

**ATTACHMENT 1**

Turtle Island Restoration Network, the Center for Biological Diversity, and Kahea: The Hawaiian Environmental Alliance (collectively the “Plaintiffs”), and the United States Department of Commerce, the National Marine Fisheries Service, and Gary Locke, in his official capacity as Secretary of the Department of Commerce, (collectively the “Federal Defendants”), by and through the undersigned counsel, state as follows:

WHEREAS, on December 16, 2009, Plaintiffs filed a complaint in the action captioned *Turtle Island Restoration Network, et.al. v. Department of Commerce, et.al.*, Case No. 09-00598 DAE-KSC, in the United States District Court for the District of Hawai’i, alleging that the Federal Defendants violated the Endangered Species Act (“ESA”), the Migratory Bird Treaty Act (“MBTA”), the Marine Mammal Protection Act (“MMPA”), and the Administrative Procedure Act (“APA”), by issuing the final rule for the Hawai’i shallow-set (swordfish) longline fishery that, among other measures, removed fishing effort limitations and raised the allowable amount of incidental take of certain sea turtles, Dkt. No. 1;

WHEREAS, on January 22, 2010, the Hawaii Longline Association (“HLA”) filed a complaint against the Federal Defendants in the action captioned *Hawaii Longline Association v. National Marine Fisheries Service*, Case No. 10-00044 DAE-KSC (D. Hi.), alleging that the Federal Defendants failed to make certain mandatory determinations required under the MMPA, ESA, and APA, to authorize the shallow-set longline fishery to incidentally take humpback whales;

WHEREAS, on February 12, 2010, this Court granted HLA’s motion to intervene as a third party defendant in this action, Dkt. No. 20;

WHEREAS, on February 16, 2010, the Federal Defendants answered Plaintiffs' complaint, raising various defenses and denying that they had violated any requirements under law, Dkt. No. 21;

Whereas, on April 1, 2010, the Federal Defendants answered the HLA's complaint, raising various defenses and denying that they had violated any mandate under ESA, APA, or MMPA;

WHEREAS, on April 5, 2010, Plaintiffs' and HLA's complaints were consolidated by Order of the U.S. District Court, Dkt. No. 61;

WHEREAS, on June 24, 2010, by Order of the U.S. District Court, Plaintiffs' complaint was dismissed without prejudice for failure to properly plead jurisdiction under the Magnuson Stevens Fishery Conservation and Management Act ("MSA"), Dkt. No. 82;

WHEREAS, on June 24, 2010, Plaintiffs filed a first amended complaint, Dkt. No. 83;

WHEREAS, on July 8, 2010, the Federal Defendants answered the first amended complaint and denied violating the MMPA, ESA, MBTA, APA, or MSA, Dkt. No. 85;

WHEREAS, in order to avoid the costs and uncertainties of litigation, the Plaintiffs and Federal Defendants desire to settle all claims asserted in the Action;

NOW, THEREFORE, Plaintiffs and the Federal Defendants STIPULATE and move the Court to ORDER AS FOLLOWS:

1. Those portions of the Biological Opinion published on October 15, 2008 ("2008 BiOp"), and those portions of the accompanying Incidental Take Statement ("ITS"), that relate to loggerhead and leatherback turtles are hereby VACATED and remanded to the Federal Defendants for further consideration. All other provisions of the 2008 BiOp and the ITS remain in full force and effect.

2. Those portions of the regulations published at 74 Fed. Reg. 65460 (December 10, 2009), amended at 75 Fed. Reg. 1023 (January 8, 2010), and codified at 50 C.F.R. § 665.813(b) (“2009 Regulations”), that relate to the incidental take of loggerhead and leatherback sea turtles are hereby VACATED and remanded to the Federal Defendants. All other provisions of the 2009 Regulations remain in full force and effect.
3. The amount of incidental take for loggerhead and leatherback sea turtles established under the regulations published at 69 Fed. Reg. 17329 (April 2, 2004) (“2004 Regulations”), and those portions of the associated biological opinion and incidental take statement (published on February 23, 2004) that relate to loggerhead and leatherback sea turtles, are hereby reinstated.
4. Following the entry of this Stipulated Injunction, as an order of the Court NMFS shall initiate appropriate rulemaking to implement the amount of annual incidental take for loggerhead and leatherback sea turtles as set forth in the 2004 Regulations identified in Paragraph 3.
5. NMFS shall not increase allowable incidental take of leatherback and/or loggerhead sea turtles by the Hawaii-based shallow-set longline fishery above the limits set forth in the 2004 Regulations, except through new regulations issued under applicable authority and after completion of a new biological opinion based on the best available science.
6. NMFS shall issue a new biological opinion and a new incidental take statement for the Hawaii-based shallow-set longline fishery no later than 135 days after NMFS' final determination on its proposed listing of nine distinct population segments of listed loggerhead sea turtles 75 Fed. Reg. 12598 (March 16, 2010). The purpose of preparing the new biological opinion includes, but is not necessarily limited to, reconsideration of the issues raised by Plaintiffs in the instant litigation.
7. Plaintiffs and the Federal Defendants reserve the right to seek to have this Court modify this Stipulated Injunction on any grounds provided in Fed. R. Civ. Pro. 60(b).
8. In the event of a disagreement between Plaintiffs and the Federal Defendants concerning the interpretation or performance of any aspect of this Stipulated Injunction, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall confer in order to attempt to resolve the dispute within 14 days after receipt of the notice, or such time thereafter as is mutually agreed upon. If the parties are unable to resolve the dispute within 21 days after receipt of the notice, or such time thereafter as is mutually agreed upon, then either party may petition the Court to resolve the dispute. The Court will consider such future requests as it deems appropriate.
9. In the event that the Federal Defendants fail to meet any requirement specified in this Stipulated Injunction, Plaintiffs’ first remedy shall be a motion to enforce the terms of

