

From: [Frazer, Gary D](#)
To: [Gale, Michael](#); [Randolph, Nikki](#)
Cc: [Williams, Martha M](#); [Randolph, Nikki](#); [Fahey, Bridget](#); [Snyder, Caitlin](#)
Subject: FR 4434 12-month finding for Tiehm's buckwheat
Date: Friday, May 21, 2021 3:51:18 PM

I just got this package, cleared it, and sent it on to CCU. A court order requires that we submit it to the FR by COB next Friday, May 28, so pls clear and forward to Martha ASAP.

Bridget or Caitlin, would you pls alert Maureen and ExecSec on Monday that it is coming to them next week and is on a rocket?

Gary Frazer
Assistant Director - Ecological Services
gary_frazer@fws.gov
Ph. (202) 208-4646
Cell (202) 253-4578

From: [Heil, John C](#)
To: [Williams, Martha M](#)
Cc: [Guertin, Stephen](#); [Souza, Paul](#); [Munoz, Anna](#); [Arroyo, Bryan](#); [Gale, Michael](#); [Wainman, Barbara W](#); [Huggler, Matthew](#); [Kodis, Martin](#); [Frazer, Gary D](#); [Martinez, Cynthia T](#); [Sanchez, Shaun](#); [Maciel, Martha L](#); [Meredith, Lauren K](#); [Gerstenslager, Robyn B](#)
Subject: Interior Region 10 Hot Topics
Date: Friday, May 14, 2021 5:01:33 PM
Attachments: [2021-5-14_HOT TOPICS_final.docx](#)

Good afternoon,

Please find attached Interior Region 10's Hot Topics.

The Interior Region 10 Hot Topics Memo is a weekly communication of current, pressing issues occurring in California, Nevada and the Klamath Basin. The Hot Topics Memo serves to keep Service leadership apprised of controversial and high-interest issues through concise, timely updates.

Should you have any questions or want to know more on any of the issues mentioned in this document, please let us know. We would be happy to set up a briefing or provide you with additional information.

Thank you,

John Heil

Deputy Assistant Regional Director
External Affairs
California Great Basin
U.S. Fish and Wildlife Service
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Cell: (916) 612-3042
Email: john_heil@fws.gov
Website: <https://www.fws.gov/cno/>

May 14, 2021

INFORMATION MEMORANDUM FOR THE DIRECTOR

FROM: Paul Souza, Regional Director, Interior Region 10

TELEPHONE: 916-414-6464

SUBJECT: Interior Region 10 Hot Topics

HOT TOPICS

2021 Oregon Fire Season in Effect: On May 10, the Oregon Dept of Forestry declared the 2021 fire season in effect for Klamath County beginning May 15, affecting all private, county, and state forestlands. The declaration puts into place regulations restricting debris burning and timber harvest operations.

Update: Klamath Water: On May 7, a Federal judge denied the Klamath Tribes' efforts to have the Bureau of Reclamation reduce flows on the Klamath River and hold Upper Klamath Lake's elevation for endangered sucker spawning. In April, the Tribes sued the BOR, arguing violation of Sections 7 and 9 of the ESA by allowing Upper Klamath Lake to dip below 4,142 feet in elevation during April and May the past two years. The Tribes also requested the judge issue a preliminary injunction and temporary restraining order for the BOR to immediately reduce baseline river flows released from Link River Dam by more than half while the remainder of the lawsuit was being heard. The BOR replied saying suspending irrigation deliveries to the Klamath Project was proof they are keeping Upper Klamath Lake levels as high as possible.

Update: California Water: On May 10, California Gov. Gavin Newsom expanded his April 21 drought emergency proclamation from two counties to 41 counties, including 39 in the Klamath River, Sacramento-San Joaquin Delta and Tulare Lake watersheds. According to the announcement, warm temperatures in April and early May accelerated the rate of snow melt, and much of the snowpack seeped into the dry ground rather than flowing into rivers and streams that feed reservoirs. Warm temperatures also prompted water diverters to withdraw water earlier and in greater volumes. These factors reduced expected supplies by more than 500,000 acre feet, leaving reservoirs extremely low.

