

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 90-10037-Civ-Moore

Florida Key Deer,  
Key Largo cotton mouse, Key Largo woodrat,  
Key tree-cactus, Lower Keys marsh rabbit,  
Schaus' swallowtail butterfly, the silver rice  
rat, and the Stock Island tree snail,  
NATIONAL WILDLIFE FEDERATION,  
FLORIDA WILDLIFE FEDERATION,  
and DEFENDERS OF WILDLIFE

Plaintiffs,

vs.

W. CRAIG FUGATE, in his official capacity  
as Director, Federal Emergency  
Management Agency ("FEMA"), Department of  
Homeland Security, and DIRK KEMPTHORNE, in his  
official capacity as Secretary of the United States  
Department of the Interior,

Defendants.

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**SETTLEMENT AGREEMENT  
AND COVENANT NOT TO SUE**

Plaintiffs National Wildlife Federation, Florida Wildlife Federation, and Defenders of  
Wildlife ("Plaintiffs") and W. Craig Fugate and Dirk Kempthorne ("Federal Defendants"), by  
and through their undersigned counsel, hereby state and agree as follows:

WHEREAS Plaintiffs in this action challenged a biological opinion issued by the  
Defendant U.S. Fish and Wildlife Service ("FWS") in 1996 (as amended in 2003), concerning  
the Federal Emergency Management Agency's ("FEMA's") administration of the National  
Flood Insurance Program in Monroe County, Florida, "may affect" the Florida Key deer, a listed

endangered species, and that FEMA therefore was required to consult with the Fish and Wildlife Service under Sec. 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). See DE # 119 filed July 27, 1998 (First Amended Complaint); DE # 187 filed July 28, 2003 (Second Amended Complaint).

WHEREAS this Court issued summary judgment in favor of Plaintiffs by order filed March 29, 2005. DE # 214.

WHEREAS this Court issued an injunction by order filed September 12, 2005. DE # 237. The injunction prohibited FEMA from “issuing flood insurance for new developments [defined as any residential or commercial development where construction of the structure has not yet begun as of the entry of this Order] in the suitable habitats of the Listed Species in Monroe County, Florida from the date of this Order until such time as the Court concludes that Defendants have complied with the March 20, 2005 Order, the ESA, and the [Administrative Procedure Act].” Id. at 22.

WHEREAS this Court directed Defendant FWS to complete a new biological opinion in consultation with Defendant FEMA by Order filed September 12, 2005 (DE # 237).

WHEREAS Federal Defendants appealed portions of this Court’s ruling on November 10, 2005 (see DE # 291); however, no appeal was taken concerning the substance of the 2003 biological opinion with respect to § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).

WHEREAS Defendant FWS issued a new biological opinion on August 8, 2006. DE # 363.

WHEREAS the U.S. Court of Appeals for the Eleventh Circuit affirmed the decision below. DE # 418.

WHEREAS the parties previously settled Plaintiffs’ claim for attorneys’ fees and costs

incurred through and including November 5, 2008. DE # 439.

WHEREAS Defendant FWS issued a revised biological opinion on April 30, 2010. DE # 466.

WHEREAS Plaintiffs and Federal Defendants wish to settle Plaintiffs' claim for reasonable attorneys' fees and costs associated with this litigation since the Court previously awarded Fees and Costs to Plaintiffs on November 5, 2008 (DE # 439).

WHEREAS Plaintiffs and Federal Defendants wish to avoid further litigation concerning the substance of FWS' revised biological opinion dated April 30, 2010, DE # 466.

NOW THEREFORE, the Plaintiffs and Federal Defendants agree hereto to the entry of this Settlement Agreement and Covenant Not to Sue ("Settlement").

