

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the Interior, et al.,

Defendants,

and

ALASKA OIL AND GAS ASSOCIATION,

Defendant-Intervenors,

and

ARCTIC SLOPE REGIONAL CORP.,

Defendant-Intervenors.

Civ. No. 08-1339 CW

**ORDER GRANTING  
STIPULATED PARTIAL  
SETTLEMENT AGREEMENT**

18 This Stipulated Partial Settlement Agreement (“Agreement”) is made between Plaintiffs  
19 Center for Biological Diversity, Natural Resources Defense Council, and Greenpeace, Inc.  
20 (collectively “Plaintiffs”); Defendants Dirk Kempthorne, Secretary of the Interior, and the United  
21 States Fish and Wildlife Service (“Service”) (collectively “Federal Defendants”); Defendant-  
22 Intervenor Alaska Oil and Gas Association; and Defendant-Intervenor Arctic Slope Regional  
23 Corporation.  
24

25 WHEREAS, on May 15, 2008, the Service issued a final rule listing the polar bear as a  
26 threatened species throughout its range, 73 Fed. Reg. 28,212 (May 15, 2008) (“Final Rule”);

27 Stip. Partial Sett. Agrmt.  
28 Case No. 08-1339 CW

1 WHEREAS, pursuant to Section 4(a)(3)(A) of the Endangered Species Act (“ESA”), 16  
2 U.S.C. § 1533(a)(3)(A), the Service must, to the maximum extent prudent and determinable,  
3 designate critical habitat concurrently with making a determination that a species is threatened or  
4 endangered;

5 WHEREAS, the Service concluded in the Final Rule that critical habitat was not  
6 determinable as of the date the Final Rule was issued;

7  
8 WHEREAS, on May 15, 2008, the Service also issued a special rule under Section 4(d) of  
9 the ESA related to the polar bear, 73 Fed. Reg. 28,306 (May 15, 2008) (“4(d) Rule”);

10 WHEREAS, on July 16, 2008 Plaintiffs filed a Second Amended Complaint alleging that  
11 the Final Rule violates the ESA, 16 U.S.C. §§ 1531 et seq.;

12 WHEREAS, Plaintiffs also allege that the Service violated the ESA, the Administrative  
13 Procedure Act (“APA”), 5 U.S.C. § 551 et seq., and the National Environmental Policy Act, 42  
14 U.S.C. § 4321, et seq. (“NEPA”) in promulgating the 4(d) Rule;

15  
16 WHEREAS, Plaintiffs further allege that the Service violated the ESA by failing to  
17 designate critical habitat for the polar bear concurrently with the final listing rule;

18 WHEREAS, Plaintiffs also allege that the Service is in violation of the Marine Mammal  
19 Protection Act (“MMPA”), 16 U.S.C. §§ 1361 et seq., because it has not published in the Federal  
20 Register a list of guidelines for use in safely deterring marine mammals or promulgated specific  
21 measures which may be used to nonlethally deter polar bears pursuant to 16 U.S.C. §  
22 1371(a)(4)(B);  
23

1 WHEREAS, on September 25, 2008, the Court entered an order approving the parties'  
2 Stipulation and Proposed Order to Extend Deadline for Administrative Record and Modify  
3 Briefing Schedule, extending the deadline for filing the administrative records for the Final Rule  
4 and the 4(d) Rule until November 17, 2008;

5 WHEREAS, the parties, through their authorized representatives, and without any  
6 admission or final adjudication of the issues of fact or law with respect to Plaintiffs' claims, have  
7 reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the  
8 claims set forth in Plaintiffs' Third Claim for Relief (Failure to Designate Critical Habitat for the  
9 Polar Bear) and Seventh Claim for Relief (Failure to Promulgate List of Measures for Nonlethal  
10 Deterrence of Polar Bears), and the parties agree that settlement of these claims is in the public  
11 interest;  
12

13 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS  
14 FOLLOWS:  
15

16 1. The Service shall submit for publication in the Federal Register a final critical  
17 habitat determination by June 30, 2010.

18 2. The Service shall submit for publication in the Federal Register, pursuant to 16  
19 U.S.C. § 1371(a)(4)(B), final guidelines for use in safely deterring polar bears, including specific  
20 measures which may be used to nonlethally deter polar bears, by March 31, 2010.

