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15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION

18 CENTER FOR BIOLOGICAL DIVERSITY,)
19 et al.,)

No. 4:19-cv-02843-PJH

20 Plaintiffs,)

**STIPULATED SETTLEMENT
AGREEMENT AND
[PROPOSED] ORDER**

21 v.)

22 DAVID BERNHARDT, in his official)
23 capacity as Secretary of the United)
24 States Department of the Interior, et al.,)

25 Defendants.)
26)
27)
28)

29 This Stipulated Settlement Agreement (“Agreement”) is entered into by and between the
30 Center for Biological Diversity (“Center”) and San Francisco Baykeeper (“collectively,
31 “Plaintiffs”) and David Bernhardt, in his official capacity as Secretary of the United States
32 Department of the Interior, and Aurelia Skipwith, in her official capacity as Director of the U.S.

1 Fish and Wildlife Service (“FWS”), (collectively “Defendants”) who, by and through their
2 undersigned counsel, state as follows:

3 WHEREAS, petitions to list the marron bacora (*Solanum conocarpum*), and the Puerto
4 Rico harlequin butterfly (*Atlantea tulita*) as threatened or endangered under the Endangered
5 Species Act (“ESA”), 16 U.S.C. §§ 1531, *et seq.*, were submitted to the Service on November 21,
6 1996 and February 25, 2009, respectively;

7
8 WHEREAS, on February 15, 2011, the FWS published a positive 12-month finding for
9 the marron bacora, finding that listing the marron bacora was warranted, but precluded by other
10 higher-priority actions. 76 Fed. Reg. 9,722.

11
12 WHEREAS, on May 31, 2011, the FWS published a positive 12-month finding for the
13 Puerto Rico harlequin butterfly, finding that listing was warranted, but precluded by other higher
14 priority actions. 76 Fed. Reg. 31,282.

15
16 WHEREAS, on December 2, 2016, the FWS published a Candidate Notice of Review
17 (“CNOR”) including warranted-but-precluded findings for several candidate species including
18 the marron bacora and the Puerto Rico harlequin butterfly, 81 Fed. Reg. 87,246;

19
20 WHEREAS, on January 15, 2019, the Center sent Defendants a letter stating its intent to
21 file suit challenging FWS’s expeditious progress to issue findings for nine candidate species and
22 to compel FWS to issue resubmitted petition findings for nine candidate species, including the
23 marron bacora and the Puerto Rico harlequin butterfly pursuant to 16 U.S.C. § 1533(b)(3)(C)(i);

24
25 WHEREAS, on March 23, 2019, Plaintiffs filed the above-captioned action to compel
26 FWS to issue resubmitted petition findings for eight candidate species including the marron
27 bacora and the Puerto Rico harlequin butterfly, in addition to an updated CNOR;

1 WHEREAS, on October 10, 2019, Defendants published an updated CNOR in the Federal
2 Register. 84 Fed. Reg. 54,732.

3 WHEREAS, Defendants published 12-month findings under 16 U.S.C. § 1533(b)(3)(B)-
4 (C)(i) in the Federal Register for the Berry Cave salamander (*Gyrinophilus gulolineatus*), 84 Fed.
5 Reg. 53,336, and red tree vole (*Arborimus longicaudus*), 84 Fed. Reg. 69,707, on October 7, 2019
6 and December 19, 2019, respectively.

7
8 WHEREAS, on December 30, 2019, Defendants submitted 12-month findings under 16
9 U.S.C. § 1533(b)(3)(B)-(C)(i) for the Sierra Nevada red fox (*Vulpes vulpes necator*) and Hermes
10 copper butterfly (*Lycaena hermes*);

11
12 WHEREAS, the Parties, through their authorized representatives, and without any final
13 adjudication of the issues of fact or law with respect to Plaintiffs' claims, have negotiated a
14 settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes
15 set forth in Plaintiffs' Complaint;

16
17 WHEREAS, the Parties agree that settlement of this action in this manner is in the public
18 interest and is an appropriate way to resolve Plaintiffs' Complaint;