The California Department of Water Resources (DWR) and BOR are expected to file a Temporary Urgency Change Petition to the State Water Resources Control Board early next week, requesting modifications to requirements to meet water quality objectives for June through August. A second petition will likely be filed later to cover operations through the remainder of the year. DWR is seeking a permit from the Army Corps of Engineers to install a drought salinity barrier on the West False River to address Delta water quality concerns. The BOR, as of May 5, has placed a hold on all Central Valley Project water deliveries to all agricultural water service contractors.

Update: Klamath Project: On Wednesday May 12, the Bureau of Reclamation announced that for the first in the history of the Klamath Project, they will not be providing any water to irrigators, closing the Project's 'A' Canal for the 2021 season. Concrete bulkheads were placed into the canal's headworks preventing any water from entering the canal. Upper Klamath Lake has decreased nearly half a foot from its peak in early April. The current elevation is a foot and a half lower than what is required during April and May by the U.S. Fish and Wildlife Service's most recent biological opinion, intended to maintain habitat for spawning C'waam and Koptu (Lost River and shortnose suckers).

The BOR also announced that a surface flushing flow to mitigate salmon disease outbreaks in the Klamath River below Iron Gate Dam will not be implemented this year. Lower Klamath National Wildlife Refuge, the nations' first waterfowl refuge, will not receive any water from the Project this year. Farmers who have contracts to flood irrigate on refuge leased lands won't be able to provide wetland habitat or food for migratory water birds. Limited water also increases the potential for a severe botulism outbreak on drying refuge marshes. Widespread media attention and planned protests are expected in the area.

IR10 DROUGHT/WATER UPDATE

Approximately 84% of the region is currently in drought, 47% of that is either extreme or exceptional, the two worst categories. Exceptional drought continued its march in the southern and eastern Sierra; the Tulare Basin is at the 2nd driest water year on record; the San Joaquin has its 3rd driest and the northern Sierra is the 2nd driest water year on record. In response to deteriorating conditions Governor Newsom expanded the drought emergency declaration to cover 39 additional counties across the state, including counties in the Sacramento and San Joaquin River watersheds.

U.S. Drought Monitor report – May 13, 2021:

(+ increase/-- decrease in % of drought area reported April 29)

California: 100% abnormal (*no change*), 100% moderate (+2), 94% severe (+6), 73% extreme (+20) and 13% exceptional (+8).

Nevada: *no change in all categories*: 100% abnormal, 100% moderate, 94% severe (+2), 75% extreme and 41% exceptional.

Oregon: 100% abnormal (+3), 91% moderate (+13); 71% severe(+24), 26% extreme (+18) and 4% exceptional drought (+4).

NRCS-SNOTEL precipitation/snow update – May 14, 2021

(-- decrease/+ increase in % of average from report of April 29)

	<u>Snow Water Equivalent</u>	<u>Water Year-to-Date</u>
Lake Tahoe Basin -	0% (-33)	53% (-2)

Truckee River Basin -	14% (-23)	52%	(n/c)
Carson River Basin -	4% (-37)	59%	(n/c)
Klamath Basin (OR) -	14% (-29)	65%	(n/c)

NO CHANGE ITEMS

The items listed below remain of interest to the Service but have no significant changes since the last update.

Hatchery Produced Fall- Run Chinook Salmon Trucking: Last updated 4/30/2021

Klamath River Salmon: Last updated 4/30/2021

Tiehm's Buckwheat: Last updated 4/23/2021

Klamath Basin refuges/Tule Lake NWR: Last updated 4/23/2021

Red Hill Bay Restoration Project at the Salton Sea: Last updated 4/23/2021

Longfin Smelt Lawsuits: Last updated 4/23/2021

Klamath Endangered Species/Suckers: Last updated 3/8/21

PREPARED BY: Robyn Gerstenslager, External Affairs, May 14, 2021

From: [Meredith, Lauren K](#)
To: [Williams, Martha M](#)
Cc: [Guertin, Stephen](#); [Souza, Paul](#); [Arroyo, Bryan](#); [Gale, Michael](#); [Wainman, Barbara W](#); [Huggler, Matthew](#); [Kodis, Martin](#); [Frazer, Gary D](#); [Martinez, Cynthia T](#); [Sanchez, Shaun](#); [Maciel, Martha L](#); [Munoz, Anna](#); [Heil, John C](#)
Subject: Interior Region 10 Hot Topics
Date: Monday, May 3, 2021 9:41:26 AM
Attachments: [2021-4-30_HOT TOPICS_final.docx](#)

