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27 *Attorneys for Defendants*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 THE CENTER FOR BIOLOGICAL)
21 DIVERSITY, et al.,)
22 Plaintiffs,)
23 vs.)
24 GARY LOCKE, et al.,)
25 Defendants.)

09-cv-02346-MMC

STIPULATED SETTLEMENT
AGREEMENT AND ~~PROPOSED~~
ORDER OF DISMISSAL

1 Plaintiffs the Center for Biological Diversity, Oceana, Inc., and Turtle Island
2 Restoration Network (collectively “Plaintiffs”), and Defendants Gary Locke, in his
3 official capacity as Secretary of Commerce, National Marine Fisheries Service
4 (“NMFS”), Ken Salazar, in his official capacity as Secretary of the Interior, and United
5 States Fish and Wildlife Service (“FWS”) (collectively “Defendants” or the “Services”),
6 by and through their undersigned counsel, state as follows:

7 WHEREAS, on July 12, 2007, the Services received a petition seeking
8 recognition of the North Pacific loggerhead sea turtle (*Caretta caretta*) population as a
9 distinct population segment (“DPS”) and a change in its listing status from threatened to
10 endangered;

11 WHEREAS, on November 16, 2007, the Services made a 90-day finding,
12 pursuant to 16 U.S.C. § 1533(b)(3)(A), that the petition presented substantial scientific
13 information indicating that the petitioned action may be warranted, 72 Fed. Reg. 64,585
14 (Nov. 16, 2007);

15 WHEREAS, on September 26, 2007, NMFS received a petition to revise the
16 critical habitat designation for the leatherback sea turtle (*Dermochelys coriacea*) to
17 include waters in the Pacific Ocean off the northern California and Oregon coasts;

18 WHEREAS, on December 28, 2007, NMFS made a 90-day finding, pursuant to
19 16 U.S.C. § 1533(b)(3)(D)(i), that the petition presented substantial scientific information
20 indicating that the revision may be warranted, 72 Fed. Reg. 73,746 (Dec. 28, 2007);

21 WHEREAS, on November 15, 2007, the Services received a petition seeking
22 recognition of the Western North Atlantic loggerhead sea turtle population as a DPS and
23 a change in its listing status from threatened to endangered;

24 WHEREAS, on March 5, 2008, the Services made a 90-day finding, pursuant to
25 16 U.S.C. § 1533(b)(3)(A), that the petition presented substantial scientific information
26 indicating that the petitioned action may be warranted, 73 Fed. Reg. 11,849 (Mar. 5,
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1 2008);

2 WHEREAS, on March 12, 2009, Plaintiffs sent a 60-day Notice of Intent to Sue
3 letter to Defendants regarding their alleged failure to make 12-month findings on all three
4 petitions;

5 WHEREAS, on May 28, 2009, Plaintiffs filed a Complaint for Declaratory and
6 Injunctive Relief pursuant to section 11 of the Endangered Species Act (“ESA”), 16
7 U.S.C. § 1540, seeking to compel the Services to complete the 12-month findings;

8 WHEREAS, Plaintiffs and Defendants, through their authorized representatives
9 and without any admission or final adjudication of the issues of fact or law with respect
10 to Plaintiffs’ claims, have reached a settlement that they consider to be a just, fair,
11 adequate, and equitable resolution of the disputes set forth in Plaintiffs’ Complaint;

12 WHEREAS, Plaintiffs and Defendants agree that settlement of this action in this
13 manner is in the public interest and is an appropriate way to resolve the dispute between
14 them;

15 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE
16 PARTIES AS FOLLOWS:

17 1. NMFS shall submit to the Federal Register a 12-month finding, pursuant
18 to 16 U.S.C. § 1533(b)(3)(D)(ii), as to how it intends to proceed with the requested
19 revision of critical habitat for the leatherback sea turtle, on or before December 4, 2009.

20 2. The Services shall submit to the Federal Register a 12-month finding,
21 pursuant to 16 U.S.C. § 1533(b)(3)(B), regarding the requested recognition of the North
22 Pacific and Western North Atlantic loggerhead populations as DPSs and, if appropriate,
23 as to whether the status of the DPSs should be changed from threatened to endangered,
24 on or before February 19, 2010.

25 3. Either party may seek to modify the deadlines for the actions specified in
26 Paragraphs 1 and 2, above, for good cause shown consistent with the Federal Rules of
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1 Civil Procedure. In that event, or in the event that either party believes that the other
2 party has failed to comply with any term or condition of this Agreement, the parties shall
3 use the dispute resolution procedures specified in Paragraph 4.

4 4. The Order entering this Agreement may be modified by the Court upon
5 good cause shown, consistent with the Federal Rules of Civil Procedure, by written
6 stipulation between the parties filed with and approved by the Court, or upon written
7 motion filed by one of the parties and granted by the Court. In the event that either party
8 seeks to modify the terms of this Agreement, including the deadlines for the actions
9 specified in Paragraphs 1 and 2, or in the event of a dispute arising out of or relating to
10 this Agreement, or in the event that either party believes that the other party has failed to
11 comply with any term or condition of this Agreement, the party seeking the modification,
12 raising the dispute, or seeking enforcement, shall provide the other party with written
13 notice of the claim. The parties agree that they will meet and confer (in-person not
14 required) at the earliest possible time in a good-faith effort to resolve the claim before
15 pursuing relief from the Court. If the parties are unable to resolve the claim after
16 conferring, either party may pursue relief from the Court.