1. The Parties agree that this Settlement is negotiated in good faith and that it represents a fair and equitable resolution of their differences.
2. The Parties agree that venue is proper.
3. Defendant FWS agrees that it will, in good faith, consider amending the revised biological opinion dated April 30, 2010, as provided in Exhibit 1. Within 14 days after entry of this Settlement Agreement, Defendant FWS will issue any final amended biological opinion. Defendant FEMA will issue a written decision whether to adopt the RPA set forth in the final amended biological opinion within 30 days after FWS issues any final revised biological opinion. FWS and FEMA will jointly provide notice to the Court regarding FEMA's decision to adopt the RPA as contemplated in this Paragraph.
4. Provided that FWS issues its final amended biological opinion and FEMA adopts an RPA materially similar to that in Exhibit 1 hereto, Plaintiffs hereby agree to relinquish and

waive all claims against FWS and FEMA concerning the substance of the April 30, 2010 biological opinion and RPA, as amended. Plaintiffs will provide notice to the Court that it is relinquishing and waiving all claims against FWS and FEMA concerning the substance of the April 30, 2010 biological opinion and RPA, as amended, within 14 days after FEMA adopts the RPA as contemplated in Paragraph 3.

5. Upon filing of Plaintiffs' notice as contemplated in Paragraph 4, Plaintiffs and Federal Defendants hereby stipulate to entry of the accompanying Proposed Order, which specifies that the FWS' new biological opinion shall be deemed to be in compliance with this Court's previous Orders for FWS to issue a new biological opinion that complies with the Court's March 20, 2005 Order, the ESA and the APA.

6. The Federal Defendants will notify the Court and the parties when Monroe County and the other "participating communities" in the Florida Keys have: 1) revised their Flood Damage Prevention Ordinance(s); and 2) implemented procedures to reference and use the updated real estate list and Species Focus Area Maps (referenced in reasonable and prudent alternative ("RPA") paragraph 1) in compliance with paragraphs 2, 3, 4, and 5 of the RPA. Defendants will include copies of relevant ordinances and associated implementation documents in providing any notice to the Court under this Paragraph.

7. The parties agree that the Injunction entered by this Court on September 12, 2005 (DE # 237) shall remain in effect until Federal Defendants provide notice to the Court pursuant to Paragraph 6 above.

8. Plaintiffs' sole remedy to challenge the merits of any actions taken by Federal Defendants FEMA, FWS, and/or the participating communities pursuant to the April 30, 2010

biological opinion and RPA, as amended, shall be to file a new lawsuit.

9. Upon entry of the accompanying "Proposed Order" Federal Defendants agree to pay Plaintiffs the amount of \$162,280.59 in settlement of Plaintiffs' claims for an award of litigation costs, including attorney fees, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and/or the Endangered Species Act, ("ESA"). Federal Defendants agree to pay such award to National Wildlife Federation c/o John Kostyack, 900 E. St., N.W., Suite 400, Washington, D.C. 20004, on behalf of Plaintiffs in this action. In consideration of payment of such award, Plaintiffs agree to accept the stated sum in full and final satisfaction of any claim for attorneys' fees and costs for litigation in the above-captioned case for the period of November 5, 2008 through and including the date of this Settlement. Plaintiffs agree that such award encompasses the entire amount of attorneys' fees and costs to which they are entitled from any party in the above-captioned matter, including all work and costs performed or incurred during the period of November 5, 2008 - present, including any work or costs performed or incurred in preparing this Settlement. Plaintiffs agree that they are not entitled to any further monetary award in connection with work and costs performed or incurred in connection with this lawsuit.

10. This Settlement is effective upon entry of the accompanying "Proposed Order" by the Court.

11. This Settlement has no precedential value as to attorneys' fees and costs and shall not be used as evidence in any other attorneys' fees litigation.

12. Within 10 days of receipt of a fully executed, file-stamped copy of the "Proposed Order" pursuant to this Settlement Agreement, Defendants agree to submit all necessary documentation for initiation of disbursement processing by the Department of the Treasury for

payment of this award.

13. Within 10 days of receipt of payment of fees and costs pursuant to this Settlement, Plaintiffs will file a notice of satisfaction of judgment.

14. The Parties, by their duly authorized representatives, agree to this Settlement Agreement.

15. The provisions of this Settlement shall apply to and be binding upon each of the Parties including, but not limited to, their officers, directors, servants, employees, successors, and assigns.

