

1 TODD KIM, Assistant Attorney General
2 SETH M. BARSKY, Section Chief
3 MEREDITH L. FLAX, Assistant Section Chief
4 H. HUBERT YANG, Senior Trial Attorney (DC Bar No. 491308)
5 United States Department of Justice
6 Environment & Natural Resources Division
7 Wildlife & Marine Resources Section
8 Ben Franklin Station
9 P.O. Box 7611
10 Washington, DC 20044-7611
11 Tel: (202) 305-0209
12 Fax: (202) 305-0275
13 E-mail: hubert.yang@usdoj.gov

14 *Attorneys for Defendants*

15 *(Additional Parties / Counsel on Signature Page)*

16 IN THE UNITED STATES DISTRICT COURT
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
18 SAN JOSE DIVISION

19 SIERRA FOREST LEGACY, et al.,) No. 5:20-cv-05800-BLF
20)
21 Plaintiffs,) STIPULATED SETTLEMENT
22) AGREEMENT
23 v.)
24)
25 UNITED STATES FISH AND WILDLIFE)
26 SERVICE, et al.,)
27)
28 Defendants,)
29)
30 and)
31)
32 COALITION FOR OWLS, RESOURCES)
33 AND THE ENVIRONMENT,)
34)
35 Defendant-Intervenor.)

36 This Stipulated Settlement Agreement (“Agreement”) is entered into by and between
37 Plaintiffs Sierra Forest Legacy, Defenders of Wildlife, and the Center for Biological Diversity
38 (collectively, “Plaintiffs”) and Defendants United States Fish and Wildlife Service (“FWS”);

1 Debra Haaland, in her official capacity as Secretary of the United States Department of Interior;
2 and Martha Williams, in her official capacity as Principal Deputy Director of FWS, (collectively,
3 “Defendants”), who, by and through their undersigned counsel, state as follows:¹

4 WHEREAS, on November 8, 2019, FWS issued a finding, in accordance with 16 U.S.C.
5 § 1533(b)(3)(B) (a “12-month finding”), in response to petitions to list the California spotted owl
6 (*Strix occidentalis occidentalis*), in which the agency concluded that listing the species under the
7 Endangered Species Act (“ESA”) was not warranted. *See* 84 Fed. Reg. 60,371 (Nov. 8, 2019);

8 WHEREAS, on August 18, 2020, Plaintiffs filed their Complaint challenging FWS’s not-
9 warranted finding for the California spotted owl and alleging violations of the ESA. *See* Docket
10 (“Dkt.”) 1;

11 WHEREAS, FWS now believes it is prudent to reconsider its not-warranted finding and
12 to develop a new 12-month finding, in accordance with 16 U.S.C. § 1533(b)(3)(B), as to whether
13 the California spotted owl warrants listing as an endangered or threatened species;

14 WHEREAS, as soon as practicable after approval of this Agreement by the Court, FWS
15 will issue a “Dear Interested Party” notification letter to various entities, including federal and
16 state agencies, Native American Tribes, non-governmental organizations, and the scientific
17 community, seeking additional and updated information to inform FWS’s analysis of the status
18 of the California spotted owl.

19 In light of the foregoing, Plaintiffs and Defendants (collectively, the “Signatory Parties”)
20 hereby agree to the following:
21
22

23
24
25
26
27
28

¹ Defendant-Intervenor is not a signatory to this Agreement and takes no position with respect to this Agreement.

1 1. On or before February 15, 2023, FWS will submit to the Federal Register a new
2 12-month finding as to whether the listing of the California spotted owl as threatened or
3 endangered is (a) not warranted; (b) warranted; or (c) warranted but precluded by other pending
4 proposals, pursuant to 16 U.S.C. § 1533(b)(3)(B).
5

6 2. The order entering this Agreement may be modified by the Court upon good cause
7 shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the
8 Signatory Parties filed with and approved by the Court, or upon written motion filed by one of
9 the Signatory Parties and granted by the Court. In the event that a Signatory Party seeks to modify
10 the terms of this Agreement, including the deadline specified in paragraph 1, or in the event of a
11 dispute arising out of or relating to this Agreement, or in the event that either party believes that
12 the other party has failed to comply with any term or condition of this Agreement, the Signatory
13 Party seeking the modification, raising the dispute, or seeking enforcement shall provide the other
14 party with notice of the claim. The Signatory Parties agree that they will meet and confer (either
15 telephonically or in person) at the earliest possible time in a good-faith effort to resolve the claim
16 before seeking relief from the Court. If the Signatory Parties are unable to resolve the claim
17 themselves, either party may seek relief from the Court.
18
19

20 3. In the event that Defendants fail to meet the deadline specified in paragraph 1 and
21 have not sought to modify it, Plaintiffs' first remedy shall be a motion to enforce the terms of this
22 Agreement, after following the dispute resolution procedures described above. This Agreement
23 shall not, in the first instance, be enforceable through a proceeding for contempt of court.
24

25 4. This Agreement requires only that FWS take the actions specified in paragraph 1.
26 No provision of the Agreement shall be interpreted as, or constitute, a commitment or requirement
27 that Defendants take action in contravention of the ESA, Administrative Procedure Act ("APA"),
28

1 or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall
2 be construed to limit or modify the discretion accorded to FWS by the ESA, the APA, or general
3 principles of administrative law with respect to the procedures to be followed in making any
4 determination required herein, or as to the substance of any determination required herein. To
5 challenge any determination issued pursuant to this Agreement, Plaintiffs will be required to file
6 a separate action, and Defendants reserve the right to raise any applicable claims or defenses in
7 response thereto.
8

