

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

WILDEARTH GUARDIANS,	)	
	)	
Plaintiff,	)	
v.	)	Civ. No. 07-1043-JB-ACT
	)	
UNITED STATES FOREST SERVICE,	)	
	)	
Federal Defendant,	)	
	)	
NEW MEXICO CATTLE GROWERS'	)	
ASSOCIATION, et al.,	)	
	)	
Defendant-Intervenors.	)	
	)	

**SETTLEMENT AGREEMENT**

WHEREAS, Plaintiff/Appellant WildEarth Guardians (“Plaintiff”), through its predecessors in interest, initiated this action against Federal Defendant/Appellee United States Department of Agriculture (“USDA”) Forest Service (“Federal Defendant”) on October 17, 2007;

WHEREAS, Plaintiff’s claims challenged whether the Forest Service legally approved continued livestock grazing on 26 specified allotments on the Gila National Forest in New Mexico pursuant to Section 339 of the Consolidated Appropriations Act of 2005, P.L. No. 108-447 § 339, which allowed such grazing approvals meeting certain criteria to be categorically excluded from documentation in an environmental assessment (“EA”) or environmental impact statement (“EIS”) under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370;

WHEREAS, on September 30, 2009, the District Court ruled in favor of Federal Defendant on all claims, and entered a Final Judgment;

WHEREAS, on November 20, 2009, Plaintiff filed a Notice of Appeal to the Tenth Circuit Court of Appeals;

WHEREAS, Plaintiff’s appeal has been partially briefed and is still pending before the Tenth

Circuit;

WHEREAS, Plaintiff and Federal Defendant believe that it is in the interests of the public, the Parties, and judicial economy to resolve the claims in this action without additional litigation;

THEREFORE, Plaintiff and Federal Defendant stipulate and agree to the following:

1. Dismissal of Action. Upon approval of this Agreement by the Court, all counts of Plaintiff's 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 the Federal Defendants satisfy their obligations under the Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

2. NEPA Schedule and Analysis.

(A) The Forest Service will continue to authorize livestock grazing on all 26 allotments challenged in this litigation under the existing NEPA decisions made pursuant to Section 339 of the Consolidated Appropriations Act of 2005, P.L. No. 108-447 § 339, unless the Forest Service determines otherwise in accordance with federal law.

(B) For the Y Canyon, Deadman, Cox Canyon, V+T, and O Bar O Allotments, the Forest Service will prepare and complete new NEPA analyses in the form of EAs and/or EISs. The Forest Service will determine whether an EA and/or EIS is appropriate for each of these Allotments consistent with NEPA. If the Forest Service decides to prepare an EA in the first instance for a particular allotment, it will issue either a Decision Notice and Finding of No Significant Impact or a notice of intent to prepare an EIS, for each NEPA analysis on Y Canyon, Deadman, and Cox Canyon Allotments by April 30, 2013; on the V+T Allotment by September 30, 2013; and on O Bar O Allotment by April 30, 2014.

(C) The Forest Service will place the Long Canyon and Dark Canyon Allotments on the 2014-2016 Rescissions Act NEPA schedule for completion of new NEPA analysis.

(D) 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 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 paragraphs 2(B) and 2(C), 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.

(E) Except as otherwise provided in paragraph 2(H) and upon compliance with paragraph 2(D), Plaintiff's sole remedy for any alleged violation by USFS of the terms of this Agreement shall be a motion to enforce the terms of this Agreement. This Agreement shall not be enforceable through a proceeding for contempt of court.

(F) Plaintiff and Federal Defendant recognize that the Forest Service's ability to meet the decision dates specified in Paragraph 2(B) is dependent upon completing consultation pursuant to Section 7(a)(2) of the Endangered Species Act by obtaining a concurrence letter or biological opinion from the U.S. Fish and Wildlife Service. If an unanticipated delay, solely on the part of the U.S. Fish and Wildlife Service, precludes the Forest Service from obtaining the required concurrence letter or biological opinion, the parties recognize that it may be impractical or infeasible for the Forest Service to meet the decision dates specified in Paragraph 2(B). Plaintiff and Federal Defendant also recognize that the decision dates specified in Paragraph 2(B) may need to be modified if the Forest Service decides to prepare an EIS in lieu of, or in addition to, an EA.

(G) In each NEPA analysis specified in Paragraph 2(B) above, the Forest Service agrees to consider an alternative submitted by Plaintiff in that NEPA analysis so long as Plaintiff provides the

Forest Service with a detailed description of that alternative during the scoping period for the NEPA analysis. Should the Forest Service conclude that further detail than that provided by Plaintiff is required to consider the alternative, it will notify Plaintiff and provide one opportunity for Plaintiff to provide further detail so long as Plaintiff's additional submission is made within 30 days of such notification.

(H) Any challenge by Plaintiff to the validity or sufficiency of the NEPA analyses completed pursuant to paragraphs 2(B) and 2(C) above, including the Forest Service's consideration of alternatives as required in paragraph 2(G), shall be made only upon (1) completion of the entire NEPA process following the issuance of the Forest Service's Decision Notice and Finding of No Significant Impact or, in the event an EIS is prepared, the Forest Service's Record of Decision, and (2) Plaintiff's exhaustion of any and all available administrative appeal opportunities; and the Court's review will be conducted only to the extent allowed by, and pursuant to, the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

(I) Livestock grazing on the allotments specified in Paragraph 2(B) will continue under the existing authorizations and NEPA decisions made pursuant to Section 339 of the Consolidated Appropriations Act of 2005, P.L. No. 108-447 § 339, during the pendency of the NEPA analyses specified in Paragraph 2(B), and any administrative appeals there from, unless the Forest Service determines otherwise in accordance with federal law.