16. This Settlement and the accompanying "Proposed Order" constitute the entire agreement of the Parties concerning the rights and obligations discussed herein and subject to dispute in this suit. No other agreement shall govern the rights of the Parties with respect to the matters resolved by this Settlement, except in accordance with the terms herein. No modification to this Settlement shall be valid unless written and executed by both parties thereto.

17. The Parties recognize that notwithstanding their efforts to comply with the commitments contained herein, an "Act of God" or "force majeure," including a natural disaster, may prevent or delay such compliance. Force majeure will not continue beyond the circumstances and conditions that prevent timely performance, and will not apply if alternative means of compliance are available. The Party claiming force majeure will have the burden of proof in proceedings to enforce or modify this Settlement.

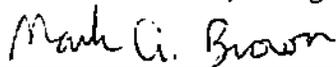
18. Nothing in this Settlement Agreement will be construed to deprive a federal official of the authority to revise, amend, or promulgate regulations or any discretion accorded by federal law concerning the substance of any actions taken hereunder. No provision of this

Agreement shall be interpreted as or constitute a commitment or requirement that defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.

SETTLEMENT AGREEMENT AND COVENANT NOT TO SUE APPROVED FOR FEDERAL DEFENDANTS:

IGNACIA S. MORENO  
Assistant Attorney General  
SETH M. BARSKY, Acting Section Chief

December 3, 2010

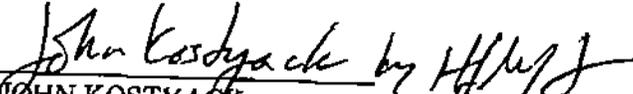
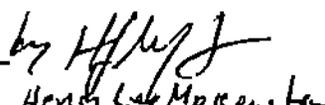
  

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Counsel for Federal Defendants

SETTLEMENT AGREEMENT AND COVENANT NOT TO SUE APPROVED FOR  
PLAINTIFFS

December 3, 2010

  
~~JOHN KOSTYACK~~ by   
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Facsimile: (202) 797-6646  
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2010 I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the Mailing Information for Case 90-10037. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF.

*Mark Arthur Brown*

Mark Arthur Brown

In situations where the Service has determined that the action as proposed by the action agency may result in jeopardy to a listed species, the Service can provide an alternate action that if implemented can avoid jeopardy to the listed species. The alternative recommended action needs to meet four specific criteria for implementation by the action agency. For the proposed action, as determined by FEMA, the Service provides the following alternative recommended action.

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### **REASONABLE AND PRUDENT ALTERNATIVE**

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Regulations (50 CFR §402.02) implementing section 7 of the Act define reasonable and prudent alternatives (RPAs) as alternative actions, identified during formal consultation, that:

- (1) can be implemented in a manner consistent with the intended purpose of the action;
- (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction;
- (3) are economically and technologically feasible; and
- (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Because this opinion has found jeopardy, FEMA is required to notify the Service of its final decision on the implementation of the RPA.

The Court's March 2005 Order criticized the 2003 RPA for (1) relying on voluntary measures and (2) not protecting against habitat loss and fragmentation or otherwise accounting for the cumulative effects of the permitted projects. These two points have been addressed in the revised RPA below. First, FEMA has more clearly described the steps that will be taken if the RPA is not followed. Second, the revised RPA will result in a review process that will allow the Service to consider the cumulative impacts of a series of permit proposals at clear points in time, rather than on a piecemeal basis.

Our jeopardy determinations were based on habitat loss and indirect effects from floodplain development expected to occur over a 13-year period of implementation of the NFIP. Therefore, we base this RPA, on habitat loss and indirect effects from floodplain development. The indirect effects from floodplain development apply to free roaming cat predation of the Key Largo cotton mouse, Key Largo woodrat, and Lower Keys marsh rabbit and traffic impacts associated with Key deer.