9 5. Nothing in this Agreement shall be construed or offered as evidence in any
10 proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact or law
11 concerning the claims settled under this Agreement or any similar claims brought in the future by
12 any other party. This Agreement is executed for the purpose of settling Plaintiffs' Complaint,
13 and no part of this Agreement shall have precedential value in any other context.
14

15 6. The Signatory Parties agree that the Agreement was negotiated in good faith and
16 that it constitutes a settlement of claims disputed by them. By entering into this Agreement, the
17 Signatory Parties do not waive any legal rights, claims, or defenses, except as expressly stated
18 herein. This Agreement contains all of the terms of agreement between the Signatory Parties
19 concerning Plaintiffs' Complaint, and is intended to be the final and sole agreement between the
20 Signatory Parties with respect thereto. The Signatory Parties agree that any prior or
21 contemporaneous representations or understanding not explicitly contained in this written
22 Agreement, whether written or oral, are of no further legal or equitable force or effect.
23
24

25 7. The undersigned representatives of each Signatory Party certify that they are fully
26 authorized by the party or parties they represent to agree to the terms and conditions of this
27 Agreement and do hereby agree to the terms herein. Furthermore, each Signatory Party, by and
28

1 through its undersigned representative, represents and warrants that it has the legal power and
2 authority to enter into this Agreement and bind itself to the terms and conditions contained in this
3 Agreement.

4
5 8. Plaintiffs reserve their right to request attorneys' fees and costs from Defendants,
6 and Defendants reserve their right to contest Plaintiffs' entitlement to recover fees and the amount
7 of any such fees and do not waive any objection or defenses they may have to Plaintiffs' request.

8 The Signatory Parties agree to the following schedule for addressing attorneys' fees and costs:

9 a. Within 45 days of the entry of an order by this Court approving this
10 Agreement, Plaintiffs will provide to Defendants an itemization of the attorneys'
11 fees and costs that they seek to recover to allow Defendants to assess whether the
12 settlement of such claims is possible.

13
14 b. Within 60 days of Defendants' receipt of this itemization of Plaintiffs'
15 proposed fees and costs, the Signatory Parties will notify the Court as to whether
16 they have reached a settlement as to the payment of Plaintiffs' attorneys' fees and
17 costs by Defendants.

18
19 c. If the Signatory Parties have not reached agreement on attorneys' fees and
20 costs at the time they provide this post-receipt notice to the Court, the parties will
21 submit a briefing schedule for Plaintiffs' motion for attorneys' fees and costs. In
22 the event that Plaintiffs file such a motion, Defendants reserve the right to contest
23 the reasonableness of the amount of Plaintiffs' claimed attorneys' fees and costs,
24 including hourly rates and the number of hours billed.

25
26 9. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement
27 that Defendants are obligated to pay any funds exceeding those available, or take any action in
28

1 contravention of the Anti-Deficiency Act, *see* 31 U.S.C. § 1341, or any other applicable
2 appropriations law.

3 10. The terms of this Agreement shall become effective upon entry of an order by the
4 Court approving the Agreement.
5

6 11. Upon approval of this Agreement by the Court, all counts of Plaintiffs' Complaint
7 shall be dismissed with prejudice. Notwithstanding the dismissal of this action, however, the
8 Signatory Parties stipulate and respectfully request that the Court retain jurisdiction to oversee
9 any motion for attorneys' fees and costs, compliance with the terms of this Agreement, and to
10 resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
11 U.S. 375 (1994).
12

13 Dated: November 29, 2021

Respectfully submitted,

14 /s/ Elizabeth B. Forsyth
15 ELIZABETH B. FORSYTH
16 (CA Bar No. 288311)
17 Earthjustice
18 810 3rd Avenue, Suite 610
19 Seattle, WA 98104
20 Tel: (213) 766-1067
21 Fax: (213) 403-4822
22 E-mail: eforsyth@earthjustice.org

TODD KIM
Assistant Attorney General
SETH M. BARSKY
Section Chief
MEREDITH L. FLAX
Assistant Section Chief

23 GREGORY C. LOARIE
24 (CA Bar No. 215859)
25 Earthjustice
26 50 California Street, Suite 500
27 San Francisco, CA 94111
28 Tel: (415) 217-2000
Fax: (415) 217-2040
E-mail: gloarie@earthjustice.org

/s/ H. Hubert Yang
H. HUBERT YANG
Senior Trial Attorney (DC Bar No. 491308)
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0209
Fax: (202) 305-0275
E-mail: hubert.yang@usdoj.gov

Attorneys for Plaintiffs

Of Counsel:

KERRY O'HARA
United States Department of the Interior

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Office of the Solicitor
Pacific Southwest Region

Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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/ H. Hubert Yang
H. HUBERT YANG
Senior Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0209
Fax: (202) 305-0275
E-mail: hubert.yang@usdoj.gov

Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2021, I electronically filed the foregoing Stipulated Settlement Agreement And [Proposed] Order with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record.

/s/ H. Hubert Yang

H. HUBERT YANG

Senior Trial Attorney

United States Department of Justice

Environment & Natural Resources Division

Wildlife & Marine Resources Section

Ben Franklin Station

P.O. Box 7611

Washington, DC 20044-7611

Tel: (202) 305-0209

Fax: (202) 305-0275

E-mail: hubert.yang@usdoj.gov

Attorney for Defendants