



Douglas  
Krofta/ARL/R9/FWS/DOI  
06/26/2006 12:16 PM

To "Nicole Alt" <Nicole\_Alt@fws.gov>  
cc  
bcc  
Subject Fw: Emailing: #114314-v1-settlement\_for\_SW\_eagle.WPD

Fyi

We will review here, but wanted to start copying you on litigation actions

Cheers  
Melanie Ikenson

**From:** Melanie Ikenson  
**Sent:** 06/26/2006 01:09 PM  
**To:** Douglas Krofta  
**Subject:** Fw: Emailing: #114314-v1-settlement\_for\_SW\_eagle.WPD

Hi Chris and Doug- here is the draft settlement agreement for the SW DPS bald eagle case for AD-ES/FWP approvals.

Thanks,

Melanie Ikenson  
Litigation/FOIA Coordinator  
USFWS-Endangered Species  
500 Gold Ave SW (Room 4012)  
Albuquerque, NM 87102  
p. 505-248-6284; f. 505-248-6788

----- Forwarded by Melanie Ikenson/RO/R2/FWS/DOI on 06/26/2006 01:10 PM -----



"Paul.Lall@usdoj.gov"  
<Paul.Lall@usdoj.gov>  
06/26/2006 12:59 PM

To "Melanie\_Ikenson@fws.gov" <Melanie\_Ikenson@fws.gov>  
cc  
Subject Emailing: #114314-v1-settlement\_for\_SW\_eagle.WPD

Via Email and Fax

Dear Janet and Melanie,

Attached please find a draft of a settlement agreement for the SW Desert Nesting Bald Eagle DPS. The terms are pretty standard. Please let me know if it is OK to file. Thank you.

Paul D. Lall, Trial Attorney  
U.S. Department of Justice  
Environment and Natural Resources Division  
601 D Street, N.W., Third Floor  
Washington, DC 20004  
Tel: (202) 305-0201  
Fax: (202) 305-0275  
Fax: (202) 305-0275

The message is ready to be sent with the following file or link attachments:

#114314-v1-settlement\_for\_SW\_eagle.WPD

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Lall, Paul (ENRD).vcf #114314-v1-settlement\_for\_SW\_eagle.WPD

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL DIVERSITY  
and MARICOPA AUDUBON SOCIETY,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the  
Department of the Interior and the  
U.S. FISH AND WILDLIFE SERVICE,

Defendants.

Case No. 06-cv-887

**STIPULATED SETTLEMENT  
AGREEMENT**

Plaintiffs Center for Biological Diversity and Maricopa Audubon Society and Defendants  
Dirk Kempthorne, Secretary of the Department of the Interior and the U.S. Fish and Wildlife  
Service by and through their undersigned counsel, say as follows:

WHEREAS, on October 13, 2004, Plaintiffs submitted a petition ("Petition") to the U.S.  
Fish and Wildlife Service ("Service") to list the Southwestern Desert Nesting Bald Eagle distinct  
population segment ("SW Bald Eagle DPS") as an endangered species pursuant to the  
Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.* (1973);

WHEREAS, on January 19, 2006, Plaintiffs sent a 60-day Notice of Intent to Sue letter to  
Defendants regarding the alleged failure of the Service to make a finding regarding the Plaintiffs'  
petition pursuant to ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A), which requires that, "[t]o the  
maximum extent practicable, within 90 days after receiving the petition of an interested person  
under section 553(e) of Title 5 to add a species to, or to remove a species from, either of the lists  
published under subsection (c) of this section, the Secretary shall make a finding as to whether  
the petition presents substantial scientific or commercial information indicating that the

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petitioned action may be warranted” (the “90-day finding”);

WHEREAS, on March 27, 2006, Plaintiffs filed a Complaint alleging that Defendants violated the ESA by failing to publish a 90-day finding for the SW Bald Eagle DPS under ESA § 4(b)(3)(A), 16 U.S.C. § 1533(b)(3)(A);

WHEREAS, the Service has not yet made a 90-day finding on whether the petition to list the SW Bald Eagle DPS presents substantial scientific or commercial information indicating that the petitioned action may be warranted;

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 dispute over the claims raised in Plaintiffs’ Complaint;

WHEREAS, all parties 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.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. On or before August 9, 2006, Defendants shall submit for publication in the Federal Register a 90-day finding on the petition to list the SW Bald Eagle DPS, pursuant to 16 U.S.C. § 1533(b)(3)(A). Nothing in this paragraph shall be construed to limit the Service’s discretion in making the 90-day finding. If the Service’s 90-day finding is positive, Defendants shall submit for publication in the Federal Register a 12-month finding on the petition to list the SW Bald Eagle DPS on or before May 9, 2007, pursuant to 16 U.S.C. § 1533(b)(3)(B). Nothing in this paragraph shall be construed to limit the Service’s discretion in making the 12-month finding.

