

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
CENTER FOR BIOLOGICAL DIVERSITY,)	
)	
Plaintiff,)	
)	
v.)	No. 1:19-cv-01071-EGS
)	
DAVID BERNHARDT, in his official capacity)	
as Secretary of the United States Department of)	
the Interior, et al.,)	
)	
Defendants.)	
)	

STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between Plaintiff Center for Biological Diversity (“Center”) and Defendants David Bernhardt, in his official capacity as Secretary of the United States Department of the Interior (“Interior”), and the United States Fish and Wildlife Service (“Service”) (collectively, “Defendants”), who, by and through their undersigned counsel, state as follows:

WHEREAS, on July 24, 2007, Forest Guardians submitted a petition requesting that the Service list the meltwater lednian stonefly (*Lednia tumana*) as threatened or endangered under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq*;

WHEREAS, on April 20, 2010, Plaintiff submitted a petition requesting that the Service list numerous species, including the Big Cypress epidendrum (*Epidendrum strobiliferum*), brook floater (*Alasmidonta varicosa*), Cape Sable orchid (*Trichocentrum undulatum*), clam-shell orchid (*Encyclia cochleata var. triandra*), Elk River crayfish (*Cambarus elkensis*), longsolid (*Fusconaia subrotunda*), pink pigtoe (*Pleurobema rubrum*), purple lilliput (*Toxolasma lividus*), round

hickorynut (*Obovaria subrotunda*), and seaside alder (*Alnus maritima*) as threatened or endangered under the ESA;

WHEREAS, on June 23, 2010, the Xerces Society for Invertebrate Conservation and Dr. Robbin Thorp submitted a petition requesting that the Service list the Franklin's bumble bee (*Bombus franklini*) as threatened or endangered under the ESA;

WHEREAS, on July 7, 2010, Plaintiff submitted a petition requesting that the Service list the Bartram stonecrop (*Graptopetalum bartramii*) and beardless chinch weed (*Pectis imberbis*) as threatened or endangered under the ESA;

WHEREAS, on December 30, 2010, the Xerces Society for Invertebrate Conservation and Plaintiff submitted a petition requesting that the Service list the western glacier stonefly (*Zapada glacier*) as threatened or endangered under the ESA;

WHEREAS, on July 11, 2012, Plaintiff submitted a petition requesting that the Service list the Panamint alligator lizard (*Elgaria panamintina*) as threatened or endangered under the ESA;

WHEREAS, on February 3, 2015, Plaintiff submitted a petition requesting that the Service list the tricolored blackbird (*Agelaius tricolor*) as threatened or endangered under the ESA;

WHEREAS, on September 15, 2015, Defenders of Wildlife submitted a petition requesting that the Service list the yellow-banded bumble bee (*Bombus terricola*) as threatened or endangered under the ESA;

WHEREAS, in accordance with 16 U.S.C. § 1533(b)(3)(A), the Service issued "90-day findings" in response to the petitions to list the species identified above, in which the Service concluded that the petitions presented substantial information indicating that the listings of these species under the ESA "may be warranted," *see* 81 Fed. Reg. 14,058 (Mar. 16, 2016) (yellow-banded bumble bee); 80 Fed. Reg. 56,423 (Sept. 18, 2015) (Panamint alligator lizard and tricolored blackbird); 77 Fed. Reg. 47,352 (Aug. 8, 2012) (Bartram stonecrop and beardless chinch weed);

76 Fed. Reg. 78,601 (Dec. 19, 2011) (western glacier stonefly); 76 Fed. Reg. 59,836 (Sept. 27, 2011) (Big Cypress epidendrum, brook floater, Cape Sable orchid, clam-shell orchid, Elk River crayfish, longsolid, pink pigtoe, purple lilliput, round hickorynut, and seaside alder); 76 Fed. Reg. 56,381 (Sept. 13, 2011) (Franklin's bumble bee); 74 Fed. Reg. 41,649 (Aug. 18, 2009) (meltwater lednian stonefly);

WHEREAS, in accordance with 16 U.S.C. § 1533(b)(3)(B), the Service also issued "12-month findings" in response to the petitions to list the meltwater lednian stonefly and western glacier stonefly, in which the Service concluded that listing the species was warranted and also proposing to list both species as threatened under the ESA, *see* 81 Fed. Reg. 68,379 (Oct. 4, 2016); 76 Fed. Reg. 18,684 (Apr. 5, 2011);

