

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 10-CV-02129-JLK

WILDEARTH GUARDIANS,

Petitioner,

v.

KEN SALAZAR, Secretary of the U.S. Department of the Interior,

Federal Respondent, and

NEW MEXICO CATTLE GROWERS ASSOCIATION,  
NEW MEXICO OIL AND GAS ASSOCIATION, and  
INDEPENDENT PETROLEUM ASSOCIATION OF NEW MEXICO,

Respondent-Intervenors.

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**PETITIONER’S AND FEDERAL RESPONDENT’S STIPULATED SETTLEMENT  
AGREEMENT AND UNOPPOSED MOTION TO DISMISS**

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WHEREAS, on August 31, 2010, Petitioner WildEarth Guardians (“Guardians”) filed its Petition (Dkt. No. 1) challenging the U.S. Fish and Wildlife Service’s (“FWS”) finding that Guardian’s petition to list the Lesser prairie chicken (*Tympanuchus pallidicinctus*) as an endangered or threatened species under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, was warranted, but precluded by higher priority actions. 74 Fed. Reg. 57,804 (Nov. 9, 2009);

WHEREAS, on September 9, 2011, in *In Re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS) (“MDL Proceeding”), United States District Judge Emmet G. Sullivan approved and ordered compliance with a Settlement

Agreement entered into between Guardians and the Federal Respondent;

WHEREAS, the Settlement Agreement entered in the MDL Proceeding sets forth, among other matters, a schedule by when the Service will either issue a proposed rule listing the Lesser Prairie Chicken, or make a determination that such listing is not warranted;

WHEREAS, under the terms of the stipulated settlement agreement reached in the MDL Proceeding, Guardians and Federal Respondent agreed to file a joint motion to dismiss this case with prejudice, and “if the respective court dismisses the case in its entirety with prejudice, Defendants agree that the Plaintiff is the prevailing party with regard to its claims in that case, and is thus entitled to an award of reasonable attorney’s fees and costs.” *In Re Endangered Species Act Section 4 Deadline Litigation*, Case No. 10-mc-377-EGS (D.D.C.) (Dkt. 31-1);

WHEREAS, Respondent-Intervenors, the New Mexico Cattle Growers Association, New Mexico Oil and Gas Association, and Independent Petroleum Association of New Mexico take no position on the Petitioner’s and Federal Respondent’s Motion to Dismiss this litigation;

WHEREFORE, Guardians and Federal Respondent hereby stipulate and agree that this case should be dismissed with prejudice, subject to the following:

1. Per the terms of the Settlement Agreement in *In re Endangered Species Act Section 4 Deadline Litigation*, Case No. 10-mc-277-EGS (D.D.C.), Federal Respondent agrees to pay Guardians’ reasonable attorneys’ fees and costs pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), provided that the Court dismisses the case in its entirety with prejudice. Federal Respondent agrees to settle all of

Guardians' claims for costs and attorneys' fees in this matter for a total of \$6,904.49. A check will be made payable in that amount to Guardians, in care of Jay Tutchton, 6439 E. Maplewood Ave., Centennial, CO 80111. In the alternative, Federal Respondent will make arrangements to transfer funds to Guardians, in care of Mr. Tutchton, via Electronic Funds Transfer. Federal Respondent agrees to submit all necessary paperwork for the processing of the payment 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 stipulated agreement and joint motion to dismiss ("Agreement"). Guardians agrees to provide, in a timely manner, all information necessary for Federal Respondent to comply with his obligations in this Paragraph One.

2. Guardians agrees to accept payment of \$6,904.49 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Guardians is entitled in this matter through and including the effective date of this Agreement. Guardians agrees that receipt of this payment from Federal Respondent shall operate as a release of Guardians' claims for attorneys' fees and costs in this matter, through and including the effective date of this Agreement.

3. This Agreement is executed for the limited purpose of securing a voluntary dismissal of this action pursuant to the stipulated settlement agreement in *In Re: Endangered Species Act*, and compromising and settling Guardians' claims in this action for attorneys' fees and costs. Nothing in this Agreement shall constitute, or be construed to constitute, a precedent in any other context, be construed as an admission of liability by Federal Respondent, or be cited in any other litigation except as necessary

to enforce the terms of this Agreement. By this Agreement, Federal Respondent does not waive any right to contest fees or costs claimed by Guardians or Guardians' counsel in any future litigation.

4. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that the United States is obligated to expend or 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 appropriations law.

5. The Petitioner and Federal Respondent agree that this Agreement was negotiated in good faith and constitutes a settlement of claims that were disputed by the parties. By entering into this Agreement the Parties do not waive any claim or defense except as provided herein.

6. Guardians' attorneys are receiving funds in trust for Guardians, and Guardians agrees to this procedure. Guardians and its attorneys agree to hold Federal Respondent harmless in any litigation, further suit, or claim arising from the payment of the agreed-upon settlement amount pursuant to this Agreement.

7. The undersigned representatives of the Petitioner and Federal Respondent certify that they are fully authorized by the party they represent to agree to this Court's approval of the terms and conditions of this Agreement and do hereby agree to the terms and conditions herein.

8. This Agreement represents the entirety of the Petitioner's and Federal Respondent's commitments with regard to settlement. The terms of this Agreement shall become effective upon entry of an order by this Court approving the Agreement.

9. Upon the Court's approval of this Agreement, all counts of Guardians'

complaint shall be dismissed with prejudice. Accordingly, the Petitioner and Federal Respondent respectfully request that this Court approve the stipulated agreement and joint motion to dismiss as stated above.

Respectfully submitted,

IGNACIA S. MORENO  
Assistant Attorney General

*/s/ Jay Tutchton (with permission)*

*/s/ J. Brett Grosko*

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JAY TUTCHTON  
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*Attorney for Petitioner WildEarth Guardians*

*Attorneys for Federal Respondent*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on November 10, 2011, I electronically filed the foregoing with the Clerk of Court using the ECF system, which will send notification of such filing to the following e-mail address:

James J. Tuthton  
WildEarth Guardians  
6439 E. Maplewood Ave.  
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*Attorneys for Respondent-Intervenors*

*/s/ J. Brett Grosko*

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J. Brett Grosko