this Stipulated Injunction. This Stipulated Injunction shall not, in the first instance, be enforceable through a proceeding for contempt of court.

10. The parties agree that Plaintiffs shall be entitled to recover their reasonable attorney fees, costs and expenses incurred in connection with this lawsuit, as described in the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or the ESA. The parties agree to attempt to resolve Plaintiffs' claim for fees and costs for all claims in this action expeditiously, without the need for Court intervention. By this Stipulated Injunction, the Federal Defendants do not waive any right to contest the amount of fees claimed by Plaintiffs or Plaintiffs' counsel, and do not waive any defense to such amount, including the hourly rate, in any future litigation or continuation of the present action. The parties further recognize that Plaintiffs reserve the right to seek additional fees and costs incurred arising from a need to apply to the Court for such an award, to enforce or defend against efforts to modify this Stipulated Injunction or for any other unforeseen continuation of this action.
11. If the parties cannot agree on the amount of such fees within 30 days of the Court approving this Stipulated Injunction, Plaintiffs may file a motion for attorneys' fees and costs with the Court in this matter.
12. No provision of this Stipulated Injunction shall be interpreted as or constitute a commitment or requirement that the Federal Defendants take action in contravention of any law or regulation, either substantive or procedural. Nothing in this Stipulated Injunction shall be construed to limit or modify the discretion accorded to Defendants by the ESA, MSA, MMPA, MBTA, APA, or the 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.
13. Nothing in this Stipulated Injunction shall bar the Federal Defendants from acting on any matters covered herein in a time frame earlier than required by this Stipulated Injunction, or from taking additional actions not specified herein if the Federal Defendants determine such actions are appropriate under applicable law.
14. No provision of this Stipulated Injunction shall be interpreted as, or constitute, a commitment or requirement that the Federal Defendants are obligated to spend funds in violation of the Anti-Deficiency Act, 31 U.S.C. Section 1341, or any other provisions of law.
15. The parties agree that this Stipulated Injunction was negotiated in good faith and that entry of this Stipulated Injunction constitutes a settlement of claims that were vigorously contested, denied, and disputed by the parties. By entering into this Stipulated Injunction, the parties do not waive any defense, except that the Federal Defendants recognize that Plaintiffs are entitled to recover their reasonable attorney fees, costs and expenses as set out in Paragraph 9.

16. The undersigned representatives of the parties certify that they are fully authorized by the parties they represent to agree to the terms and conditions of this Stipulated Injunction and do hereby agree to the terms herein.
17. Upon entry of this Stipulated Injunction, Plaintiffs' complaint shall be dismissed with prejudice. The dismissal shall apply to and be binding upon the parties hereto and anyone acting on their behalf, including successors, employees, agents, elected and appointed officers, and assigns. Plaintiffs agree not to bring, assist any other party in bringing, or join the Federal Defendants or any other party in any court proceeding that concerns alleged violations of law identical to or significantly similar to the allegations in Plaintiffs' complaint.
18. This Stipulated Injunction does not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, including without limitation, the Federal Defendants, their officers, or any other person affiliated with them, or any interpretation of any applicable provision of law. This Stipulated Injunction has no precedential value and shall not be used as evidence in any other court proceeding or in any other settlement discussions.
19. Plaintiffs' sole judicial remedy to address the merits of any final action that may ensue from the Federal Defendants' performance of its obligations under this Stipulated Injunction is to file a separate lawsuit challenging such final action. The Federal Defendants reserve all defenses to any such suit. Nothing in this Stipulated Injunction alters or affects the standards for review of final agency action, or creates jurisdiction that otherwise would not exist to review agency action.
20. Notwithstanding the dismissal of this action, this Court retains jurisdiction to oversee compliance with the terms of this Stipulated Injunction and to resolve any dispute between the parties pertaining to it. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).
21. The terms of this Stipulated Injunction constitute the entire agreement of the parties, and no statement, agreement or understanding, oral or written, which is not contained herein, shall be recognized or enforced.
22. The terms of this Stipulated Injunction shall become effective upon entry of an order by the Court ratifying this Stipulated Injunction.

SO ORDERED this 31st day of January, 2011.



  
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David Alan Ezra  
United States District Judge