Good morning,

Please find attached Interior Region 10's hot topics.

The Interior Region 10 Hot Topics Memo is a weekly communication of current, pressing issues occurring in California, Nevada and the Klamath Basin. The Hot Topics Memo serves to keep Service leadership apprised of controversial and high-interest issues through concise, timely updates.

Should you have any questions or want additional information on any of the issues mentioned in this document, please let us know. We would be happy to set up a briefing or provide you with additional information.

Thank you,

Lauren

Lauren Meredith
Congressional Liaison | U.S. Fish and Wildlife Service
Sacramento, CA
Cell: 916-467-5793

April 30, 2021

INFORMATION MEMORANDUM FOR THE DIRECTOR

FROM: Paul Souza, Regional Director, Interior Region 10

TELEPHONE: 916-414-6464

SUBJECT: Interior Region 10 Hot Topics

HOT TOPICS

Hatchery Produced Fall- Run Chinook Salmon Trucking: On May 3 and 4, the FWS plans to truck the remaining Fall- Run Chinook Salmon from Coleman National Fish Hatchery to the San Francisco Bay for release due to drought conditions in California. FWS has already released nearly 12 million salmon smolts into Sacramento Valley rivers. The remainder of this year's production, approximately 950,000 fish, were too small to release during other releases. Now, the in-river conditions have deteriorated to a point where fish released into the river are unlikely to survive. This latest release has been coordinated with the California Department of Fish and Wildlife, National Marine Fisheries Service and multiple NGO interests. While most of the responses have been supportive, the Northern California Guides Association is opposed to trucking and has indicated that they will launch a social media campaign to express their displeasure with the proposed trucking.

Update: Klamath River Salmon: During the week of April 20, the prevalence of infection from the parasite *C. shasta* increased to 43% in out-migrating juvenile Chinook salmon within the Shasta to Scott River reach of the Klamath River. During sampling efforts, field crews observed the first juvenile fish of the season displaying visual signs of clinical infections. Spore concentrations remain elevated at all monitoring sites. In the section of river historically referred to as the "infectious zone," the spore concentrations remain at levels predicted to cause significant mortality in juvenile salmon.

Related: Due to continued low returns of adult salmon, the Yurok Tribe has again cancelled their commercial fishery this year, and the Pacific Fishery Management Council has recommended the closure of the commercial fishery in the California-Klamath Management Zone.

IR10 DROUGHT/WATER UPDATE

Storms that moved across the West this week were not enough to erase months of little to no rainfall. Drought levels expanded in northern California, with mandatory water restrictions in Marin County starting May 1. Water shortages there are so severe that discussions are underway to build a water transport pipeline this winter from the East Bay across the Richmond/San Rafael bridge. A super bloom of lupine covered parts of the Folsom Lake lakebed, which is at 37%

capacity and 50% of the historical average. Shallow wells are going dry in the San Joaquin Valley.

U.S. Drought Monitor report – April 29, 2021:

(+ increase/- decrease in % of drought area reported April 22)

California: 100% abnormal (*no change*), 98% moderate (+1), 88% severe (+3), 53% extreme (+3) and 5% exceptional (*no change*).

Nevada: *no change in all categories*: 100% abnormal, 100% moderate, 92% severe, 74% extreme and 40% exceptional.

Oregon: 97% abnormal (+2), 78% moderate (+2); 47% severe, 14% extreme and 2% exceptional drought (*no change*).

