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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL
DIVERSITY and
ANIMAL WELFARE INSTITUTE,

Plaintiffs,

vs.

ANIMAL & PLANT HEALTH
INSPECTION
SERVICE, *et al.*,

Federal Defendants.

Case No. 4:16-cv-00659-RM

SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs brought claims pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706, alleging violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. Part 402, against the Animal and Plant Health Inspection Service-Wildlife Services (“APHIS-Wildlife Services”) and the U.S. Fish and Wildlife Service (“FWS”);

WHEREAS, Plaintiffs’ claims allege that APHIS-Wildlife Services and FWS (collectively, “Federal Defendants”) are violating the ESA by not reinitiating Section 7 consultation on the impact of APHIS-Wildlife Service’s wildlife damage management program in southern Arizona on the ocelot and that APHIS-Wildlife Services is violating NEPA and the Administrative Procedure Act (“APA”), 5

1 U.S.C. §§ 701-706 by not preparing a supplemental environmental analysis on its
2 Environmental Assessments (“EAs”) for Arizona prepared in the 1990s, or its
3 1994 Programmatic Environmental Impact Statement (“PEIS”);

4 WHEREAS, Federal Defendants maintain that ESA Section 7 consultation
5 was reinitiated in 2015 to analyze the possible effects of APHIS’ Arizona wildlife
6 damage management activities on numerous listed species – one of which is the
7 ocelot;

8 WHEREAS, Plaintiffs’ position is that Federal Defendants have not
9 reinitiated Section 7 consultation with respect to the ocelot. APHIS-Wildlife
10 Services prepared and sent to FWS in 2015 a draft Biological Assessment to
11 analyze the possible effects of APHIS’ Arizona wildlife damage management
12 activities on numerous listed species under Section 7 of the ESA. For the ocelot,
13 the draft Biological Assessment states that the 2010 Biological Opinion covering
14 the ocelot “is sufficient at this time to avoid take”;

15 WHEREAS, on October 12, 2016, APHIS-Wildlife Services posted the
16 following notice on its Website stating that, as regards the 1994 PEIS:

17 No new APHIS-Wildlife Services NEPA documents signed after the
18 date of this Notice will be tiered to the 1994 PEIS. In the future,
19 APHIS-Wildlife Services intends to revise or redo all of its NEPA
documents that are currently tiered to the 1994 PEIS.

20 This notice was issued pursuant to a settlement agreement filed in a separate case
21 in the District of Nevada;¹

22 WHEREAS, on October 26, 2016, APHIS-Wildlife Services issued a draft
23 EA for Predator Damage Management in Arizona;

24 WHEREAS, the Parties have engaged in good faith settlement negotiations
25 in an effort to avoid the time and expense of further litigation;

26 _____
27 ¹ <https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/programs/nepa> (last
visited Jan. 19, 2017).

1 WHEREAS, the Parties, by and through their authorized representatives,
2 and without any admission or final adjudication of the issues of fact or law with
3 respect to Plaintiffs' claims, have reached a settlement that they consider to be a
4 lawful resolution of the disputes set forth in Plaintiffs' complaint.;

5 NOW THEREFORE, it is stipulated and agreed to by Plaintiffs and Federal
6 Defendants as follows:

- 7 1. Dismissal of Action. Upon approval of this Agreement by the Court,
8 Plaintiffs' complaint shall be dismissed with prejudice.
- 9 2. ESA Section 7 Consultation. APHIS-Wildlife Services prepared and sent to
10 FWS a draft Biological Assessment in 2015. On February 22, 2017, the
11 agencies exchanged correspondence confirming that the ocelot is part of
12 reinitiated consultation. As part of this settlement proposal, the agencies
13 also commit to the following action:
 - 14 a. By June 30, 2017, FWS will issue its consultation determination on
15 the effects of APHIS-Wildlife Services' wildlife damage
16 management activities in Arizona on the ocelot.
- 17 3. NEPA Review. APHIS-Wildlife Services issued a draft EA for Predator
18 Damage Management in Arizona in October 2016. On May 17, 2017,
19 APHIS-Wildlife Services issued a new draft EA. APHIS-Wildlife Services
20 also commits, by December 29, 2017, APHIS-Wildlife Services to issue a
21 final EA along with either a Finding of No Significant Impact or a Notice
22 of Intent to Prepare an Environmental Impact Statement.
- 23 4. This Agreement may be modified by written stipulation between the Parties
24 filed with and approved by the Court. In the event that either party seeks to
25 modify the terms of this Agreement, the party seeking the modification,
26 will confer at the earliest possible time with the other party.

