiff's First Claim for Relief that FEMA has violated the requirements of the ESA by failing to avoid jeopardy to listed species and adverse modification of critical habitat shall be dismissed without prejudice. Nothing in this agreement shall prevent Plaintiff from filing, at the conclusion of formal consultation between FEMA and FWS, contemplated in this agreement, a separate action challenging FEMA's substantive compliance with 16 U.S.C. § 1536(a)(2) to ensure the agency's actions authorized, funded, or carried out pursuant to the NFIP are "not likely to jeopardize the continued existence of any endangered species

or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . .” 16 U.S.C. § 1536(a)(2). Plaintiff agrees not to bring such a suit during the pendency of consultation pursuant to this Agreement.

18. Plaintiff agrees that FEMA’s compliance with the terms and conditions of this Settlement Agreement shall be deemed to constitute compliance with the 2002 Settlement Agreement of the 2001 Action, and further agrees not to seek any further action to enforce the 2002 Settlement Agreement, except pursuant to the provisions of Paragraphs 6 through 8 of this Settlement Agreement.
19. 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. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994). This Agreement shall terminate automatically upon conclusion of formal consultation.

Respectfully submitted this 11th day of February, 2011,

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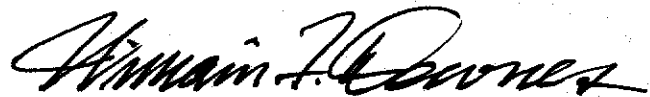
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Attorney for Plaintiff

ORDER

The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as an enforceable ORDER of this Court, and this matter is hereby DISMISSED.

Dated: this 11th day of Feb, 2011.



UNITED STATES DISTRICT JUDGE