

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CENTER FOR BIOLOGICAL)	
DIVERSITY, et al.,)	
)	
Plaintiffs,)	Civil No. 07-152-RFC
v.)	
)	
KEN SALAZAR, et al.,)	
)	
Defendants.)	
_____)	

STIPULATED SETTLEMENT AGREEMENT

Plaintiffs, Center for Biological Diversity, et al., and Federal Defendants, Ken Salazar, et al., by and through their undersigned counsel, state as follows:

WHEREAS, in 1982, the U.S. Fish and Wildlife Service (“Service”) placed the Montana Arctic grayling (*Thymallus arcticus*) on the candidate species list. See 47 Fed. Reg. 58,454 (Dec. 30, 1982). The Service classified Montana Arctic grayling as a “Category 2” species, meaning that listing as endangered or threatened was possibly appropriate, but that data were not then available to biologically support a proposed rule.

WHEREAS, on October 2, 1991, George Wuerthner and the Biodiversity Legal Foundation (now, the Center for Biological Diversity) submitted a petition to list the “fluvial Arctic grayling” throughout its historic range in the conterminous United States.

WHEREAS, on July 25, 1994, the Service issued a 12-month finding on the petition to list. See 59 Fed. Reg. 37,738 (July 27, 1994). The 1994 12-month finding identified the fluvial Arctic grayling of the upper Missouri River—including populations in the Big Hole River and the Madison

River/Ennis Reservoir—as a DPS. See id. at 37,740. The 1994 12-month finding identified threats to the grayling, including reduction in historical range, dewatering of streams, competition or predation by nonnative fish, and habitat degradation. Id. Due to these threats the Service concluded that listing of the Montana fluvial Arctic grayling DPS was “warranted,” but nonetheless “precluded by other higher priority listing actions.” Id. at 37,741. The Service assigned the DPS “a listing priority of 9 because the magnitude of threats have been moderated as a result of ongoing cooperative conservation actions.” Id.

WHEREAS, the Service maintained this status for the fluvial Arctic grayling through “Candidate Notices of Review” until 2004. See, e.g. 66 Fed. Reg. 54,807, 54,819 (Oct. 30, 2001); 67 Fed. Reg. 40,657, 40,669 (June 13, 2002).

WHEREAS, in 2004, the Service elevated the fluvial Arctic grayling’s listing priority to 3—the highest priority available for a DPS—“because the abundance of the remnant population in the Big Hole River declined substantially and the reestablishment efforts [had] not yet produced self-sustaining populations elsewhere in the upper Missouri River.” 69 Fed. Reg. 24,876, 24,881 (May 4, 2004).

WHEREAS, on November 2, 2005, the Service affirmed the fluvial Arctic grayling’s high listing priority “because the threat to the confirmed remaining population in the Big Hole River remains high and imminent.”

WHEREAS, on May 31, 2003, the Center for Biological Diversity, Western Watersheds Project, and George Wuerthner filed a complaint in United States District Court in Washington D.C., challenging the Service’s ongoing “warranted but precluded” determinations. See Center for Biological Diversity v. U.S. Fish and Wildlife Service, CV 1:03-01110 (JDB). The litigation was

settled in August 2005, pursuant to which the Service agreed that on or before April 16, 2007, the agency would submit for publication in the Federal Register a final decision as to whether the Montana fluvial Arctic grayling is an endangered or threatened species.

WHEREAS, on April 24, 2007, the Service issued a 12-month finding for the upper Missouri River fluvial Arctic grayling, determining that it is not a distinct population segment suitable for listing under the Endangered Species Act. 72 Fed. Reg. 20305 (April 24, 2007) (“2007 Finding”);

WHEREAS, on May 15, 2007, Plaintiffs sent the Service a 60-day notice of intent to sue with regard to the 2007 Finding;

WHEREAS, Plaintiffs filed a complaint for declaratory and injunctive relief in the U.S. District Court for the District of Montana on November 15, 2007, challenging the 2007 Finding.

WHEREAS, the parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to the 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;

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

1. On or before December 31, 2009, the Service shall submit a notice to the Federal Register for publication that solicits public comment on the status of the upper Missouri River Arctic grayling. On or before August 30, 2010, the Service shall submit a new 12-month finding for the upper Missouri River Arctic grayling to the Federal Register for publication. In making this finding,

the Service shall consider, among other things, the appropriateness of listing the upper Missouri River fluvial Arctic grayling as a distinct population segment, the appropriateness of listing the upper Missouri River adfluvial Arctic grayling as a distinct population segment, and the appropriateness of listing a combined fluvial and adfluvial population of the upper Missouri River Arctic grayling as a distinct population segment. If the Service determines that listing a distinct population segment is warranted and not otherwise precluded, the Service shall prepare a proposed listing rule in accordance with the Service's listing guidance. See 48 Fed. Reg. 43098 (September 21, 1983).

2. The Order entering this Stipulated Settlement Agreement ("Agreement"), including the deadlines specified in Paragraph 1, may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadlines specified in Paragraph 1, 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 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.

3. In the event that the Federal Defendants fail to meet a deadline specified in Paragraph 1 and the Federal Defendants have not sought to modify that deadline, Plaintiffs' 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.

4. Defendants agree that Plaintiffs are the “prevailing party” in this action, and agree to pay Plaintiffs’ reasonable attorneys’ fees and costs pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g). Defendants therefore agree to settle all of Plaintiffs’ claims for costs and attorneys’ fees in this matter for a total of \$27,000. A check or electronic funds transfer will be made payable in that amount to Earthjustice (209 S. Wilson Avenue, Bozeman, MT 59715). Defendants agree to submit all necessary paperwork for the processing of the attorneys’ fee award to the Department of the Treasury’s Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the court order approving this Agreement.

5. Plaintiffs agree to accept payment of \$27,000 in full satisfaction of any and all claims for attorneys’ fees and costs of litigation to which Plaintiffs are entitled in this matter through 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.

6. 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 Paragraph 1 or for any other 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.

7. 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 Administrative Procedure Act (“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.

8. 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 USC § 1341, or any other applicable appropriations law.

9. Nothing in this Agreement may be cited by either party in connection with any other administrative or judicial proceeding in order to demonstrate acquiescence to the time deadlines provided in this Agreement or for any other reason.

10. 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.

11. 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.

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

13. Upon approval of this Agreement by the Court, all counts of Plaintiffs’ complaint shall be dismissed with prejudice. Notwithstanding the dismissal of this action, however, 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). In particular, in the event of unforeseen circumstances, Plaintiffs retain the right to seek emergency relief from the Court, pending the completion of the rulemaking.

Respectfully submitted this 30th day of September, 2009.

JOHN C. CRUDEN
Acting Assistant Attorney General
JEAN E. WILLIAMS, Chief

/s/ Erik Petersen
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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2009, I filed a true and correct copy of the Parties' Stipulated Settlement Agreement and the Proposed Order with the Court's CM/ECF system which will generate a Notice of filing and Service on all parties.

/s/ Erik Petersen
ERIK E. PETERSEN