21 3. The Service shall issue a proposed critical habitat determination and proposed  
22 deterrence guidelines in sufficient time to comply with the requirements of the ESA, MMPA, and  
23 APA.  
24

1           4.       Upon approval of this Agreement by the Court, Count Three of the Second  
2 Amended Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil  
3 Procedure 41(a)(1). Count Seven of the Second Amended Complaint shall be dismissed with  
4 prejudice with respect to any claims regarding deterrence guidelines for the polar bear, but  
5 without prejudice to Plaintiffs' right to raise in a separate action any such claim regarding other  
6 species.

7  
8           5.       Notwithstanding the dismissal of these claims, the parties hereby stipulate and  
9 respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this  
10 Agreement and to resolve any motions to modify such terms. See Kokkonen v. Guardian Life  
11 Ins. Co. of America, 511 U.S. 375 (1994). However, Federal Defendants assert that, in the event  
12 this case is transferred to another district, the transferee court should have jurisdiction over this  
13 Agreement. Any challenge to a critical habitat rule or MMPA guidelines completed in  
14 accordance with this Agreement shall be raised in a new lawsuit.

15  
16           6.       Any party may seek to modify the deadline for any actions specified in  
17 Paragraphs 1 or 2 for good cause shown. In that event, or in the event that a party believes that  
18 any other party has failed to comply with any term or condition of this Agreement, the parties  
19 shall use the dispute resolution procedures specified in Paragraph 7.

20  
21           7.       The Order entering this Agreement may be modified by the Court upon good cause  
22 shown by written stipulation between the parties, filed with and approved by the Court, or upon  
23 written motion filed by one of the parties and granted by the Court. In the event that any party  
24 seeks to modify the terms of this Agreement, including the deadline for the actions specified in  
25 Paragraphs 1 or 2, or in the event of a dispute arising out of or relating to this Agreement, or in  
26

1 the event that any party believes that another party has failed to comply with any term or  
2 condition of this Agreement, the party seeking the modification, raising the dispute, or seeking  
3 enforcement shall provide the other parties with written notice of the proposed modification. The  
4 parties agree that they will meet and confer (in-person not required) at the earliest possible time  
5 after receipt of the written notice in a good-faith effort to resolve the claim before bringing any  
6 matter to the Court.

7  
8 8. No party shall use this Agreement or the terms herein as evidence of what  
9 does or does not constitute a reasonable timeline for a designation of critical habitat or deterrence  
10 guidelines in any other proceeding regarding the Service's implementation of the ESA or MMPA.

11 9. Plaintiffs intend to seek from Federal Defendants reimbursement of attorneys' fees  
12 and costs incurred in connection with their Third and Seventh Claims for Relief. Federal  
13 Defendants agree that Plaintiffs are the prevailing parties with respect to their Third and Seventh  
14 Claims for Relief, and agree to pay Plaintiffs their costs of litigation, including reasonable  
15 attorneys' fees, with respect to these claims. Costs incurred in connection with the Third Claim  
16 for Relief will be paid pursuant to Section 11(g)(4) of the ESA, 16 U.S.C. § 1540(g)(4). Costs  
17 incurred in connection with the Seventh Claim will be paid pursuant to the Equal Access to  
18 Justice Act, 28 U.S.C. § 2412 ("EAJA"). Plaintiffs and Federal Defendants agree to attempt to  
19 resolve Plaintiffs' claim for fees and costs expeditiously and without the need for Court  
20 intervention. The Court shall retain jurisdiction over the Third and Seventh Claims for the  
21 purpose of resolving any dispute between the parties regarding Plaintiffs' claim for an award of  
22 fees and costs. However, Federal Defendants assert that, in the event this case is transferred to  
23 another district, the transferee court should have jurisdiction over any disputed claim for fees and  
24  
25  
26

1 costs. By this Agreement, Federal Defendants do not waive any right to contest fees claimed by  
2 Plaintiffs, including the hourly rate, in any continuation of the present action or any future  
3 litigation.

4 10. Plaintiffs recognize that Federal Defendants assert that no provision of this  
5 Agreement shall be interpreted as or constitute a commitment or requirement that Federal  
6 Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or  
7 any other law or regulation. Federal Defendants recognize that Plaintiffs assert that (a) this  
8 Agreement and its terms do not create a conflict with the Anti-Deficiency Act, 31 U.S.C. §  
9 1341(a)(1)(B), because the subjects of this Agreement are required in non-discretionary terms by  
10 the ESA and MMPA; and (b) the Anti-Deficiency Act would not excuse compliance with a  
11 pre-existing, court-approved Agreement. Plaintiffs intend to assert this position if Federal  
12 Defendants fail to comply with the terms of this Agreement for reasons of insufficient  
13 appropriations. Federal Defendants reserve all legal and equitable defenses to such a claim.