3. Attorneys Fees and Costs.

(A) The Forest Service agrees to pay Plaintiff \$27,500.00 in full and complete satisfaction of any and all claims, demands, rights, and causes of action pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and/or any other statute and/or common law theory, for any and all attorneys' fees and costs incurred in this litigation through the date of dismissal of the action

pursuant to Paragraph 1.

(B) The parties agree that Plaintiff reserves 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 2(B) or for any other continuation of this action. By this Agreement, Defendant does not waive any defense to fees claimed by Plaintiff or Plaintiff's counsel, including defenses to entitlement and the amount of fees claimed, 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.

(C) The Forest Service's payment as identified in Paragraph 3(A) above, shall be accomplished by electronic fund transfer into the WildEarth Guardians Attorneys' Fees Account. Plaintiff's counsel will provide the appropriate account number, tax identification, and other information needed to facilitate payment to undersigned counsel for Federal Defendant. The Forest Service shall submit the paperwork for the payment within thirty (30) business days after this Settlement Agreement is approved by the Court or Plaintiff provides the necessary information as required by this paragraph to facilitate the payment, whichever is later. Plaintiff's counsel shall notify undersigned counsel for Federal Defendant when payment is received.

(D) Plaintiff agrees that receipt of the full amount specified in Paragraph 3(A) above shall operate as a release of any and all claims for attorneys' fees and costs that Plaintiff has incurred in this litigation through the date of dismissal of the action pursuant to Paragraph 1.

4. Representative Authority. The undersigned representatives of Plaintiff and Federal Defendant certify that they are fully authorized by the party or parties whom they represent to enter into the terms and conditions of this Settlement Agreement and to legally bind those parties to it.

5. Compliance with Other Laws. Nothing in this Settlement Agreement shall be interpreted as, or shall constitute, a commitment or requirement that Federal Defendant obligate or pay funds, or take any other actions in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other

applicable law. Nothing in this Settlement Agreement shall be construed to deprive a federal official of authority to revise, amend or promulgate regulations, or to amend or revise land and resource management plans. Nothing in this Settlement Agreement is intended to or shall be construed to amend or require amendment of the Forest Plan for the Gila National Forest; to waive any obligation to exhaust administrative remedies; to constitute an independent waiver of the United States' sovereign immunity; to change the standard of judicial review of federal agency actions under the Administrative Procedure Act ("APA"); or to otherwise extend or grant this Court jurisdiction to hear any matter, except as expressly provided in the Settlement Agreement.

6. Mutual Drafting And Other Provisions.

(A) It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by Plaintiff and Federal Defendant. Accordingly, the Parties hereby agree that any and all rules of construction, to the effect that ambiguity is construed against the drafting party, shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of the Settlement Agreement.

(B) This Settlement Agreement contains all of the agreements between Plaintiff and Federal Defendant, and is intended to be and is the final and sole agreement between Plaintiff and Federal Defendant concerning the complete and final resolution of Plaintiff's claims and pending appeal before the Tenth Circuit. Plaintiff and Federal Defendant agree that any other prior or contemporaneous representations or understandings not explicitly contained in this Settlement Agreement, whether written or oral, are of no further legal or equitable force or effect. Any subsequent modifications to this Settlement Agreement must be in writing, and must be signed and executed by Plaintiff and Federal Defendant.

(C) This Settlement Agreement is the result of compromise and settlement, and does not constitute an admission, implied or otherwise, by Plaintiff or Federal Defendant to any fact, claim, or defense on any issue in this litigation. This Settlement Agreement has no precedential value and

shall not be cited in any other litigation.

7. Force Majeure. The Parties understand that notwithstanding their efforts to comply with the commitments contained herein, events beyond their control may prevent or delay such compliance. Such events may include natural disasters as well as unavoidable legal barriers or restraints, including those arising from actions of persons or entities that are not party to this Settlement Agreement. Force majeure shall not continue beyond the circumstances and conditions that prevent timely performance, and shall not apply if alternative means of compliance are available. The Party claiming force majeure shall have the burden of proof in proceedings to enforce or modify the Settlement Agreement.

8. Effective Date. The terms and agreements contained in this Settlement Agreement do not go into effect unless and until the District Court enters an order approving this Settlement Agreement. The parties request the Court to incorporate the terms of the settlement agreement into its order of dismissal and to retain jurisdiction for the sole purpose of enforcing the Agreement or resolving any disputes concerning its implementation.

The undersigned parties hereby consent to the form, substance and entry of the foregoing Settlement Agreement.

***For Plaintiff WildEarth Guardians:***

DATED this 15th day of April, 2011.

/s/ authorized on 4-15-2011  
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***For Federal Defendant USDA Forest Service:***

DATED this 15th day of April, 2011.

IGNACIA S. MORENO  
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United States Department of Justice  
Environment and Natural Resources Division

/s/ Andrew A. Smith  
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