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14 *Attorneys for Defendants*

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  
21 AGREEMENT AND  
22 [PROPOSED] ORDER**

v. )

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

26 Defendants. )  
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;

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.

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

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

24 WHEREAS, on March 23, 2019, Plaintiffs filed the above-captioned action to compel  
25 FWS to issue resubmitted petition findings for eight candidate species including the marron  
26 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.  
10  
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)  
17 Center for Biological Diversity  
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/s/ Davis A. Backer  
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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  
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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