WHEREAS, on October 6, 2015, the Service issued a final rule listing the Florida bristle fern (*Trichomanes punctatum ssp. floridanum*) as endangered under the ESA, *see* 80 Fed. Reg. 60,439 (Oct. 6, 2015), and also concluded that critical habitat was "not determinable" at the time of the listing determination, *id.* at 60,465;

WHEREAS, on October 5, 2016, the Service issued a final rule listing the Miami tiger beetle (*Cicindelidia floridana*) as endangered under the ESA, *see* 81 Fed. Reg. 68,985 (Oct. 5, 2016), and also concluded that critical habitat was "not determinable" at the time of the listing determination, *id.* at 69,007;

WHEREAS, on October 6, 2016, the Service issued a final rule listing the Suwannee moccasinshell (*Medionidus walkeri*) as threatened under the ESA, *see* 81 Fed. Reg. 69,417 (Oct. 6, 2016), and also concluded that critical habitat was "not determinable" at the time of the listing determination, *id.* at 69,423;

WHEREAS, the Service proposed to designate critical habitat for slickspot peppergrass (*Lepidium papilliferum*) on May 10, 2011, *see* 76 Fed. Reg. 27,184 (May 10, 2011), and later

revised its proposed critical habitat designation, *see* 79 Fed. Reg. 8,402 (Feb. 12, 2014), and also extended and reopened the comment period on its proposed and revised proposed critical habitat designations, *see* 79 Fed. Reg. 22,077 (Apr. 21, 2014); 76 Fed. Reg. 66,250 (Oct. 26, 2011); 76 Fed. Reg. 39,807 (July 7, 2011);

WHEREAS, the Service proposed to designate critical habitat for the black pinesnake (*Pituophis melanoleucus lodingi*) on March 11, 2015, *see* 80 Fed. Reg. 12,845 (Mar. 11, 2015), and later reopened the comment period on its proposed critical habitat designation, *see* 83 Fed. Reg. 51,418 (Oct. 11, 2018);

WHEREAS, the Service proposed to designate critical habitat for the elfin-woods warbler (*Setophaga angelae*) on June 22, 2016, *see* 81 Fed. Reg. 40,632 (June 22, 2016);

WHEREAS, on January 8, 2019, Plaintiff sent a letter to Defendants stating its intent to file suit to compel the Service to complete 12-month findings with respect to 16 of these species (Bartram stonecrop, beardless chinch weed, Big Cypress epidendrum, brook floater, Cape Sable orchid, clam-shell orchid, Elk River crayfish, Franklin's bumble bee, longsolid, Panamint alligator lizard, pink pigtoe, purple lilliput, round hickorynut, seaside alder, tricolored blackbird, and yellow-banded bumble bee), final listing determinations with respect to 2 of these species (meltwater lednian stonefly and western glacier stonefly), and proposed or final critical habitat designations with respect to 6 of these species (Florida bristle fern, Miami tiger beetle, Suwannee moccasinshell, black pinesnake, elfin-woods warbler, and slickspot peppergrass);

WHEREAS, on March 12, 2019, the Service responded to Plaintiff's January 8, 2019, letter, and provided an update regarding the agency's expected timeline for the completion of the actions identified above;

WHEREAS, on April 17, 2019, Plaintiff filed a complaint in the above-captioned action to compel the Service to complete the actions identified above by dates certain, *see* Docket (“Dkt.”) 1 (“Complaint”);

WHEREAS, the Service issued a 12-month finding for Franklin’s bumble bee on August 13, 2019, *see* 84 Fed. Reg. 40,006 (Aug. 13, 2019); a 12-month finding for brook floater on August 15, 2019, *see* 84 Fed. Reg. 41,694 (Aug. 15, 2019); a 12-month finding for seaside alder on August 15, 2019, *see id.*; a 12-month finding for tricolored blackbird on August 15, 2019, *see id.*; a 12-month finding for yellow-banded bumble bee on August 15, 2019, *see id.*; a 12-month finding for clam-shell orchid on October 7, 2019, *see* 84 Fed. Reg. 53,336 (Oct. 7, 2019); and a 12-month finding for Panamint alligator lizard on October 7, 2019, *see id.*;

WHEREAS, the parties, by and through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiff’s claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiff’s complaint;

WHEREAS, the parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

NOW, THEREFORE, the parties hereby stipulate and agree as follows:

1. On or before the following dates, the Service shall review the status of the following species and submit to the Federal Register 12-month findings as to whether the listing of these species as threatened or endangered is (a) not warranted; (b) warranted; or (c) warranted but precluded by other pending proposals, pursuant to 16 U.S.C. § 1533(b)(3)(B):
 - a. Bartram stonecrop and beardless chinch weed by November 29, 2019.
 - b. Big Cypress epidendrum, Cape Sable orchid, Elk River crayfish, longsolid, purple lilliput, and round hickorynut by June 30, 2020.

c. Pink pigtoe by August 31, 2021.

