

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

|  |   |                            |
|--|---|----------------------------|
| BUFFALO RIVER WATERSHED ALLIANCE;                  | ) |                            |
| ARKANSAS CANOE CLUB; NATIONAL PARKS                | ) |                            |
| CONSERVATION ASSOCIATION; and OZARK                | ) |                            |
| SOCIETY,   | ) |                            |
|  | ) |                            |
| Plaintiffs,  | ) |                            |
|  | ) |                            |
| v.   | ) | Civil No. 4:13-cv-0450 DPM |
|  | ) |                            |
| UNITED STATES DEPARTMENT OF                        | ) |                            |
| AGRICULTURE; UNITED STATES SMALL                   | ) |                            |
| BUSINESS ADMINISTRATION; TOM VILSACK, in           | ) |                            |
| his official capacity as Secretary, United States  | ) |                            |
| Department of Agriculture; MARIA CONTRERAS-        | ) |                            |
| SWEET, in her official capacity as Administrator,  | ) |                            |
| Small Business Administration; VAL DOLCINI, in his | ) |                            |
| official capacity as Administrator, Farm Service   | ) |                            |
| Agency; LINDA NEWKIRK, in her official capacity as | ) |                            |
| Arkansas State Executive Director, Farm Service    | ) |                            |
| Agency; and LINDA NELSON, in her official capacity | ) |                            |
| as Arkansas District Director, Small Business      | ) |                            |
| Administration,                                    | ) |                            |
|  | ) |                            |
| Defendants.  | ) |                            |

**DEFENDANTS’ UNOPPOSED MOTION TO MODIFY INJUNCTIVE RELIEF**

The United States Department of Agriculture Farm Service Agency (“FSA”) and the Small Business Administration (“SBA”) are currently working, under an injunction from this Court, to comply with the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”) with regard to loan guaranties they issued to back private loans made to C&H Hog Farms. ECF No. 59. The Court’s Order requires the Agencies to comply by December 2, 2015. *Id.* at 2. As explained below, it has become clear to the Agencies that they cannot complete the NEPA and ESA processes within the timeframe set by the Court. The Agencies therefore move this Court under Federal Rule of Civil Procedure 60(b)(5) to modify its injunction to extend the deadline for compliance by ninety days, until March 1, 2016.

Counsel for Federal Defendants have conferred with counsel for Plaintiffs and are advised that they do not oppose the motion extend the deadline for compliance with NEPA and the ESA by ninety days but reserve their right to contest the Federal Defendants' compliance.

## **II. LEGAL BACKGROUND**

Rule 60(b)(5) of the Federal Rules of Civil Procedure provides that “[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application.”

There is no single set of circumstances or “talismanic” standard governing when modification of an injunction under Rule 60(b) is appropriate. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 380 (1992). Indeed, the Supreme Court has directed district courts to “exercise flexibility in considering” such motions, and noted that modification of an injunction may be warranted by “a significant change either in factual conditions or in law,” including “when changed factual conditions make compliance with the decree substantially more onerous,” when the injunction “proves to be unworkable because of unforeseen obstacles,” or when enforcement “would be detrimental to the public interest.” *Id.* at 384. The party seeking modification of an injunction bears the initial burden of showing modification of an injunction is warranted. *Id.* 502 U.S. at 383.

## **III. ARGUMENT**

Although the FSA and SBA have worked diligently to complete the requisite NEPA and ESA analyses by the deadline set by this Court, the receipt of an unexpectedly large volume of comments during the public comment period on the draft Environmental Assessment has made clear to the Agencies that they will not be able to properly address and respond to the comments and issue a final decision without additional time.

As set forth in the attached Declaration of Matthew Ponish, the Director of the Conservation and Environmental Programs Division of the FSA, the Agencies have worked in good faith to comply with the Court's injunction. *See* Exhibit 1 (Declaration of Matthew T.

Ponish (“Ponish Declaration”). In particular, the Agencies, after engaging in an expedited procurement process, hired an independent contractor to prepare an Environmental Assessment (“EA”) under NEPA and to assist with completion of consultation under the ESA. Ponish Decl. at ¶ 1. A draft EA was issued for public review and comment on August 6, 2015, and a public meeting was held on August 27, 2015. *Id.* at ¶ 3.

The Agencies originally anticipated that they would be able to respond to public comments and issue a final decision within the timeframe allotted by the Court. However, by the close of the comment period on September 4, 2015, the Agencies had received 1,858 comments. *Id.* at ¶ 4. This volume of comments far exceeds the number usually received by the FSA on its EAs, and many of the comments are lengthy, raise multiple substantive issues, and in some cases provide additional studies or technical references which need to be identified and reviewed for applicability. *Id.* at ¶¶ 4-6.

To manage and address this large volume of comments, all comments are being read, logged into a database, and sorted by the substantive issues they raise. *Id.* at ¶ 5. The Agencies must then determine how to respond to each substantive issue. *Id.* at ¶ 7. The Agencies anticipate that addressing some issues may require additional coordination with, and requests for data from, other agencies. *Id.* at ¶ 6.

Once the substantive issues raised during the comment period are addressed and incorporated into a final EA, the Agencies must determine whether a “finding of no significant impact” (“FONSI”) is appropriate or whether a full Environmental Impact Statement (“EIS”) is required. *Id.* at ¶ 8. If the Agencies determine that a FONSI is appropriate, then in compliance with the Court’s order (ECF No. 58 at 11), a draft of the FONSI must be made publically available for thirty days before it is adopted. Ponish Decl. at ¶ 8.

In addition, the comments received include information that bears on the ongoing process of consultation and preparation of a Biological Assessment under the ESA. *Id.* at ¶ 9. As the Agencies review and determine how to address the issues raised in the comment period, they

may need to include additional analysis or information in the Biological Assessment, which may slow the completion of the ESA consultation process. *Id.*

The Agencies believe that properly addressing the issues raised during the public comment period and reviewing the large number of comments that the Agencies now anticipate receiving on a draft FONSI require extending the Court's deadline by ninety days. *Id.* at ¶ 10. The Agencies submit that this extension of the deadline is in the public interest. Defendants recognize, and share, the Court's concern, that "everyone—the parties, interested non-parties such as C&H and Farm Credit Services of Western Arkansas, and the public—need resolution sooner rather than later." ECF No. 58 at 16. But, as the extensive public comment on the draft EA has shown, there is intense public interest in this project. Providing the Agencies with sufficient time to consider and address the public's comments best serves the interests of the public and of all parties in ensuring that the environmental analyses being undertaken are done adequately.

Respectfully submitted this 25th day of September, 2015.

/s/ Barclay T. Samford  
Barclay T. Samford  
Trial Attorney, Natural Resources Section  
United States Department of Justice  
Environment & Natural Resources Division  
999 18<sup>th</sup> Street  
South Terrace, Suite 370  
Denver, CO 80202  
(303) 844-1475 | Phone  
(303) 844-1350 | Fax  
[Clay.Samford@usdoj.gov](mailto:Clay.Samford@usdoj.gov)

*Counsel for Defendants*