

JEAN E. WILLIAMS
Deputy Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Section Chief
SARAH J. SHEFFIELD, Trial Attorney
(HI Bar No. 10415)
Wildlife and Marine Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 305-0211
Fax: (202) 305-0275
sarah.sheffield@usdoj.gov

Attorneys for Defendants

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

CENTER FOR BIOLOGICAL)	
DIVERSITY,)	Case No. 1:19-cv-00588 HG-KJM
)	
<i>Plaintiff,</i>)	
)	STIPULATED SETTLEMENT
v.)	AGREEMENT AND ORDER
)	
DAVID BERNHARDT, in his official)	
capacity as Secretary of the U.S.)	
Department of the Interior; and the U.S.)	
FISH AND WILDLIFE SERVICE,)	
)	
<i>Defendants.</i>)	

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

WHEREAS, on October 29, 2013, the Service listed 15 species on the island of Hawai’i as endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544, (“ESA”). 78 Fed. Reg. 64,638 (Oct. 29, 2013);

WHEREAS, on August 21, 2018, the Service designated critical habitat for one of the 15 Hawai’i Island species, *Bidens micrantha* ssp. *ctenophylla*, that was listed as endangered in 2013. 83 Fed. Reg. 42,362 (Aug. 21, 2018);

WHEREAS, the Service has not yet designated critical habitat for the remaining Hawai’i Island species listed as endangered in 2013: *Bidens hillebrandiana* ssp. *hillebrandiana*; *Cyanea marksii*; *Cyanea tritomantha*; *Cyrtandra nanawaleensis*; *Cyrtandra wagneri*; *Phyllostegia floribunda*; *Pittosporum hawaiiense*; *Platydesma remyi*; *Pritchardia lanigera*; *Schiedea diffusa* ssp. *macraei*; *Schiedea hawaiiensis*; *Stenogyne cranwelliae*; *Drosophila digressa*; and *Vetericaris chaceorum* (collectively “14 species”);

WHEREAS, on October 28, 2019, Plaintiff filed the above-captioned action to compel the Service to issue proposed and final critical habitat rules for the 14 species by dates certain;

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

WHEREAS, the parties desire to resolve Plaintiff's claims according to the terms set forth below, and thus hereby stipulate and agree as follows:

1. No later than February 28, 2023, the Service shall submit to the *Federal Register* for publication a determination pursuant to 16 U.S.C. § 1533(a)(3) concerning the designation of critical habitat for the 14 species.
2. If the determination in Paragraph 1 is in the form of a proposed rule, the Service shall submit to the *Federal Register* for publication a final determination pursuant to 16 U.S.C. § 1533(a)(3) concerning the designation of critical habitat for the 14 species no later than February 29, 2024.
3. 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 or 2, 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 or modification. 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.

4. In the event that Defendants fail to meet the deadlines in Paragraphs 1 or 2 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.

5. This Agreement requires only that Defendants take the actions specified in Paragraphs 1 and 2. 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 Defendants by the ESA, 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 determinations made pursuant to Paragraphs 1 and 2 of the Agreement. To challenge any final determination issued pursuant to Paragraph 2, Plaintiff must file a separate action. Defendants reserve the right to raise any applicable claims or defenses to such challenges.

6. 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 a determination regarding critical habitat for any listed species.

7. 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, none of the parties waives or relinquishes any legal rights, claims, or defenses it 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.

8. 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.

9. The parties agree that this Agreement was negotiated in good faith and that it constitutes a settlement of claims that were disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense except as expressly stated herein. This Agreement contains all of the terms of agreement between the parties concerning the 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.

10. 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.

11. The terms of this Agreement shall become effective upon entry of an Order by the Court ratifying the Agreement.

12. Plaintiff reserves its right to request reasonable fees from Defendants and Defendants reserve their right to contest Plaintiff's entitlement to recover fees in this case and to the amount of any such fees, and do not waive any objection or defenses they may have to Plaintiff's fee request. If the Parties are unable to negotiate a resolution of the fee claim, Plaintiff will file an application with the Court for the recovery of fees and costs within 60 days of the approval of this Agreement by the Court.

13. Upon adoption 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 February 25, 2020

Respectfully submitted,

JEAN E. WILLIAMS,
Deputy Assistant Attorney General
Environment & Natural Resources Division

SETH M. BARSKY, Chief
MEREDITH L. FLAX, Assistant Chief

/s/ Sarah J. Sheffield

SARAH J. SHEFFIELD
Trial Attorney HI Bar Number 10415
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Telephone: 202.305.0211
Facsimile: 202.305.0275

Attorneys for Defendants

/s/ Maxx Phillips

Maxx Phillips (HI Bar No. 10032)
CENTER FOR BIOLOGICAL DIVERSITY
1188 Bishop Street, Suite 2412
Honolulu, HI 96813
Phone: (808) 284-0007
Email: mphilips@biologicaldiversity.org

Ryan Adair Shannon (OR Bar No. 155537)
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211
Phone: (503) 283-5474 ext. 407
Email: rshannon@biologicaldiversity.org

Attorneys for Plaintiff

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**STIPULATED SETTLEMENT
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DAVID BERNHARDT, in his official)
capacity as Secretary of the U.S.)
Department of the Interior; and the U.S.)
FISH AND WILDLIFE SERVICE,)

Defendants.)

APPROVED AND SO ORDERED.

Dated: _____