1. The Service will create and maintain an updated list of all real estate numbers of parcels (either vacant lots or built upon lots) that are within the Species Focus Area Maps. The Species Focus Area Maps identify all potential suitable habitat parcels for all nine species on Table 17, including both "jeopardy" and "no jeopardy" species including all potential suitable habitat, public and private, whether or not in an existing HCP. The Species Focus Area Maps identify which parcels must be referred to the Service for review as outlined in RPA 4. The Species Focus Area Maps were developed by the Service, based on the best available science, and indicate potentially suitable, federally threatened or

endangered species habitat for the species subject to the prohibitions of this RPA. Companion buffer zone maps were also created and maintained for the Key Largo cotton mouse, Key Largo woodrat, and Lower Keys marsh rabbit. The Service will provide these maps to FEMA for distribution to all participating communities in the Florida Keys portion of Monroe County. The updated real estate parcel list will be completed within 60 days of acceptance of this BO by the Court, and then updated as needed by the Service. We do not anticipate that updates would occur frequently, but may be needed as habitat changes or new information (habitat or species) becomes available.

2. Pursuant to 44 CFR 60.3(a)(2), FEMA will require Monroe County and other participating communities in the Florida Keys to revise their Flood Damage Prevention Ordinance(s) to reference and use the updated real estate list and Species Focus Area Maps (referenced in RPA paragraph 1) to implement and enforce the procedures required in paragraph 4 within 12 months of acceptance of this BO by the Court. In the event that the real estate list and/or Species Focus Area Maps are updated by the Service, the new list and/or maps will be used. FEMA will also require the county and participating communities as per 44 CFR 60.3(a)(2) to incorporate Service review recommendations (or Reasonable and Prudent Measures resulting from formal consultation) under section 7 and section 10 incidental take exemption and implementing terms and conditions as enforceable conditions in their floodplain development permits.
3. In areas mapped as containing unsuitable habitat, participating communities in Monroe County will place a form letter in their permit file that indicates:
  - a. the individual that made the determination,
  - b. the date of the determination; and
  - c. the date of the Species Focus Area Map and real estate parcel list used to make the determination.

After this form letter is completed, participating communities in Monroe County may take action on the proposed floodplain development permits without further concerns for threatened and endangered species (or their critical habitat).

4. Any issuance of floodplain development permits for all development, including those activities that will remove vegetation, will require further consultation for the real estate parcels within the Species Focus Area Maps. Specifically, participating communities in Monroe County will forward weekly to the Service those applications proposing floodplain development of lot(s) or floodplain development on vacant parcels and floodplain development on parcels with a structure within the Species Focus Area Maps that will: 1) expand the footprint of the structure; or 2) expand associated clearing of, or placement of fencing into native habitat. The Service will then determine either of the following:
  - a) Determine that a proposed action would not adversely affect federally threatened or endangered species or designated critical habitat either individually or cumulatively. If the Service determines that the action would not adversely affect threatened or endangered species or designated critical habitat, they will notify FEMA, the participating community, and the applicant of the not likely to

adversely affect determination. The Service may condition a finding of “may affect, not likely to adversely affect” on the implementation of specific modifications to a proposed action to avoid possible impacts on species. The determination and its specific project modifications are binding conditions that must be incorporated into the participating community’s floodplain development permit(s) for the development on the parcel, and must be enforced by the participating community. This action may be achieved by the Service through the development of an assessment key. The assessment key would provide a step-wise process for applicants, the county and NFIP participating communities, and FEMA to follow that may result in Service concurrence determinations through acceptance of the key’s requirements. An applicant signed and community co-signed copy of the acceptance form will be maintained in the floodplain development permit file. FEMA will provide a yearly report of how many floodplain development permits were issued by NFIP participating jurisdictions that were assessed through the use of the assessment key and species affected.