17 5. In the event that Defendants fail to meet a deadline and have not sought to
18 modify it, Plaintiffs' first remedy shall be a motion to enforce the terms of this
19 Agreement. This Agreement shall not, in the first instance, be enforceable through a
20 proceeding for contempt of court. However, this Agreement does not affect the
21 availability of remedies, including contempt, should the Defendants fail to comply with
22 court orders issued, subsequent to missed deadlines, by the Court regarding the schedule
23 of events to which the parties have agreed.

24 6. This Agreement only requires Defendants to take action by the deadlines
25 specified herein and does not limit the Service's authority with regard to the substantive
26 outcome of any determination. To challenge any final rule issued in accordance with this
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1 Agreement, Plaintiffs will be required to file a separate action.

2 7. No party shall use this Agreement or the terms herein as evidence of what
3 does or does not constitute a reasonable time line for making a determination pursuant to
4 16 U.S.C. § 1533 in any other proceeding regarding the Services' implementation of the
5 ESA.

6 8. Defendants agree to pay Plaintiffs an award of reasonable attorneys' fees
7 and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540 (g). Therefore,
8 Defendants agree to settle all of Plaintiffs' claims for costs and attorneys' fees in the
9 above-captioned litigation for a total of \$18,000.00. A check will be made payable in
10 that amount to Plaintiffs' undersigned counsel, Center for Biological Diversity, 351
11 California Street, Suite 600, San Francisco, CA 94104. Defendants agree to submit all
12 necessary paperwork for the processing of the attorneys' fee award to the Department of
13 the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10)
14 business days of receipt of the court order approving this stipulation.

15 9. Plaintiffs agree to accept payment of \$18,000.00 in full satisfaction of any
16 and all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in
17 the above-captioned litigation, through and including the date of this agreement.
18 Plaintiffs agree that receipt of this payment from Defendants shall operate as a release of
19 Plaintiffs' claims for attorneys' fees and costs in this matter, through and including the
20 date of this agreement.

21 10. The parties agree that Plaintiffs reserve the right to seek additional fees
22 and costs incurred subsequent to this agreement arising from a need to enforce or defend
23 against efforts to modify the underlying schedules outlined in Paragraphs 1 and 2, or for
24 any other unforeseen continuation of this action.

25 11. By this agreement, Defendants do not waive any right to contest fees
26 claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate, in any future
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1 litigation, or continuation of the present action. Further, this stipulation as to attorneys'
2 fees and costs has no precedential value and shall not be used as evidence in any other
3 attorneys' fees litigation.

4 12. No provision of this Agreement shall be interpreted as or constitute a
5 commitment or requirement that Defendants take action in contravention of the ESA, the
6 Administrative Procedure Act ("APA"), or any other law or regulation, either substantive
7 or procedural. Nothing in this Agreement shall be construed to limit or modify the
8 discretion accorded to Defendants by the ESA, the APA, or general principles of
9 administrative law with respect to the procedures to be followed in developing the
10 findings required herein, or as to the substance of the findings.

11 13. No provision of this Agreement shall be interpreted as, or shall constitute,
12 a commitment or requirement that Defendants are obligated to pay any funds exceeding
13 those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C.
14 § 1341, or any other applicable appropriations law.

15 14. The undersigned representatives of each party certify that they are fully
16 authorized by the party they represent to agree to the Court's entry of the terms and
17 conditions of this Agreement and do hereby agree to the terms herein. None of the
18 provisions or obligations of this Settlement Agreement shall become binding and
19 effective unless and until the Court enters an Order approving the terms of this
20 Settlement Agreement. The Effective Date of this Agreement shall be the date the Court
21 enters the Order.

22 15. The terms of this Agreement constitute the entire agreement of the Parties
23 with regard to Plaintiffs' claims set forth in the above-captioned case, and no statement,
24 agreement or understanding, oral or written, which is not contained herein, shall be
25 recognized or enforced.

26 16. Upon approval of this Agreement by the Court, Plaintiffs' Complaint shall
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1 be dismissed with prejudice. Notwithstanding the dismissal of this action, the parties
2 hereby stipulate and respectfully request that the Court retain jurisdiction to oversee
3 compliance with the terms of this Agreement and to resolve any motions to modify such
4 terms. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

5 Dated: October 8, 2009

6 Respectfully submitted,

7 /s/ Miyoko Sakashita

(per e-mail authorization to M. Flax on 10-8-09)
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21 /s/ Meredith L. Flax

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Attorneys for Defendants

ORDER

The terms and conditions of this Stipulated Settlement Agreement are hereby adopted as an ORDER of this Court, and this matter is hereby DISMISSED.

Dated: this 13th day of October, 2009.


United States District Court Judge