16 11. No provision of this Agreement shall be interpreted as or constitute a commitment  
17 or requirement that Federal Defendants take action in contravention of the ESA, the MMPA, the  
18 APA, or any other law or regulation, either substantive or procedural. Nothing in this Agreement  
19 shall be construed to limit or modify the discretion accorded to Federal Defendants by the ESA,  
20 the MMPA, the APA, or general principles of administrative law with respect to the procedures to  
21 be followed in making any determination required herein, or as to the substance of any final  
22 determinations.

24 12. Wherever possible, each provision of this Agreement shall be interpreted in such a  
25 manner as to be effective and valid. If any provision of this Agreement is prohibited by or invalid  
26

1 under applicable law, such provision shall be ineffective to the extent of such prohibition or  
2 invalidity, without invalidating the remainder of such provision or the remaining provisions  
3 hereof. However, in the event the Court does not accept any part of this Agreement, each party  
4 reserves the right to withdraw from the Agreement and proceed with the existing litigation.

5 13. The parties agree that this Agreement was negotiated in good faith and it  
6 constitutes a settlement of claims that were vigorously contested, denied, and disputed by the  
7 parties. By entering into this Agreement, the parties do not waive any claim or defense.

8 14. The terms of this Agreement constitute the entire agreement of the parties, and no  
9 statement, agreement or understanding, oral or written, which is not contained herein shall be  
10 recognized or enforced.

11 15. The undersigned representatives of each party certify that they are fully  
12 authorized by the party they represent to agree to the Court's entry of the terms and conditions of  
13 this Agreement and do hereby agree to the terms herein.

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

16  
17  
18  
19  
20 Respectfully submitted,

21 Dated: October 6, 2008

/s/ Brendan Cummings (by KBF with permission)  
Brendan Cummings  
Center for Biological Diversity  
P.O. Box 549  
Joshua Tree, CA 92252  
Telephone: 760-366-2232  
Facsimile: 760-366-2669

Counsel for Plaintiffs

22  
23  
24  
25  
26  
27 Stip. Partial Sett. Agrmt.  
Case No. 08-1339 CW

1 RONALD J. TENPAS  
2 Assistant Attorney General  
3 United States Department of Justice  
4 Environment & Natural Resources Division  
5 JEAN E. WILLIAMS, Chief  
6 LISA LYNNE RUSSELL, Assistant Chief

7 Dated: October 6, 2008

8 /s/ Kristen Byrnes Floom  
9 KRISTEN BYRNES FLOOM, Trial Attorney  
10 DC Bar No. 469615  
11 United States Department of Justice  
12 Environment & Natural Resources Division  
13 Wildlife and Marine Resources Section  
14 Benjamin Franklin Station, P.O. Box 7369  
15 Washington, DC 20044-7369  
16 Telephone: (202) 305-0340  
17 Facsimile: (202) 305-0275  
18 Kristen.Floom@usdoj.gov

19 Attorneys for Federal Defendants

20 Dated: October 6, 2008

21 /s/ Jeffrey W. Leppo (by KBF with permission)  
22 JEFFREY W. LEPPPO (*pro hac vice*)  
23 SETH D. HILTON (SB # 181899)  
24 STOEL RIVES LLP  
25 600 University Street, Suite 3600  
26 Seattle, WA 98101  
27 Telephone: (206) 624-0900  
28 Facsimile: (206) 386-7500

Attorneys for Intervenor-Defendant Alaska Oil and Gas Association

Dated: October 6, 2008

/s/ Kevin M. Cuddy (by KBF with permission)  
JEFFREY M. FELDMAN (*pro hac vice*)  
KEVIN M. CUDDY (*pro hac vice*)  
FELDMAN ORLANSKY & SANDERS  
500 L Street, Suite 400  
Anchorage, AK 99501  
Telephone: (907) 272-3538  
Facsimile: (907) 274-0819  
Email: feldman@frozenlaw.com  
cuddy@frozenlaw.com

Attorneys for Intervenor-Defendant Arctic Slope Regional Corporation

Stip. Partial Sett. Agrmt.  
Case No. 08-1339 CW



**ORDER**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**IT IS SO ORDERED.**

**DATED this 7th day of October, 2008**



**Honorable Claudia Wilken  
United States District Court Judge**