

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

Judge John L. Kane

Civil Action No. 10-cv-01959-AP

WILDEARTH GUARDIANS,

Petitioner,

v.

STEVE GUERTIN, in his official capacity
as director of U.S. Fish & Wildlife Service's
Mountain-Prairie Region;
et al.

Respondents.

STIPULATED AGREEMENT AND JOINT MOTION TO DISMISS

WHEREAS, on August 17, 2010, Petitioner WildEarth Guardians (Guardians) filed a Petition for Review of Agency Action challenging Federal-Defendants' December 17, 2009, "warranted but precluded" finding on Canada lynx (lynx). 74 Fed. Reg. 66938 (Dec. 17, 2009). Specifically, Guardians challenged Federal-Defendants' determination that its petition to expand the listing of the lynx to include the State of New Mexico was warranted but precluded by higher priority actions within the meaning of section 4(b)(3)(B) of the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B) ("ESA").

WHEREAS, in a separate but related case: *In Re: Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377-EGS, MDL Docket No. 2165 (D.D.C) ("*In Re: Endangered Species Act*"), Guardians reached a stipulated settlement agreement

with Federal-Defendants over the U.S. Fish and Wildlife Service's ESA listing program. See Dkt. No. 12 (Exhibit 1).

WHEREAS, under the terms of the stipulated settlement agreement reached in *In Re: Endangered Species Act*, Federal-Defendants agreed to, among other matters, "submit to the Federal Register a proposed rule to amend the Distinct Population Segment boundaries for the Canada lynx to include New Mexico no later than the end of FY 2013." Dkt. No. 12 (Exhibit 1 at paragraph 4).

WHEREAS, under the terms of the stipulated settlement agreement reached in *In Re: Endangered Species Act*, Guardians and Federal-Defendants agreed to file a joint motion to dismiss this case with prejudice, and "if the respective court dismisses the case in its entirety with prejudice, Defendants agree that the Plaintiff is the prevailing party with regard to its claims in that case, and is thus entitled to an award of reasonable attorney's fees and costs." Dkt. No. 12 (Exhibit 1 at paragraph 12).

WHEREAS, on May 16, 2011, the Parties in this matter asked this Court to stay all proceedings pending a final decision on the stipulated settlement agreement filed in *In Re: Endangered Species Act*. See Dkt. No. 12.

WHEREAS, on September 9, 2011, the U.S. District Court for the District of Columbia issued a final decision and order approving the stipulated settlement agreement reached in *In Re: Endangered Species Act*, MDL Docket Entry No. 55 (D.D.C. September 9, 2011).

WHEREFORE, Guardians and Federal-Defendants hereby stipulate and agree that this case should be dismissed with prejudice, subject to the following:

1. Federal-Defendants agree to pay Guardians' reasonable attorneys' fees and costs pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g). Federal-Defendants agree to settle all of Guardian's claims for costs and attorneys' fees in this matter for a total of \$26,498.51. A check will be made payable in that amount to Guardians, in care of the Western Environmental Law Center (WELC), 1216 Lincoln Ave., Eugene, OR 97401. In the alternative, Federal-Defendants will make arrangements to transfer funds to Guardians, in care of WELC, via Electronic Funds Transfer. Federal-Defendants agree to submit all necessary paperwork for the processing of the payment to the Department of the Treasury's Judgment Fund Office pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the court order approving this stipulated agreement and joint motion to dismiss ("Agreement"). Guardians agrees to provide, in a timely manner, all information necessary for Federal-Defendants to comply with their obligations in this Paragraph One.
2. Guardians agrees to accept payment of \$26,498.51 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Guardians is entitled in this matter through and including the effective date of this Agreement. Guardians agrees that receipt of this payment from Federal-Defendants shall operate as a release of Guardians' claims for attorneys' fees and costs in this matter, through and including the effective date of this Agreement.

3. This Agreement is executed for the limited purpose of securing a voluntary dismissal of this action pursuant to the stipulated settlement agreement in *In Re: Endangered Species Act*, and compromising and settling Guardians' claims in this action for attorneys' fees and costs. Nothing in this Agreement shall constitute, or be construed to constitute, a precedent in any other context, be construed as an admission of liability by Federal-Defendants, or be cited in any other litigation except as necessary to enforce the terms of this Agreement. By this Agreement, Federal-Defendants do not waive any right to contest fees or costs claimed by Guardians or Guardians' counsel in any future litigation.
4. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that the United States is obligated to expend or 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.
5. 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 the Parties do not waive any claim or defense except as provided herein.
6. Guardians' attorneys are receiving funds in trust for Guardians, and Guardians agrees to this procedure. Guardians and its attorneys agree to hold Federal-Defendants harmless in any litigation, further suit, or claim arising from the payment of the agreed-upon settlement amount pursuant to this Agreement.

7. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to this Court's approval of the terms and conditions of this Agreement and do hereby agree to the terms and conditions herein.
8. This Agreement represents the entirety of the Parties' commitments with regard to settlement. The terms of this Agreement shall become effective upon entry of an order by this Court approving the Agreement.
9. Upon the Court's approval of this Agreement, all counts of Guardians' complaint shall be dismissed with prejudice.

Accordingly, the Parties respectfully request that this Court approve the stipulated agreement and joint motion to dismiss as stated above.

Respectfully submitted this 11th day of October, 2011.

IGNACIA S. MORENO, Asst. Attorney General
SETH M. BARSKY, Section Chief

/s/ John H. Martin

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was e-filed on this 11th day of October, 2011, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

/s/ John H. Martin
John H. Martin