2. The parties agree that this Settlement Agreement (“Agreement”) was negotiated in good faith. By entering into this Agreement, Plaintiffs and Defendants do not waive any claim or

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1 defense on any grounds in this or any other case.

2 3. Upon approval of this Agreement by this Court, Plaintiffs' Complaint shall be  
3 dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(1), and that dismissal shall apply to  
4 and be binding upon the parties hereto and anyone acting on their behalf, including successors,  
5 employees, agents, elected and appointed officers, and assigns.

6 4. No provision of this Agreement shall be interpreted as or constitute a commitment  
7 or requirement that the United States is obligated to pay funds in contravention of the Anti-  
8 Deficiency Act, 31 U.S.C. § 1341, or any other provisions of law. Plaintiffs assert that this  
9 Agreement does not create a conflict with the Anti-Deficiency Act because the duty to make  
10 petition findings is required in non-discretionary terms by the ESA and because the Anti-  
11 Deficiency Act would not excuse compliance with a pre-existing court-approved Agreement.  
12 Plaintiff intends to assert this position if the Service fails to comply with the terms of this  
13 Agreement for reasons of insufficient appropriations. No provision of this Agreement shall be  
14 interpreted as or constitute a commitment or requirement that the Defendants take actions in  
15 contravention of the ESA, the Administrative Procedure Act, or any other law or regulation,  
16 either substantive or procedural.

17 5. Notwithstanding the dismissal of Plaintiffs' Complaint, the parties hereby  
18 stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the  
19 terms of this Agreement to allow any party to enforce the terms of this Agreement and to resolve  
20 any motions to modify such terms. See Kokkonen v. Guardian Life Ins. Co. of America, 511  
21 U.S. 375 (1994).

22 6. In the event that pursuant to the preceding paragraph either party seeks to modify  
23 the deadline for the action specified in Paragraph 1 or in the event that either party believes that  
24 the other party has failed to comply with any term or condition of this Agreement, the parties

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1 shall use the dispute resolution procedures specified in Paragraph 7.

2 7. In the event of any dispute, claim, or controversy arising out of or relating to this  
3 Agreement or an alleged breach thereof, the parties shall use their best efforts to settle the  
4 controversy. To this effect, the party raising the dispute shall give written notice to the other  
5 party stating the nature of the matter to be resolved and the position of the party asserting the  
6 controversy. The parties shall consult and negotiate with each other in good faith and,  
7 recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to all  
8 parties. If the parties do not resolve the controversy to their mutual satisfaction within twenty  
9 (20) working days from the date on which the notice of controversy is delivered, the aggrieved  
10 party may file a motion for relief to be adjudicated by the Court. The party filing such motion  
11 may request an expedited briefing schedule and a hearing date to be set by the Court.

12 8. Defendants agree that Plaintiffs are “prevailing parties” in this action, and agree to  
13 pay Plaintiffs reasonable attorneys’ fees and costs, pursuant to Section 11(g) of the ESA, 16  
14 U.S.C. § 1540(g). Therefore, Defendants agree to settle all of Plaintiffs’ claims for costs and  
15 attorneys’ fees for the claims in the Complaint for a total of \$2,700. A check will be made  
16 payable in that amount to:

17 Center for Biological Diversity  
18 c/o Justin Augustine  
19 1095 Market Street, Suite 511  
San Francisco, CA 94103

20 9. Defendants agree to submit all necessary paperwork to the Department of the  
21 Treasury’s Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business  
22 days of receipt of the signed court order approving this stipulation.

23 10. Plaintiffs agree to accept payment of \$2,700 in full satisfaction of any and all  
24 claims for attorneys’ fees and costs of litigation to which Plaintiffs are entitled in the above-  
25 captioned litigation, through and including the date of this agreement.

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11. Plaintiffs agree that receipt of this payment from Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and costs related to this litigation, through and including the date of this agreement.

12. 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.

13. 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.

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties 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.

15. The terms of this Agreement shall become effective upon entry of an order by the Court ratifying this Agreement.

Dated: June \_\_, 2006.

Dated: June \_\_, 2006.

SUE ELLEN WOOLDRIDGE,  
Assistant Attorney General  
JEAN E. WILLIAMS,  
Section Chief  
LISA LYNNE RUSSELL,  
Assistant Section Chief

JUSTIN AUGUSTINE

PAUL D. LALL, Trial Attorney

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Center for Biological Diversity  
1095 Market Street, Suite 511  
San Francisco, CA 94103  
Telephone: (415) 436-9682  
Facsimile: (415) 436-9683

Attorney for Plaintiffs

United States Department of Justice  
Environment & Natural Resources Division  
Wildlife & Marine Resources Section  
Benjamin Franklin Station, P.O. Box 7369  
Washington, D.C. 20044-7369  
Telephone: (202) 305-0201  
Facsimile: (202) 305-0275

Attorneys for Defendants

IT IS SO ORDERED.

\_\_\_\_\_  
Date

\_\_\_\_\_  
JAMES A. TEILBORG  
United States District Court Judge

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