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Attorneys for Federal Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY;
WILDEARTH GUARDIANS; THE HUMANE
SOCIETY OF THE UNITED STATES;
and THE FUND FOR ANIMALS,

Plaintiffs,

v.

RYAN ZINKE, Secretary of the Interior, in his
official capacity; UNITED STATES FISH AND
WILDLIFE SERVICE; and GREG SHEEHAN,
U.S. Fish and Wildlife Service Principal Deputy
Director, in his official capacity,

Defendants.

No. 9:17-cv-00044-DLC
Judge Dana L. Christensen

**STIPULATED SETTLEMENT
AGREEMENT**

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between Plaintiffs Center for Biological Diversity, WildEarth Guardians, the Humane Society of the United States, and the Fund for Animals and Federal Defendants the United States Fish and Wildlife Service (“FWS”); Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior; and Greg Sheehan, in his official capacity as Principal Deputy Director of FWS.

WHEREAS, the Environmental Protection Agency registers pesticides containing the active ingredients sodium fluoroacetate and sodium cyanide under the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.*

WHEREAS, Section 7(a)(2) of the Endangered Species Act (“ESA”) requires each federal agency to ensure “that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of” the species’ critical habitat.

WHEREAS, on February 26, 1991, the Environmental Protection Agency requested initiation of formal consultation with FWS to ensure that its registration of pesticides containing the active ingredients sodium fluoroacetate and sodium cyanide complied with Section 7(a)(2) of the ESA;

WHEREAS, in March 1993, FWS completed this consultation by issuing a biological opinion entitled the “Effects of 16 Vertebrate Control Agents on Threatened and Endangered Species” to the Environmental Protection Agency. The biological opinion analyzed the effects of the active ingredients sodium cyanide and sodium fluoroacetate on species listed pursuant to the ESA;

WHEREAS, on February 11, 2011, the Environmental Protection Agency sent letters to FWS requesting reinitiation of ESA Section 7(a)(2) consultation on the effects of re-registration under FIFRA of pesticides containing the active ingredients sodium fluoroacetate and sodium cyanide on species listed pursuant to the ESA and on the listed species’ critical habitat;

WHEREAS, FWS has not yet completed the Environmental Protection Agency’s requested reinitiated consultation;

WHEREAS, on April 4, 2017, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief alleging that Federal Defendants have unlawfully withheld or unreasonably delayed completing the reinitiated consultation in violation of Section 706(1) of the Administrative Procedure Act.

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;

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 AS FOLLOWS:

1. By no later than December 31, 2021, FWS will complete the Environmental Protection Agency's requested reinitiated consultation on the active ingredients sodium fluoroacetate and sodium cyanide pursuant to Section 7 of the ESA and the ESA's corresponding regulations.

2. This Agreement requires Federal Defendants to take the action described in Paragraph 1 by the deadline specified in that Paragraph. The Agreement shall not (and shall not be construed to) limit or modify the discretion accorded to Federal Defendants by the ESA, the Administrative Procedure Act, 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. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Federal Defendants take any action in contravention of the ESA, the Administrative Procedure Act, or any other law or regulation, either substantive or procedural.

3. To challenge any final decision issued in accordance with this Agreement, Plaintiffs will be required to file a separate action and otherwise comply with applicable legal requirements.

4. 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 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 agree that they will meet and confer (either 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.

5. In the event that Federal Defendants fail to meet the deadline specified in Paragraph 1, Federal Defendants have not sought to modify the deadline, and the parties cannot resolve the claim pursuant to the meet and confer provisions of Paragraph 4, Plaintiffs' first remedy shall be a motion to enforce the terms of this Agreement. Plaintiffs shall not, in the first instance, move to enforce the Agreement through a proceeding for contempt of court.

6. Nothing in this Agreement may be cited by either party in connection with any other administrative or judicial proceeding in order to demonstrate what does or does not constitute a reasonable timeframe for completing reinitiated consultation under Section 7 of the ESA or ESA's corresponding regulations.

7. Federal Defendants agree to settle all of Plaintiffs' claims for attorneys' fees and costs in the above-captioned case pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, for a total of \$8,500.

8. Plaintiffs shall provide Federal Defendants with all information necessary to effectuate the payment described in Paragraph 7. Within ten (10) business days after entry of this Agreement or the receipt of all information necessary to effectuate payment from Plaintiffs, whichever is later, Federal Defendants shall submit all necessary paperwork for processing such payment to the appropriate office(s).

9. Plaintiffs agree to accept payment of \$8,500 in full and complete satisfaction of any and all claims, demands, rights, and/or causes of action for attorneys' fees and costs to which it may be entitled in connection with the above-captioned case through and including the date of this Agreement. Plaintiffs will provide Federal Defendants with confirmation of their receipt of payment within ten (10) business days after receipt.

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 schedule outlined in Paragraph 1 or for any other continuation of this action. By this Agreement, Federal 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. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that Federal 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 appropriations law.

12. The parties agree that this Agreement was negotiated in good faith and that it 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. The Agreement contains all of the agreement between the parties and is intended to be the final and sole agreement between the parties. The parties agree that any prior or contemporaneous representations or understandings not explicitly contained in this written Agreement, whether written or oral, are of no further legal or equitable force or effect.

13. Nothing in this Agreement shall be construed or offered in evidence in any proceeding as an admission or concession of wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement. Federal Defendants do not waive any defenses they may have concerning the claims settled under this Agreement or any similar claims brought in the future by any other party. This Agreement is executed solely for the purpose of compromising and settling Plaintiffs' Complaint, and nothing herein shall be construed as precedent in any other context.

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

15. Upon approval of this Agreement by the Court, Plaintiffs' complaint shall be dismissed with prejudice. 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 Federal Defendants satisfy their obligations under the Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am*, 511 U.S. 375 (1994).

16. The undersigned representatives of each party certify that they are fully authorized by the party they represent to agree to the Court's entry of the terms and conditions of this Agreement and that they agree to the terms herein.

Date: February 28, 2018

JEFFREY H. WOOD, Acting Assistant Attorney General
SETH M. BARSKY, Chief
S. JAY GOVINDAN, Assistant Chief

/s/ Kaitlyn Poirier

KAITLYN POIRIER, Trial Attorney (TN Bar # 034394)
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing Agreement with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Kaitlyn Poirier

KAITLYN POIRIER, Trial Attorney (TN Bar # 034394)

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