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**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MONTANA  
MISSOULA DIVISION**

DEFENDERS OF WILDLIFE, et al.,  
  
Plaintiffs,  
  
v.  
  
DIRK KEMPTHORNE, et al.,  
  
Defendants.

Civil No. 05-99-M-DWM

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' UNOPPOSED  
MOTION TO MODIFY ORDER**

Pursuant to Fed. R. Civ. P. 60(b) and Local Rule 7.1(c), Defendants Dirk Kempthorne, Secretary of the Interior, et al. (“Defendants”) respectfully submit the following Memorandum in support of Defendants’ Motion to Modify the Court’s September 29, 2006 Order (“Order”). For the reasons set forth below, Defendants request that the Court modify its Order to extend the deadline for Defendants to complete the status review and 12-month finding for the wolverine (*Gulo gulo luscus*) by five months, to and including February 28, 2008. In accordance with Local Rule 7.1(j), Plaintiffs’ counsel has been contacted and has stated that Plaintiffs do not oppose Defendants’ Motion.

### **BACKGROUND**

On June 8, 2005, Plaintiffs filed suit challenging the U.S. Fish and Wildlife Service’s (“Service”) negative 90-day finding on Plaintiffs’ petition to list the wolverine as a threatened species under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. See Order at 1-2. Pursuant to ESA Section 4(b)(3)(A), the Service had concluded that Plaintiffs’ petition did not “present substantial scientific or commercial information indicating that listing the wolverine in the contiguous United States may be warranted.” Order at 4, 9; 16 U.S.C. § 1533(b)(3)(A).

The parties subsequently filed cross-motions for summary judgment. By Order dated September 29, 2006, the Court granted Plaintiffs’ motion, denied Defendants’ cross-motion, and held that the Service did not comply with the ESA in making its negative 90-day finding on Plaintiffs’ petition. Order at 2. The Court remanded the matter to the Service and directed the agency to make a 12-month finding “as required by law and this Order.” Order at 21.

Pursuant to ESA Section 4(b)(3)(B), if the Service determines that a petitioned action “may be warranted,” the Service has one year to make a “12-month finding” as to whether the petitioned action is warranted, not warranted, or warranted but precluded. 16 U.S.C. § 1533(b)(3)(B); Order at 9. Although the Court did not set a specific deadline for completing the remand, Defendants interpret the Court’s Order as requiring the publication of a 12-month finding within twelve months, *i.e.* by September 29, 2007. Order at 21; 16 U.S.C. § 1533(b)(3)(B); Declaration of Randall Luthi, Deputy Director for the U.S. Fish and Wildlife Service (“Luthi Decl.”), ¶ 3.

### **STANDARD FOR MODIFICATION**

Under Federal Rule of Civil Procedure 60(b)(5), a party is entitled to relief from a judgment if, *inter alia*, “it is no longer equitable that the judgment should have prospective application.” Fed. R. Civ. P. 60(b)(5). The Ninth Circuit has applied the “flexible standard” set forth in Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), to motions for equitable relief from judgment under Fed. R. Civ. P. 60(b)(5). See Bellevue Manor Assocs. v. United States, 165 F.3d 1249, 1255-56 (9th Cir. 1999); Hook v. Arizona, 120 F.3d 921, 924 (9th Cir. 1997). Under this standard, a party seeking a modification of a court order need only establish that a “significant change in facts or law warrants a revision of the decree and that the proposed modification is suitably tailored to the changed circumstance.” Rufo, 502 U.S. at 393; SEC v. Coldicutt, 258 F.3d 939, 942 (9th Cir. 2002).

Court orders regulating the conduct of government agencies require a particularly flexible approach. As the Supreme Court stated in Rufo, such decrees “reach beyond the parties

involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.” Rufo, 502 U.S. at 381 (quoting Heath v. DeCourcy, 888 F.2d 1105, 1109 (6<sup>th</sup> Cir. 1989)). “[T]he public interest is a particularly significant reason for applying a flexible modification standard.” Rufo, 502 U.S. at 381; see also Still's Pharmacy, Inc. v. Cuomo, 981 F.2d 632, 636-37 (2<sup>nd</sup> Cir. 1992) (applying flexible standard to consent decree relating to New York State's compliance with federal Medicaid regulations); Plyler v. Evatt, 846 F.2d 208, 212 (4<sup>th</sup> Cir. 1988). Moreover, in determining whether a particular modification to a court's judgment is tailored to resolve the problems created by the changes in circumstances, the courts “give significant weight to the views” of the agency that must implement the judgment. Rufo, 502 U.S. at 393 & n.14.