2. On or before November 15, 2019, the Service shall submit to the Federal Register final listing determinations for the meltwater lednian stonefly and western glacier stonefly, pursuant to 16 U.S.C. § 1533(b)(6)(A).

3. On or before the following dates, the Service shall submit to the Federal Register proposed or revised proposed determinations concerning the designation of critical habitat for the following species, pursuant to 16 U.S.C. § 1533(a)(3)(A):

a. Suwannee moccasinshell by November 20, 2019.

b. Florida bristle fern by February 17, 2020.

c. Slickspot peppergrass by June 30, 2020.

d. Miami tiger beetle by August 31, 2021.

4. On or before the following dates, the Service shall submit to the Federal Register final determinations concerning the designation of critical habitat for the following species, pursuant to 16 U.S.C. § 1533(b)(6)(C):

a. Black pinesnake by January 31, 2020.

b. Elfin-woods warbler by June 1, 2020.

5. The order entering this Agreement may be modified by the Court upon good cause shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the parties filed with and approved by the Court, or upon written motion filed by one of the parties and granted by the Court. In the event that either party seeks to modify the terms of this Agreement, including the deadlines specified in paragraphs 1-4, or in the event of a dispute arising out of or relating to this Agreement, or in the event that either party believes that the other party has failed to comply with any term or condition of this Agreement, the party seeking the modification, raising the dispute, or seeking enforcement shall provide the other party with notice

of the claim. The parties agree that they will meet and confer (either telephonically or in person) at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from the Court. If the parties are unable to resolve the claim themselves, either party may seek relief from the Court.

6. In the event that Defendants fail to meet a deadline specified in paragraphs 1-4 and have not sought to modify it, Plaintiff's first remedy shall be a motion to enforce the terms of this Agreement, after following the dispute resolution procedures described above. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

7. This Agreement requires only that the Service take the actions specified in paragraphs 1-4. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the Service by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any determination required herein. To challenge any final determination issued in accordance with this Agreement, Plaintiff will be required to file a separate action, and Defendants reserve the right to raise any applicable claims or defenses in response thereto.

8. No part of this Agreement shall have precedential value in any litigation or in representations before any court or forum or in any public setting. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for making determinations regarding the listing of or designation of critical habitat for any species.

9. Nothing in this Agreement shall be construed or offered as evidence in any proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement or any similar claims brought in the future by any other party. Except as expressly provided in this Agreement, the parties do not waive or relinquish any legal rights, claims, or defenses they may have. This Agreement is executed for the purpose of settling Plaintiff's Complaint, and nothing herein shall be construed as precedent having preclusive effect in any other context.

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

11. The parties agree that this Agreement was negotiated in good faith and it constitutes a settlement of claims disputed by the parties. By entering into this Agreement, the parties do not waive any legal rights, claims, or defenses, except as expressly stated herein. This Agreement contains all of the terms of agreement between the parties concerning Plaintiff's Complaint, and is intended to be the final and sole agreement between the parties with respect thereto. The parties agree that any prior or contemporaneous representations or understanding not explicitly contained in this written Agreement, whether written or oral, are of no further legal or equitable force or effect.

12. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the terms and conditions of this Agreement and do hereby agree to the terms herein. Further, each party, by and through its undersigned representative, represents and warrants that it has the legal power and authority to enter into this Agreement and bind itself to the terms and conditions contained in this Agreement.

13. The terms of this Agreement shall become effective upon entry of an order by the Court approving the Agreement.

14. Plaintiff reserves its right to request attorneys' fees and costs from Defendants, and Defendants reserve their right to contest Plaintiff's entitlement to recover fees and the amount of any such fees and do not waive any objection or defenses they may have to Plaintiff's request.

15. Upon approval of this Agreement by the Court, all counts of Plaintiff's complaint shall be dismissed with prejudice. Notwithstanding the dismissal of this action, however, the parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve any motions to modify such terms.

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

Dated: October 11, 2019

Respectfully submitted,

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