

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS¹, et al.)
)
Plaintiff,)
) No. 01-0079-MCA/RLP
vs.)
)
UNITED STATES FEDERAL EMERGENCY)
MANAGEMENT AGENCY,)
)
Defendant.)
_____)

**MOTION FOR ORDER REQUIRING DEFENDANT TO
COMPLY WITH COURT’S ORDER OF APRIL 25, 2002
AND MEMORANDUM IN SUPPORT OF MOTION**

I. Introduction

Plaintiffs WildEarth Guardians, Sierra Club, and Southwest Environmental Center (collectively “WildEarth Guardians”) respectfully moves this Court for an Order compelling Defendant United States Federal Emergency Management Agency (“FEMA”)

¹ WildEarth Guardians was formerly knows as Forest Guardians, and commenced this litigation under its former name. WildEarth Guardians hereby substitutes for Forest Guardians pursuant to Federal Rule of Civil Procedure 25 as Forest Guardians’ successor in interest.

to comply with this Court's Order of April 25, 2002 which specifically and expressly incorporated the parties' April 23, 2002 Amended Settlement Agreement and Stipulation for Dismissal in this citizen's suit under the Endangered Species Act ("ESA"). See Exhibits 1 and 2. In particular, with this motion WildEarth Guardians seeks to enforce FEMA's obligation to consult with the United States Fish and Wildlife Service ("FWS") under ESA Section 7(a)(2), 16 U.S.C. §1536(a)(2), as to the effects of its administration of the National Flood Insurance Program ("NFIP") in New Mexico on threatened and endangered species and their designated critical habitats "as expeditiously as possible." See Exhibit 2 at ¶3.

II. This Court's jurisdiction to enforce its April 25, 2002 Order

Where, as in this case, parties to a lawsuit enter into a settlement agreement and the terms of that settlement agreement are specifically incorporated into a court's order of dismissal, the terms of that settlement agreement may be enforced under the court's "ancillary jurisdiction." Kokkonen v. Guardian Life Insurance Co. Of America, 511 U.S. 375, 379-80, 114 S.Ct. 1673 (1994). The exercise of the court's ancillary jurisdiction "enable[s] a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees" in those cases where there is a violation of a settlement agreement that is incorporated into a court order dismissing a case. Id. at 381, 379-80. "In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." Id.

In this case, it is clear that this Court has ancillary jurisdiction to enforce the parties' April 23, 2002 Amended Settlement Agreement generally, and FEMA's obligation to consult with the FWS "as expeditiously as possible" in particular. The Court's April 25, 2002 Order dismissing this case states: "The parties' Amended Settlement Agreement and Stipulation for Dismissal is hereby incorporated and made an Order of this Court." See Exhibit 1.

III. FEMA has not complied with its obligation to consult with the FWS

In this case, the "core" of the parties' settlement agreement was FEMA's agreement to consult with the FWS "as expeditiously as possible" as to the adverse effects of FEMA's administration of the NFIP in New Mexico on threatened and endangered species listed for protection under the ESA as of the date that the Complaint was filed and their designated critical habitats as of the date that the Complaint was filed.

In this connection, the agreement states:

Prior to May 15, 2002, FEMA, will prepare and submit a biological assessment ("BA") to the U.S. Fish and Wildlife Service on the effects, if any, of NFIP on listed species and designated critical habitat through the New Mexico portions of the Rio Grande, San Juan River, and other rivers. FEMA will seek to complete consultation pursuant to Section 7 of the ESA as expeditiously as possible.

See Exhibit 2 at ¶3.

In this case, FEMA produced its first iteration of the contemplated BA on May 14, 2002. The FWS found that the BA was inadequate because it failed to provide all the

information necessary for the required Section 7 consultation. In a letter of August 1, 2002, FWS informed FEMA of its need for additional information before the Section 7 consultation could be commenced. Again in a letter of June 28, 2005, FWS requested additional information of FEMA in order to facilitate the required Section 7 consultation and stated that it was “awaiting the remainder of the information necessary to initiate formal consultation.” Yet again in a letter of November 5, 2007, the FWS informed FEMA that “formal consultation is required” in this case and requested additional information from FEMA regarding its administration of the NFIP in New Mexico. To date, twenty-two months after FWS’s last request for information and formal consultation, FEMA has still not responded to FWS’s request.

FEMA’s failure to prepare a factually and legally adequate BA to commence a Section 7 consultation with the FWS as to the effects of FEMA’s administration of the NFIP in New Mexico, as plainly required by the parties’ April 23, 2002 settlement agreement in this case, constitutes a breach of the agreement. Likewise, FEMA’s failure to consult with the FWS under Section 7 “as expeditiously as possible” constitutes a breach of the parties’ April 23, 2002 settlement agreement. Wherefore, WildEarth

Guardians respectfully requests that this Court exercise its ancillary jurisdiction in this case to enforce the terms of the agreement.

Dated: September 14, 2009

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of MOTION FOR ORDER REQUIRING DEFENDANT TO COMPLY WITH COURT'S ORDER OF APRIL 25, 2002 AND MEMORANDUM IN SUPPORT OF MOTION was served by the Court's ECF notice system to Andrew Smith <andrew.smith6@usdoj.gov> and to the following counsel of record by first class mail:

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