- b) Determine that a proposed action may adversely affect threatened or endangered species or designated critical habitat either individually or cumulatively. In this event, the Service would notify FEMA, the participating community, and the applicant by letter of the “may affect” determination and the need for conditions, modifications, or other additional actions to insure the protection required under section 7 or section 10 of the Act. The “may affect” determination letter and any specific project modifications required upon further review are binding conditions that must be incorporated into the participating community’s floodplain development permit(s) for the development on the parcel and must be enforced by the participating community. The required modifications will be designed to ensure compliance with either section 7 or section 10 of the Act and that the amount of incidental take exempted through compliance with section 7 or section 10 of the Act does not exceed the levels of incidental take individually or cumulatively exempted in this BO. FEMA will provide a yearly report of how many floodplain development permits were issued by NFIP participating jurisdictions and the amount of incidental take exempted under the incidental take provision in this BO.
- c) FEMA will request that each participating community which proposes a change in ROGO or the Tier classifications provide notice of the proposed change to FEMA and the Service at the time the proposal is presented in writing to the staff of the participating community. In addition, notwithstanding any changes to ROGO and/or the Tier classification, proposed actions within the properties designated in the Species Focus Area Maps will continue to receive additional review as outlined in this RPA. In the event that current HCPs designated in the Florida Keys under section 10 of the Act expire, all properties addressed by these HCPs that fall within the Species Focus Area Maps will be referred to the Service for review per the guidelines in this RPA.

- 5. Pursuant to 44 CFR 60.3(a)(2), FEMA will require participating communities to establish written procedures within 14 months of acceptance of this BO by the Court for referring

floodplain development permit applicants to the Service for review, inclusion of any conditions or modifications into the floodplain development permits involved, and enforcement of those conditions or modifications, as outlined in RPA paragraph 4.

The participating community will exercise its enforcement authority to require the permittee to comply with the Service's conditions that are incorporated as conditions of the participating community's floodplain development permit. In the event of non-compliance with the floodplain development permit conditions by the applicant, the participating community will request, as outlined in RPA paragraph 8(b), that FEMA deny individual flood insurance for the subject property.

6. Free-Roaming Cats: FEMA will coordinate with participating communities in Monroe County in their development of a brochure, information on a website, and other materials for addressing predation by domestic and feral cats in areas within endangered and threatened species habitat and buffer zones in the Special Flood Hazard Area. Participating communities will be required to provide this brochure to all floodplain development permit applicants seeking a floodplain development permit, to build a structure, or expand an existing structure. This brochure will describe how to protect threatened and endangered species by keeping pets indoors. FEMA will provide a yearly report and a list by parcel of how many floodplain development permits were issued by NFIP participating communities for each of the buffer zones by species affected in the Special Flood Hazard Area.
7. Pursuant to 44 CFR 59.24, FEMA will monitor the participating communities' compliance with the conditions of any "not likely to adversely affect" effect determination or any section 7 or section 10 incidental take authorizations and their implementing terms and conditions. FEMA will coordinate with the Service every 6 months to evaluate the extent of compliance with the Act for proposed floodplain development in participating communities in Monroe County. FEMA will require the communities to maintain, whichever is obtained, either the Section 10(a)(1)(B) permit or the completed section 7 consultation in the administrative record for the floodplain development permit file for future review by FEMA during their community assistance visits. FEMA will visit participating communities in Monroe County every 6 months. During community visits to participating communities in Monroe County, FEMA will evaluate the administrative records maintained by the participating community on floodplain development permits issued for proposed actions described in this RPA to ensure compliance with the RPA requirements. FEMA will use information provided by the Service or other Federal, State, or local agencies to achieve this purpose. FEMA will treat any violation of the procedures established under the RPA as a substantive program deficiency or violation under 44 CFR 60.3.
8. Within 15 days of determining non-compliance with the procedures established under the RPA, FEMA will notify the participating community in writing that substantial progress must be made to correct the program deficiencies or remedy any violation within 60 days. The community must provide FEMA with a written response within 60 days of FEMA's notice, of the actions being taken to correct the program deficiencies and any violation. If the community cannot resolve all of the program deficiencies or remedy the violation

within 60 days, the community must describe in its response the actions it will take and a schedule for resolving the deficiencies and remedying the violation.

