

DOUGLAS L. HONNOLD
TIMOTHY J. PRESO
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
Phone: (406) 586-9699; Fax: (406) 586-9695
dhonnold@earthjustice.org
tpreso@earthjustice.org

ATTORNEYS FOR PLAINTIFFS

WILLIAM W. MERCER
United States Attorney
MARK STEGER SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
2929 Third Ave. North, Suite 400
P.O. Box 1478
Billings, MT 59103
Phone: (406) 247-4667; Fax: (406) 657-6989

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
MEREDITH L. FLAX, Trial Attorney
Wildlife and Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Phone: (202) 305-0404; Fax: (202) 305-0275
meredith.flax@usdoj.gov

ATTORNEYS FOR DEFENDANTS

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

DEFENDERS OF WILDLIFE, et al

Plaintiffs,

v.

SALAZAR, et al.,

Defendants.

Civil No. 08-139-M-DWM

**STIPULATED SETTLEMENT
AGREEMENT**

Plaintiffs, Defenders of Wildlife, Center for Biological Diversity, Conservation Northwest, Friends of the Clearwater, Greater Yellowstone Coalition, Idaho Conservation League, Jackson Hole Conservation Alliance, Klamath-Siskiyou Wildlands Center, and Wyoming Outdoor Council (collectively “Plaintiffs”), and Defendants, Ken Salazar, Secretary of the United States Department of the Interior, and Rowan Gould, Acting Director, U.S. Fish and Wildlife Service (collectively “Service” or “Defendants”), by and through their undersigned counsel, state as follows:

WHEREAS, on July 14, 2000, the Service received a petition requesting that the Service list the wolverine, *Gulo gulo luscus*, in the lower-48 United States as endangered or threatened, and that the Service designate critical habitat concurrently with the listing;

WHEREAS, on October 21, 2003, the Service made a 90-day finding, pursuant to 16 U.S.C. § 1533(b)(3)(A), that the petition did not present substantial scientific information indicating that listing the wolverine in the lower-48 United States may be warranted, 68 Fed. Reg. 60,112 (Oct. 21, 2003);

WHEREAS, on September 29, 2006, the U.S. District Court for the District of Montana held the Service’s 90-day finding was in error, and ordered the Service to make a 12-month finding on the petition;

WHEREAS, the Court granted the Service’s unopposed motion to extend the deadline to complete the 12-month finding to February 28, 2008;

WHEREAS, on March 11, 2008, the Service made a 12-month finding on the July 2000 petition, pursuant to 16 U.S.C. § 1533(b)(3)(B), 73 Fed. Reg. 12,929 (Mar.

11, 2008). The 12-month finding determined that listing the wolverine in the lower-48 United States was not warranted, as the population of the species within the United States was found not to constitute a distinct population segment. The 12-month finding also determined that the lower-48 United States is not a significant portion of the range of the North American wolverine, and therefore the wolverine in the lower-48 United States did not warrant listing on that basis;

WHEREAS, on September 30, 2008, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief pursuant to section 11 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540, seeking to set aside the 12-month finding;

WHEREAS, Plaintiffs and Defendants, 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, Plaintiffs and Defendants 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, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. The Service shall reconsider its twelve-month finding on whether the petitioned action to list the wolverine in the lower-48 United States is warranted. The Service shall submit a new twelve-month finding, pursuant to 16 U.S.C. § 1533(b)(3)(B), to the Federal Register by December 1, 2010.
2. The Service shall provide Plaintiffs with a letter no later than December 31,

2009, informing them whether the Service has received the University of Washington climate downscaling study.

3. The Service shall provide Plaintiffs with a letter no later than June 30, 2010, informing them whether the Service has received the Rocky Mountain Research Station study on wolverine habitat projections. The letters referenced in this paragraph and Paragraph 2 shall be mailed to Plaintiffs' counsel, Earthjustice, 209 South Willson Avenue, Bozeman, Montana, 59715.

4. Either party may seek to modify the deadline for the action specified in Paragraph 1, above, for good cause shown consistent with the Federal Rules of Civil Procedure. In that event, 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 parties shall use the dispute resolution procedures specified in Paragraph 5.

5. 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 for the actions 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 written notice of the claim. The parties agree that they will meet and confer (in-person not required) at the earliest possible time in a good-faith effort to resolve the

claim before pursuing relief from the Court. If the parties are unable to resolve the claim after conferring, either party may pursue relief from the Court.

6. This Agreement only requires the Defendants to take action by the deadlines specified herein and does not limit the Service's authority with regard to the substantive outcome of any determination. To challenge any final rule issued in accordance with this Agreement, Plaintiffs will be required to file a separate action. Plaintiffs do not waive their ability to challenge substantive decisions made by the Defendants pursuant to Paragraph 1, above, and Defendants do not waive any applicable claims or defenses.

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

8. Defendants agree that Plaintiffs are entitled to an award of reasonable attorneys' fees and costs, pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540 (g). Therefore, Defendants agree to settle all of Plaintiffs' claims for costs and attorneys' fees in the above-captioned litigation for a total of \$12,663.51. A check will be made payable in that amount to Plaintiffs' undersigned counsel, Earthjustice, 209 South Willson Avenue, Bozeman, MT 59715. Defendants agree to submit all necessary paperwork for the processing of the attorneys' fee award to the Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the court order approving this stipulation.

9. Plaintiffs agree to accept payment of \$12,663.51 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in the

above-captioned litigation, through and including the date of this agreement. Plaintiffs agree that receipt of this payment from Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and costs in this matter, through and including the date of this agreement.

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 underlying schedule outlined in Paragraph 1, or for any other unforeseen continuation of this action.

11. By this agreement, 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 stipulation as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

12. No provision of this Agreement shall be interpreted as, or shall constitute, a commitment or requirement that 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 applicable appropriations law.

13. 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 do hereby agree to the terms herein. None of the provisions or obligations of this Settlement Agreement shall become binding and effective unless and until the Court enters an Order approving the terms of this Settlement Agreement. The Effective Date of this Agreement shall be the date the

Court enters the Order.

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

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. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994).

Dated: June 10, 2009

Respectfully submitted,

/s/ Timothy J. Preso

TIMOTHY J. PRESO
DOUGLAS L. HONNOLD
Earthjustice
209 South Willson Avenue
Bozeman, MT 59715
Phone: (406) 586-9699
Fax: (406) 586-9695

Attorneys for Plaintiffs

WILLIAM W. MERCER
United States Attorney
MARK S. SMITH
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 1478
Billings, MT 59103
Phone: (406) 657-6101
Fax: (406) 657-6989

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment & Natural Resources Division

U.S. Department of Justice

/s/ Meredith L. Flax

MEREDITH L. FLAX
Trial Attorney (D.C. Bar # 468016)
Wildlife & Marine Resources Section
Ben Franklin Station, P.O. Box 7369
Washington, D.C. 20044-0663
Phone: (202) 305-0404
Fax: (202) 305-0275
meredith.flax@usdoj.gov

Attorneys for Defendants