19 NOW, THEREFORE, the Parties hereby stipulate and agree as follows:

- 20
21 1. No later than July 31, 2020, FWS shall review the status of the marron bacora and submit
22 a 12-month finding to the Federal Register for publication pursuant to the ESA, 16 U.S.C.
23 § 1533(b)(3)(B)-(C)(i);
- 24 2. No later than August 31, 2020, FWS shall review the status of the Puerto Rico harlequin
25 butterfly and submit a 12-month finding to the Federal Register for publication pursuant
26 to the ESA, 16 U.S.C. § 1533(b)(3)(B)-(C)(i);
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- 1 3. The Order entering this Agreement may be modified by the Court upon good cause shown,
2 consistent with the Federal Rules of Civil Procedure, by written stipulation between the
3 Parties filed with and approved by the Court, or upon written motion filed by one of the
4 Parties and granted by the Court. In the event that either Party seeks to modify the terms
5 of this Agreement, including the deadline specified in Paragraph 1, 2, and/or 3, or in the
6 event of a dispute arising out of or relating to this Agreement, or in the event that either
7 Party believes that the other Party has failed to comply with any term or condition of this
8 Agreement, the Party seeking the modification, raising the dispute, or seeking
9 enforcement shall provide the other Party with notice of the claim or modification. The
10 Parties agree that they will meet and confer (either telephonically or in person) at the
11 earliest possible time in a good-faith effort to resolve the claim before seeking relief from
12 the Court. If the Parties are unable to resolve the claim themselves, either Party may seek
13 relief from the Court.
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17 4. In the event that Defendants fail to meet the deadlines in Paragraphs 1 or 2 and have not
18 sought to modify this Agreement, Plaintiffs' first remedy shall be a motion to enforce the
19 terms of this Agreement, after following the dispute resolution procedures described
20 above. This Agreement shall not, in the first instance, be enforceable through a proceeding
21 for contempt of court.
22
23 5. Plaintiffs reserve their right to request attorneys' fees and costs from Defendants
24 pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), and Defendants reserve their
25 right to contest Plaintiffs' entitlement to recover fees and the amount of any such fees
26 and do not waive any objection or defenses that they may have to Plaintiffs' request. The
27 parties agree to the following schedule for addressing attorneys' fees and costs:
28

- 1 a. Within 30 days of the entry of the order by this Court approving this Agreement,
2 the Center will provide to Defendants an itemization of the attorneys' fees and
3 costs it seeks to recover to allow Defendants to assess whether settlement of such
4 claims is possible.
5
- 6 b. Within 60 days of Defendants' receipt of this itemization of the Center's
7 proposed fees and costs, the parties will notify the Court whether they have
8 reached a settlement as to the payment of the Center's attorneys' fees and costs
9 by Defendants.
10
- 11 c. If the parties have not reached agreement on attorneys' fees and costs at the time
12 they provide this post-receipt notice to the Court, the Center may move within 30
13 days of that date for the Court to award attorneys' fees and costs. Briefing and
14 adjudication of the Center's motion for attorneys' fees and costs and Defendants'
15 opposition thereto will then proceed as provided in LCvR 7. In the event that the
16 Center files such a motion, Defendants reserve the right to contest any
17 entitlement to and/or the reasonableness of the amount of Plaintiffs' claimed
18 attorneys' fees and costs, including hourly rates and the number of hours billed.
19
- 20 6. The parties agree that Plaintiffs reserve the right to seek additional fees and costs
21 incurred subsequent to this Agreement arising from a need to enforce or defend
22 against efforts to modify the underlying schedule outlined in Paragraph 2 or for
23 any other continuation of this action. By this Agreement, Defendants do not
24 waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel,
25 including hourly rates and the number of hours billed, in any future litigation or
26 continuation of the present action. Further, this Agreement as to attorneys' fees
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1 and costs has no precedential value and shall not be used as evidence in any
2 other attorneys' fees litigation.