Correcting deficiencies and remedying violations can take a variety of forms depending upon their type and nature. The following are examples of possible actions that FEMA would expect the community to undertake within 60 days or to include as part of a remediation plan to correct any remaining program deficiencies and violations remaining after 60 days:

- (a). Demonstrate that the community has initiated an enforcement action against the property owner who did not apply for a floodplain development permit and provide a description of the enforcement action being taken. If the community has not initiated some type of enforcement action against the property owner, the community should issue a stop work order or take other action to stop further floodplain development impacts. The enforcement action can include, through coordination with the Service, restoration of the site to pre-impact conditions.
  - (b). Should enforcement actions proposed by the participating community not be complied with by the applicant, the participating community will submit a request for a declaration of denial of flood insurance following 44 CFR Part 73 (Section 1316 of the National Flood Insurance Act of 1968) to FEMA for construction of an insurable structure that has occurred without receipt of the necessary section 7 or section 10 incidental take exemption by the Service. Upon submission of a valid declaration, FEMA then will deny the flood insurance to that property.
  - (c). If corrective actions referenced in RPA paragraph 8(a) are not possible, then FEMA will continue to deny the individual flood insurance policy. Insurance availability will be restored to a property only if the community has submitted a valid rescission to FEMA correcting the deficiencies referenced in RPA paragraph 8(a). A valid rescission from the community shall consist of a description of, and supporting documentation for, the measures taken to bring the structure into compliance with the local floodplain management ordinance and this RPA along with other requirements in accordance with 44 CFR 73.3 (Section 1316).
  - (d). Rescission of the floodplain development permit for any floodplain development action if the participating community issued a floodplain development permit in contravention to the Service's technical assistance recommendations or the Service's section 7 or section 10 incidental take authorizations and implementing terms and conditions.
  - (e). Seek civil or criminal penalties or other appropriate legal action against the property owner as provided for in the participating community's ordinance or code.
9. If FEMA determines the participating community's non-compliance with the procedures established under the RPA has caused take of threatened or endangered species that

cannot be corrected or offset, FEMA will initiate procedures outlined in 44 CFR 59.24 for probation and suspension of community eligibility for flood insurance. In addition, if the community is not responsive to FEMA's initial notice or it has not made substantial progress within 60 days to correct the program deficiencies and remedy the violation, FEMA will initiate the probation and suspension procedures outlined in 44 CFR 59.24 that allows FEMA to place participating communities on probation or suspend them from the NFIP. If the community fails to adhere to the agreed upon remediation plan and schedule or fails to demonstrate why the schedule for resolving any remaining program deficiencies or violation cannot be adhered to, FEMA will also initiate procedures outlined in 44 CFR 59.24 for probation and suspension.

10. FEMA, in conjunction with the Service, will conduct training sessions with public officials and local building officials on the requirements of these RPAs.
11. FEMA will require participating communities to provide to floodplain development permit applicants a brochure or similar written material about the floodplain development permit referral process and post this information on the community's website and otherwise make it generally available. FEMA and the participating communities will coordinate with the Service in developing this communication to the public.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**  
Case No. 90-10037-Civ-Moore

FLORIDA KEY DEER, *et al.*,

Plaintiffs,

vs.

W. CRAIG FUGATE, *et al.*,

Defendants.

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**ORDER**

THIS CAUSE came before this Court on the Plaintiffs' and Federal Defendants' Settlement Agreement and Covenant Not To Sue ("Settlement") filed December 3, 2010.

UPON CONSIDERATION, and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED that the U.S. Fish and Wildlife Service's Biological Opinion for the Department of Homeland Security's Federal Emergency Management Agency's (FEMA) administration of the National Flood Insurance Program (NFIP) in participating communities in Monroe County, Florida dated April 30, 2010, DE # 466, as amended pursuant to the Settlement is hereby deemed to be in compliance with this Court's previous Orders for FWS to issue a new biological opinion that complies with the Court's March 20, 2005 Order (DE # 237), the Endangered Species Act and the Administrative Procedure Act.

IT IS FURTHER ORDERED AND ADJUDGED that the parties' stipulation as to an award of fees and costs incurred by Plaintiffs since November 5, 2008 is hereby APPROVED.

IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction solely for the purpose of enforcing the Court's injunction, DE # 237, which shall remain in effect until Federal Defendants provide notice to the Court pursuant to the Settlement.

DONE AND ORDERED, in Chambers, at Miami, Florida, this \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE  
K. MICHAEL MOORE

cc: All counsel of record