Even if the Court does not apply Rule 60(b)(5), the Court can exercise its equitable discretion in this case pursuant to Rule 60(b)(6). Rule 60(b)(6) provides, in relevant part, that “[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for . . . any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b)(6). Courts typically apply Rule 60(b)(6) only in circumstances that are not addressed by the first five numbered clauses of the Rule. See Pierce v. United Mine Workers, 770 F.2d 449, 451 (6<sup>th</sup> Cir. 1985). As the Ninth Circuit has noted, “Rule 60(b)(6) does not particularize the factors that justify relief, but we have previously noted that it provides courts with authority ‘adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.’” United States v. Washington, 98 F.3d 1159, 1163 (9<sup>th</sup> Cir. 1996) (citation omitted). While the rule should be applied only in “extraordinary

circumstances,” *id.*, district courts may employ subsection (b)(6) as a means to achieve substantial justice when “something more” than one of the grounds contained in Rule 60(b)’s first five clauses is present. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2864 (R60). Accordingly, a motion made under Rule 60(b)(6) is addressed to the trial court’s discretion, which is “especially broad” given the underlying equitable principles involved. *Cf. Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6<sup>th</sup> Cir. 1985); *Matter of Emergency Beacon Corp.*, 666 F.2d 754, 760 (2<sup>nd</sup> Cir. 1981).

### **ARGUMENT**

The Service is now requesting a five-month extension of the September 29, 2007 due date for completing the status review and 12-month finding for the wolverine required by the Court’s Order. As stated above, the Plaintiffs have indicated that they do not oppose Defendants’ request. Moreover, as set forth in detail in the accompanying Declaration of Randall Luthi, Deputy Director for the U.S. Fish and Wildlife Service, the extension will allow the Service to consider peer-reviewed articles to be published in an upcoming volume of *The Journal of Wildlife Management* that are likely to contain important scientific information on the wolverine. Luthi Decl. ¶¶ 3-10. The proposed extension will therefore insure that the Service considers “the best scientific and commercial data available” in its analysis and 12-month finding, as required by the ESA. 16 U.S.C. § 1533(b)(1)(A). Accordingly, Defendants’ proposed modification of the Court’s Order is just, in the public interest, and “suitably tailored to the changed circumstance.” *Rufo*, 502 U.S. at 393; *Coldicutt*, 258 F.3d at 942.

**Additional Time Would Allow the Service To Incorporate Important Scientific Information On the Wolverine Into Its Status Review and 12-Month Finding**

There is currently a paucity of research and sound data on wolverines that limits the Service's ability to determine the status of the species and to evaluate the factors that may be threatening the species. Luthi Decl. ¶ 4. However, the Service has been informed that several peer-reviewed research manuscripts on wolverines will be published in a special section of an upcoming edition of *The Journal of Wildlife Management (Journal)*. Id. The *Journal* is a quarterly publication long recognized as a major source of knowledge in wildlife biology that contains peer-reviewed papers on wildlife research and management. Id. The papers on the wolverine to be published in the *Journal* will constitute the most current, peer-reviewed research on the species and will contain data essential the Service's status review, such as historic and current distribution in the contiguous United States, genetic substructure of population, habitat associations, and sources and patterns of wolverine mortality. Id.

The publication schedule for the papers on the wolverine depends on the time required to complete the peer-review process and when the *Journal's* editors approve the articles for publication. Luthi Decl. ¶ 5. It is the Service's understanding that the authors are attempting to complete the manuscripts as soon as possible so that the Service may consider them in its status review. Id. The editors of the *Journal* currently anticipate that the special wolverine section would be published in either the summer or the fall 2007 volume of the *Journal*. Id.

To complete the 12-month finding required by the Court's Order, the Service will consider the best scientific and commercial information available on the wolverine. Luthi Decl. ¶ 6; 16 U.S.C. § 1533(b)(1)(A). In order to ensure that the Service has adequate time to analyze

and incorporate the new information published in the *Journal* into its 12-month finding, the Service anticipates needing at least an additional five months, to and including February 28, 2008, within which to complete its status review and publish its 12-month finding based upon the steps set forth below. Luthi Decl. ¶¶ 6-10.

First, the Service proposes to publish a notice in the *Federal Register* announcing the initiation of the wolverine status review and requesting new information regarding the status of the species. Luthi Decl. ¶ 7. The Service anticipates publishing the notice in May 2007, followed by a 60-day comment period. Id. ¶ 8. After the close of the comment period, the Service will begin preparation of the status review and 12-month finding based on the information received during the comment period. Id. Once the special section of the *Journal* is published, the Service will incorporate the new information into its analysis. Id.

Because the *Journal's* editors anticipate that the special wolverine section will be published by September 2007, the Service believes that the appropriate Field Office will be in a position to submit a draft 12-month finding to the Regional Office for review by November 30, 2007. Luthi Decl. ¶ 9. The Service further anticipates that the comprehensive internal review and drafting process can be completed by February 13, 2008, with submission of the 12-month finding to the *Federal Register* for publication occurring shortly thereafter and prior to February 28, 2008. Luthi Decl. ¶¶ 9-10.

## CONCLUSION

For the foregoing reasons and the reasons stated in the Declaration of Randall Luthi, Defendants' motion for a modification of the Court's Order extending the deadline for

completion of the 12-month finding by five months, to and including February 28, 2008, should be granted.

Respectfully submitted this 5th day of April, 2007.

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