NRCS-SNOTEL precipitation/snow update – April 29, 2021

(-- decrease/+ increase in % of average from report of April 22)

	<u>Snow Water Equivalent</u>	<u>Water Year-to-Date</u>
Lake Tahoe Basin -	33% (-6)	55% (n/c)
Truckee River Basin -	37% (-5)	53% (n/c)
Carson River Basin -	41% (-5)	59% (n/c)
Eastern Nevada -	no readings this week	
Klamath Basin (OR) -	43% (-9)	65% (n/c)

NO CHANGE ITEMS

The items listed below remain of interest to the Service but have no significant changes since the last update.

Tiehm's Buckwheat: Last updated 4/23/2021

California Water: Last updated 4/23/2021

Klamath Basin refuges/Tule Lake NWR: Last updated 4/23/2021

Red Hill Bay Restoration Project at the Salton Sea: Last updated 4/23/2021

Longfin Smelt Lawsuits: Last updated 4/23/2021

Klamath Endangered Species/Suckers: Last updated 3/8/21

PREPARED BY: Lauren Meredith, External Affairs, April 30, 2021

From: [Gale, Michael](#)
To: [Frazer, Gary D](#); [Williams, Martha M](#)
Cc: [Arroyo, Bryan](#); [Welles, Caroline R](#); [Randolph, Nikki](#); [Galst, Carey](#); [Gilbert, Parks](#)
Subject: Re: Urgent -- revised settlement memo for Tiehm's buckwheat deadline litigation (DCN FR74845)
Date: Tuesday, May 11, 2021 4:44:38 PM
Attachments: [05102021.Tiehm s Buckwheat settlement memo 074780 For Signature Final.pdf](#)

See attached, signed revised settlement memo. It's also uploaded in DTS, and CCU will route in the morning.

Thanks Gary for the heads up!

Michael

--

Michael Gale | Chief of Staff, Office of the Director | U.S. Fish & Wildlife Service | (202) 273-3288 (office), (571) 982-2158 (cell) | Pronouns: he/him

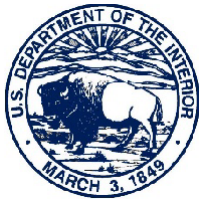
From: Frazer, Gary D <gary_frazer@fws.gov>
Sent: Tuesday, May 11, 2021 4:52 PM
To: Williams, Martha M <martha_williams@fws.gov>
Cc: Arroyo, Bryan <bryan_arroyo@fws.gov>; Gale, Michael <michael_gale@fws.gov>; Welles, Caroline R <caroline_welles@fws.gov>; Randolph, Nikki <nikki_randolph@fws.gov>; Galst, Carey <carey_galst@fws.gov>; Gilbert, Parks <parks_gilbert@fws.gov>
Subject: Urgent -- revised settlement memo for Tiehm's buckwheat deadline litigation (DCN FR74845)

Martha -- You signed last week a memo authorizing DOJ to pursue settlement of the deadline litigation for this species in lieu of a potentially very challenging order from the court. The plaintiff, CBD, rejected those terms of settlement on the grounds that they retained the option of the Service making a "warranted but precluded" 12-month finding.

The revised memo in DCN FR74845 amends the terms of settlement to authorize DOJ to take a "warranted but precluded" finding off the table. While atypical, this is not a typical situation, DOJ supports this, and it is not the first time we have settled on such terms. So I recommend that you concur with these terms of settlement.

Sorry, but DOJ would like the green light ASAP, by COB today if possible. Call if you have any questions. -- GDF

Gary Frazer
Assistant Director - Ecological Services
gary_frazer@fws.gov
Ph. (202) 208-4646



United States Department of the Interior

FISH AND WILDLIFE SERVICE
2800 Cottage Way, W-2606
Sacramento, CA 95825



In Reply Refer to:
FWS/IR10/DCN074780

Memorandum

To: Principal Deputy Director, Exercising the Delegated Authority of the Director

Through: Assistant Director, Ecological Services **GARY FRAZER** Digitally signed by GARY FRAZER
Date: 2021.05.11 16:39:37 -04'00'