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- 1 5. Plaintiffs and Federal Defendants recognize that APHIS-Wildlife Services
2 will be relieved of its obligation under Paragraph 3 to prepare an EA if
3 APHIS-Wildlife Services decides to prepare an EIS in lieu of an EA.
- 4 6. Nothing in this Settlement precludes any challenge by Plaintiffs to the
5 validity or sufficiency of the ESA consultation and NEPA analysis
6 completed pursuant to paragraphs 2 and 3 above. Such challenges shall be
7 made only upon (1) completion of the entire NEPA process following the
8 issuance of APHIS-Wildlife Service's Finding of No Significant Impact or,
9 in the event an EIS is prepared, APHIS-Wildlife Service's Record of
10 Decision, and (2) Plaintiffs' exhaustion of any and all available
11 administrative appeal opportunities; and the Court's review will be
12 conducted only to the extent allowed by, and pursuant to, the judicial
13 review provisions of the APA.
- 14 7. Attorneys' Fees and Costs. The Parties have agreed to settle any and all of
15 Plaintiffs' claims for attorneys' fees, costs, and expenses associated with
16 this litigation for a lump sum of \$9,900. This Joint Compromise Settlement
17 Agreement represents the entirety of the undersigned Parties' commitments
18 with regard to settlement of claims for attorneys' fees, costs, and expenses.
19 Pursuant to 31 U.S.C. §§ 3711, 3716; 26 U.S.C. § 6402(d); 31 C.F.R.
20 §§ 285.5, 901.3, and other authorities, the United States will offset
21 against the settlement amount any delinquent debts that Plaintiff owes
22 to the United States. *See Astrue v. Ratliff*, 560 U.S. 586 (2010).
- 23 8. Representative Authority. The undersigned representatives of Plaintiffs and
24 Federal Defendants certify that they are fully authorized by the party or
25 parties whom they represent to enter into the terms and conditions of this
26 Settlement Agreement and to legally bind those parties to it.
- 27

1 9. Compliance with Other Laws. Nothing in this Settlement Agreement shall
2 be interpreted as, or shall constitute, a commitment or requirement that
3 Federal Defendants obligate or pay funds, or take any other actions in
4 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
5 applicable law. Nothing in this Settlement Agreement shall be construed to
6 deprive a federal official of authority to revise, amend, or promulgate
7 regulations, or to amend or revise land and resource management plans.
8 Nothing in this Settlement Agreement is intended to, or shall be construed
9 to, waive any obligation to exhaust administrative remedies; to constitute
10 an independent waiver of the United States' sovereign immunity; to change
11 the standard of judicial review of federal agency actions under the APA; or
12 to otherwise extend or grant this Court jurisdiction to hear any matter,
13 except as expressly provided in the Settlement Agreement.

14 10. Mutual Drafting and Other Provisions.

15 a. It is hereby expressly understood and agreed that this Settlement
16 Agreement was jointly drafted by Plaintiffs and Federal Defendants.
17 Accordingly, the Parties hereby agree that any and all rules of
18 construction, to the effect that ambiguity is construed against the
19 drafting party, shall be inapplicable in any dispute concerning the
20 terms, meaning, or interpretation of the Settlement Agreement.

21 b. This Settlement Agreement contains all of the agreements between
22 Plaintiffs and Federal Defendants, and is intended to be and is the
23 final and sole agreement between Plaintiffs and Federal Defendants
24 concerning the complete and final resolution of Plaintiffs' claims.
25 Plaintiffs and Federal Defendants agree that any other prior or
26 contemporaneous representations or understandings not explicitly
27 contained in this Settlement Agreement, whether written or oral, are

1 of no further legal or equitable force or effect. Any subsequent
2 modifications to this Settlement Agreement must be in writing, and
3 must be signed and executed by Plaintiffs and Federal Defendants.

4 c. This Settlement Agreement is the result of compromise and
5 settlement, and does not constitute an admission, implied or
6 otherwise, by Plaintiffs or Federal Defendants to any fact, claim, or
7 defense on any issue in this litigation. This Settlement Agreement
8 has no precedential value and shall not be used as evidence either by
9 Federal Defendants or Plaintiffs in any other litigation except as
10 necessary to enforce the terms of this Agreement.

11 11. Force Majeure. The Parties understand that notwithstanding their efforts to
12 comply with the commitments contained herein, events beyond their
13 control may prevent or delay such compliance. Such events may include
14 natural disasters as well as unavoidable legal barriers or restraints,
15 including those arising from actions of persons or entities that are not party
16 to this Settlement Agreement.

17 12. Effective Date. The terms of this Agreement shall become effective upon
18 execution of this Settlement Agreement and approval by the Court. The
19 parties agree that this Settlement Agreement may be executed in one or
20 more counterparts, each of which shall constitute an original, and all of
21 which, taken together, shall constitute the same instrument. Facsimile or
22 scanned signatures submitted by electronic mail shall have the same effect
23 as an original signature in binding the parties.

24 13. Notwithstanding the dismissal of this action, the parties have agreed and
25 requested that this Court retain jurisdiction to oversee compliance with the
26 terms of this Settlement Agreement and to resolve any motions to modify
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1 such terms. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S.
2 375 (1994).

3
4 IN WITNESS THEREOF, this Settlement Agreement between the
5 Plaintiffs and the Federal Defendants has been duly executed by their authorized
6 legal representatives.

7 /s/ Collette Adkins
8 Collette Adkins, Senior Attorney
9 Center for Biological Diversity
10 P.O. Box 595
11 Circle Pines, MN 55014

12 *Attorney for Plaintiffs Center for Biological*
13 *Diversity and*
14 *Animal Welfare Institute*

15 Dated: 06/23/17

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources
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/s/ Rickey D. Turner Jr.
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