3 7. This Agreement requires only that Defendants take the actions specified in
4 Paragraphs 1 and 2. No provision of this Agreement shall be interpreted as, or
5 constitute, a commitment or requirement that Defendants take action in
6 contravention of the ESA, the Administrative Procedure Act ("APA"), or any other
7 law or regulation, either substantive or procedural. Nothing in this Agreement shall
8 be construed to limit or modify the discretion accorded to Defendants by the ESA,
9 APA, or general principles of administrative law with respect to the procedures to
10 be followed in making any determination required herein, or as to the substance of
11 any determinations made pursuant to Paragraphs 1 and 2 of the Agreement. To
12 challenge any final determination issued pursuant to Paragraphs 1 and 2 Plaintiffs
13 must file a separate action. Defendants reserve the right to raise any applicable
14 claims or defenses to such challenges.

15 8. No part of this Agreement shall have precedential value in any litigation or in
16 representations before any court or forum or in any public setting. No Party shall
17 use this Agreement or the terms herein as evidence of what does or does not
18 constitute a reasonable timeline for issuing 12-month findings for any petitioned
19 species.

20 9. Nothing in this Agreement shall be construed or offered as evidence in any
21 proceeding as an admission or concession of any wrongdoing, liability, or any
22 issue of fact or law concerning the claims settled under this Agreement or any
23 similar claims brought in the future by any other party. Except as expressly
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1 provided in this Agreement, none of the Parties waives or relinquishes any legal
2 rights, claims, or defenses it may have. This Agreement is executed for the purpose
3 of settling Plaintiffs' Complaint, and nothing herein shall be construed as
4 precedent having preclusive effect in any other context.
5

6 10. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement
7 that Defendants are obligated to pay any funds exceeding those available, or take
8 any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any
9 other applicable appropriations law.
10

11 11. The Parties agree that this Agreement was negotiated in good faith and that it
12 constitutes a settlement of claims that were disputed by the Parties. By entering
13 into this Agreement, none of the Parties waive any legal rights, claims, or defenses
14 except as expressly stated herein. This Agreement contains all of the terms of
15 agreement between the Parties concerning the Complaint, and is intended to be the
16 final and sole agreement between the Parties with respect thereto. The Parties
17 agree that any prior or contemporaneous representations or understanding not
18 explicitly contained in this written Agreement, whether written or oral, are of no
19 further legal or equitable force or effect.
20

21 12. The undersigned representatives of each Party certify that they are fully authorized
22 by the Party or Parties they represent to agree to the terms and conditions of this
23 Agreement and do hereby agree to the terms herein. Further, each Party, by and
24 through its undersigned representative, represents and warrants that it has the legal
25 power and authority to enter into this Agreement and bind itself to the terms and
26 conditions contained in this Agreement.
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1 13. The terms of this Agreement shall become effective upon entry of an Order by the
2 Court ratifying this Agreement.

3 14. Upon adoption of this Agreement by the Court, all counts of Plaintiffs' Complaint
4 shall be dismissed without prejudice, except as dismissal relates to Plaintiffs'
5 counts alleging violations of the ESA in connection with the marron bacora and
6 the Puerto Rico harlequin butterfly, which shall be dismissed with prejudice.
7 Notwithstanding the dismissal of this action, however, the Parties hereby stipulate
8 and respectfully request that the Court retain jurisdiction to oversee compliance
9 with the terms of this Agreement and to resolve any motions to modify such terms.
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11

12 *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).*

13 Dated: February 12, 2020

Respectfully submitted,

14
15 /s/ Amy R. Atwood
16 AMY R. ATWOOD (OR Bar No. 060407)
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24 *Attorneys for Plaintiffs*

Attorneys for Defendants

[PROPOSED] ORDER

The Stipulated Settlement Agreement is approved and all Parties shall comply with its provisions.

IT IS SO ORDERED.

Dated: _____, 2020

By: _____
THE HONORABLE PHYLLIS J. HAMILTON
UNITED STATES DISTRICT JUDGE

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ATTESTATION OF CONCURRENCE

In accordance with Civil Local Rule 5-1(i)(3), I hereby attest that I obtained concurrence in the filing for the signatures of all counsel indicated by a conformed signature (“/s/”) within this e-filed document.

/s/ Davis A. Backer
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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, I electronically filed the foregoing Stipulated Settlement Agreement with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ Davis A. Backer
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