From: Regional Director, Region 10 **PAUL SOUZA** Digitally signed by PAUL SOUZA
Date: 2021.05.11 12:39:00 -07'00'

Subject: Revised Request for Concurrence on Recommendation to Settle Tiehm's Buckwheat Litigation

We are in litigation with the Center for Biological Diversity (CBD) over their complaints alleging that we unreasonably delayed our 12-month finding on a petition to list the Tiehm's buckwheat and arbitrarily and capriciously denied a petition to emergency list the species. *CBD v. Bernhardt*, No. 2:20-CV-01812. On April 21, 2021, the court issued an order concluding that we violated the Endangered Species Act (Act) by missing the 12-month finding deadline and ordered us to send a proposed listing rule and proposed critical habitat rule to the Federal Register by May 21, 2021.

Our legal counsel advises that the court has made an error of law by ordering us to issue a proposed rule and proposed critical habitat instead of a 12-month finding. Therefore, DOJ filed a motion requesting alteration of the court's judgment, asking the court to order us to complete a 12-month finding instead. The motion noted that if we find that listing is warranted, we would develop a proposed rule and proposed critical habitat in a timely manner. DOJ also filed a motion requesting that the court not make a decision until May 17, 2021, on the motion to alter judgment.

The Act does not require us to issue a proposed listing rule immediately upon making or concurrently with a warranted 12-month finding; it only requires us to "promptly" issue a proposed rule. We normally publish proposed listing rules simultaneously with warranted findings but, given the time constraints imposed by the court's order, in this case we plan to issue a proposed rule a few months later. CBD opposes our motion to alter judgment, as they see an order for us to complete a 12-month finding as a way for us to delay issuing protections for the Tiehm's buckwheat, given that we could issue a warranted-but-precluded finding. However, CBD has offered to settle with us. After informal settlement discussion, we have arrived at terms we think CBD will accept.

Specifically, DOJ is authorized to offer to CBD the following dates for each document to be delivered to the Federal Register:

- Complete a 12-month finding by May 31, 2021.
- If we find that listing is warranted (which is the recommendation from the Region), propose to list the species by September 30, 2021.
- If CBD will not agree to the above offers, then also offer to propose critical habitat by January 31, 2022 (if listing is warranted) or May 2, 2022 if OMB determines the rule significant under E.O. 12866 (this will not be offered immediately, but only if necessary).
- If CBD will not agree to the above offers, then also offer to complete final listing and critical habitat rules in accordance with statutory timeframes.

DOJ is additionally authorized to offer to CBD that the Service will make a 12-month finding of warranted or not warranted, but will not make a warranted but precluded 12-month finding.

Even if the court rules in our favor and we issue a warranted 12-month finding without a proposed listing rule, CBD could file a new lawsuit or motion challenging our interpretation of “promptly,” attempting to force us to issue a proposed listing rule quickly. We might be able to persuade CBD not to challenge a warranted finding by entering into a settlement with them. Additionally, we have serious concerns about the possibility of the judge issuing an adverse ruling on our alteration of judgment motion. Should we receive an adverse ruling, we could recommend that DOJ appeal, but it may take longer than the time between the court’s order and the new date it by which it orders us to complete the finding to obtain internal approvals to file an appeal, and we have no guarantee that an appeal would be taken up in time or at all. Settling would eliminate these risks.


After discussion with counsel, considering the above, and evaluating our workload, we request your concurrence to recommend that DOJ negotiate with CBD by committing to the above terms. We request signature by the end of the day Tuesday 5/11 in order to give DOJ time to obtain internal approvals, confer with CBD, draft a stipulated remedy, and update the court no later than Friday, May 14th. If you have any questions, please contact Mike Senn, acting Assistant Regional Director for Ecological Services, at 916-225-7086 or michael_senn@fws.gov.

Concur: _____ Do not Concur: _____

Date: _____ Date: _____

From: [Trott, Matthew E](#)
To: [Williams, Martha M](#)
Cc: [Wainman, Barbara W](#); [Huggler, Matthew](#); [Monroe, Nancy S](#); [Gale, Michael](#); [Owens, Cheyenne E](#); [Welles, Caroline R](#)
Subject: weekly items happening next week
Date: Friday, May 21, 2021 6:03:43 AM

Morning, hope your trip to DC was great.

