

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

Stipulated Settlement Agreement  
06 Cv-887

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

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

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

11 WHEREAS, all parties agree that settlement of this action in this manner is in the public  
12 interest and is an appropriate way to resolve the dispute between them.

13 THE PARTIES THEREFORE AGREE AS FOLLOWS:

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

22 2. The parties agree that this Settlement Agreement ("Agreement") was negotiated  
23 in good faith. By entering into this Agreement, Plaintiffs and Defendants do not waive any  
24 claim or defense on any grounds in this or any other case.

25 3. Upon approval of this Agreement by this Court, Plaintiffs' Complaint shall be  
26 dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(1), and that dismissal shall apply to

27 Stipulated Settlement Agreement  
28 06-CV-887

1 and be binding upon the parties hereto and anyone acting on their behalf, including successors,  
2 employees, agents, elected and appointed officers, and assigns.

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

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

19 6. In the event that pursuant to the preceding paragraph either party seeks to modify  
20 the deadline for the action specified in Paragraph 1 or in the event that either party believes that  
21 the other party has failed to comply with any term or condition of this Agreement, the parties  
22 shall use the dispute resolution procedures specified in Paragraph 7.

23 7. In the event of any dispute, claim, or controversy arising out of or relating to this  
24 Agreement or an alleged breach thereof, the parties shall use their best efforts to settle the  
25 controversy. To this effect, the party raising the dispute shall give written notice to the other  
26 party stating the nature of the matter to be resolved and the position of the party asserting the

27 Stipulated Settlement Agreement  
28 06-Cv-887

1 controversy. The parties shall consult and negotiate with each other in good faith and,  
2 recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to  
3 all parties. If the parties do not resolve the controversy to their mutual satisfaction within twenty  
4 (20) working days from the date on which the notice of controversy is delivered, the aggrieved  
5 party may file a motion for relief to be adjudicated by the Court. The party filing such motion  
6 may request an expedited briefing schedule and a hearing date to be set by the Court.

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

12 Center for Biological Diversity  
13 c/o Justin Augustine  
14 1095 Market Street, Suite 511  
San Francisco, CA 94103

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

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

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

24 12. The parties agree that Plaintiffs reserve the right to seek additional fees and costs  
25 incurred subsequent to this agreement arising from a need to enforce or defend against efforts to  
26 modify the underlying schedule outlined in Paragraph 1, or for any other unforeseen continuation

27 Stipulated Settlement Agreement  
28 06-CV-887

1 of this action.

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

6 14. The undersigned representatives of each party certify that they are fully  
7 authorized by the party or parties they represent to agree to the Court's entry of the terms and  
8 conditions of this Agreement and do hereby agree to the terms herein.

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

11  
12 Dated: July 13, 2006.

Dated: July 13, 2006.

13  
14 SUE ELLEN WOOLDRIDGE,  
15 Assistant Attorney General  
16 JEAN E. WILLIAMS,  
Section Chief  
LISA LYNNE RUSSELL,  
Assistant Section Chief

17 /s/  
18 JUSTIN AUGUSTINE  
19 Center for Biological Diversity  
20 1095 Market Street, Suite 511  
San Francisco, CA 94103  
Telephone: (415) 436-9682  
Facsimile: (415) 436-9683

21 Attorney for Plaintiffs

/s/ (by Justin Augustine with consent)  
PAUL D. LALL, Trial Attorney  
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

22 Attorneys for Defendants

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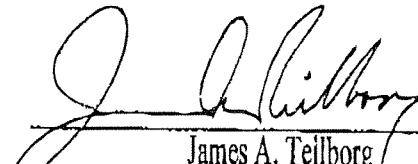
Case No. CV-06-0887-PHX-JAT

**ORDER**

13 The Court, having reviewed the parties' Stipulated Settlement Agreement and  
14 being otherwise fully advised FINDS and ORDERS as follows:

15 The Stipulated Settlement Agreement is hereby Approved; the Clerk of the Court  
16 shall enter judgment of dismissal with prejudice pursuant to Fed. R. Civ. Pro. 41(a)(1).

17 Dated this 13th day of July, 2006.

18  
19   
20 James A. Teilborg  
21 United States District Judge

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) **JUDGEMENT IN A CIVIL CASE**

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\_\_\_\_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

  X   **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

Having approved the parties Stipulated Settlement Agreement, Judgment is hereby entered with prejudice pursuant to Fed.R.Civ.P. 41(a)(1).

DATED at Phoenix, Arizona, this 12<sup>th</sup> day of July, 2006.

RICHARD H. WEARE  
Clerk of Court/DCE

By: s/Kathy Gerchar

Kathy Gerchar, Deputy Clerk

CIV-21 (4/96)