 [FWS Weekly 2021-05-19.docx](#)

happening week of May 24

- On May 24, FWS, NPS, and USGS will provide comments on a Draft Environmental Impact Study (DEIS) and Section 4(f) Evaluation being developed by the Federal Railroad Administration (FRA) in partnership with the Maryland State Department of Transportation and a private partner, Baltimore-Washington Rapid Rail, regarding the Superconducting Magnetic Levitation (MAGLEV) proposal. The DEIS consists of two proposed alternatives that have the potential to impact the Baltimore-Washington Parkway (NPS) and the Patuxent Research Refuge (FWS). Comments will be sent by the Office of Environmental Policy and Compliance. There have been media inquiries from the Washington Post requesting a copy of the comments. On May 6, House Transportation and Infrastructure Subcommittee hosted experts, officials, and executives to discuss high-speed rail opportunities where the project sponsor testified.
(05/12/2021)
- Proposed Listing of Lesser prairie chicken (Northern and Southern DPSs) is due to FR May 26
- By May 31, FWS must submit to the *Federal Register* a 12-month finding that listing the Tiehm's buckwheat is either warranted or not warranted, according to a schedule agreed upon by the DOJ and Center for Biological Diversity. If listing Tiehm's buckwheat is warranted, FWS must submit to the FR a proposed listing rule no later than September 30, 2021. If FWS determines critical habitat is prudent and determinable, a proposed designation must be submitted to the FR no later than January 31, 2022; however, if OMB determines it is a significant regulatory action under EO 12866, the FWS will have until May 2, 2022, to submit a proposed designation rule. For the 12-month finding, FWS has prepared a communications plan and news release for regional distribution. (05/19/2021)

possible

- By May 31, FWS will publish a notice of availability in the *Federal Register* of the *Birds of Conservation Concern 2021*. This report will be used for cooperative research, monitoring and management actions that can directly or indirectly affect migratory birds with the help of international, federal, state, Tribal, and private partners. The publication is required under the Fish and Wildlife Conservation Act. It includes bird species protected under the Migratory Bird Treaty Act the Service considers to be of conservation concern. It will help focus conservation attention on bird species to help prevent the need for listing under the Endangered Species Act. The report identifies 269 species of conservation concern. The report will be available online; a national news release is planned with social media and notifications to the Hill and stakeholders.
(Updated 05/12/2021)

Matt Trott

matthew_trott@fws.gov

U.S. FISH & WILDLIFE SERVICE

EA-Division of Marketing Communications

MS: EA

5275 Leesburg Pike

Falls Church, VA 22041-3803

703-358-2512

Email communication is easier and better for me

From: michael_gale@fws.gov
To: martha_williams@fws.gov; michael_gale@fws.gov; nikki_randolph@fws.gov
Subject: DCN: 074780 - Request for Concurrence on Recommendation to Settle Tiehm's Buckwheat Litigation
Date: Tuesday, May 4, 2021 7:15:42 AM
Attachments: [Tiehm s buckwheat court decision.pdf](#)
[20210503_NTR_Tiehm s buckwheat settlement.docx](#)
[Settlement Memo Tiehm s Buckwheat DTS074780 ps.pdf](#)

Good morning, Martha,

We received an urgent request from Gary Frazer this morning for you to review and sign this settlement memo this morning for Tiehm's Buckwheat. This is in your Cleared for Signature folder in DTS, and also attached here for your immediate reference.

Thanks!

Michael

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CENTER FOR BIOLOGICAL DIVERSITY,

Case No. 2:20-CV-1812 JCM (NJK)

Plaintiff(s),

ORDER

v.

DAVID BERNHARDT,

Defendant(s).

Presently before the court is plaintiff Center for Biological Diversity's motion for summary judgment. (ECF Nos. 17, 22). Defendants David Bernhardt, Douglas Furtado, Aurelia Skipwith, U.S. Bureau of Land Management, and U.S. Fish and Wildlife Service filed a response, (ECF No. 29), to which plaintiff replied, (ECF No. 31).

Also before the court is defendants' cross-motion for summary judgment. (ECF No. 34). Plaintiff responded. (ECF No. 32).

Finally before this court is defendants' motion to dismiss. (ECF Nos. 20, 25). Plaintiff filed a response, (ECF No. 28), to which defendants replied, (ECF No. 30).

I. Facts

Plaintiff Center for Biological Diversity seeks to "prevent the extinction of Tiehm's buckwheat." (ECF Nos. 1, 11).

Tiehm's buckwheat is a rare wildflower found only on "10 isolated acres of [Bureau of Land Management ("BLM")] administered public lands in the Rhyolite Ridge area of the Silver Peak Range mountains of western Nevada." (ECF No. 17). This mineral-rich region is the prospective site for the "Rhyolite Ridge open-pit lithium/boron mine," which is under review for federal permitting. (ECF No. 11).

1 BLM has already designated Tiehm's buckwheat as a "sensitive species," and the U.S.
 2 Fish and Wildlife Service ("FWS") is considering it for listing under the Endangered Species Act
 3 ("ESA"). (ECF No. 11); 90-Day Findings for Two Species, 85 Fed. Reg. 44,265, 44,267 (July
 4 22, 2020) ("90-day finding"); *see also* Environmental Conservation Online System, Tiehm's
 5 Buckwheat (*Eriogonum tiehmii*), <https://ecos.fws.gov/ecp/species/4217> ("Listing Status: Under
 6 Review"). The State of Nevada is also considering the buckwheat for listing as a "fully
 7 protected species" under NRS 503.585. (ECF No. 17).

8 On October 7, 2019, plaintiff formally petitioned the FWS to list Tiehm's buckwheat as
 9 "endangered" under the ESA. (ECF Nos. 17-4, 25-3). That petition also requested the issuance
 10 of an "emergency listing," under the Administrative Procedure Act ("APA") and ESA. (*Id.*).

11 Over nine months later, on July 22, 2020, FWS published its "90-day finding" that
 12 plaintiff's listing petition provided "substantial information" that protecting the buckwheat "may
 13 be warranted." 85 Fed. Reg. at 44,267. Yet FWS's finding declined plaintiff's request for an
 14 emergency listing on the basis that the ESA does "not provide a right to petition the issuance of
 15 such a rule." *Id.* ("[T]herefore, we are evaluating this petition under the normal process of
 16 determining if it presents substantial scientific or commercial information indicating that the
 17 petitioned action may be warranted."). FWS made no reference to the APA in making this
 18 determination.. *Id.*

19 In September 2020, plaintiff and other groups observed significant disturbance among the
 20 buckwheat's population, discovering that an estimated 40 percent of the species was impacted.
 21 (ECF No. 11). Plaintiff alleges that this destruction occurred "between July 5, 2020 and
 22 September 11, 2020," and remains a danger to the plant's continued existence. (*Id.*).

23 Although the exact cause of this destruction is uncertain,¹ the parties do not dispute the
 24 ongoing and "alarming" threat to the species. (*Id.*; *see also* ECF Nos. 25, 29).

25
 26 ¹ Many theories exist as to the species' decline, including hungry ground squirrels and
 27 human tampering. (ECF No. 17-10 ("The buckwheats appear to have been dug up by small
 28 shovels or spades. . . . We also want to note that for some number of months, Ioneer Corp. has
 had a 'missing' poster for Tiehm's buckwheat posted in the general store in nearby Dyer, NV.
 The poster offers a \$5,000 reward for confirming a new population of Tiehm's buckwheat."));
 ECF No. 29 ("The eDNA data collected as well as rodent incisor marks on the roots of the
 damaged plants strongly supported the hypothesis that a rodent in genus *Ammospermophilus*

1 On September 15, 2020, plaintiff sent a letter to FWS and BLM, documenting its recent
 2 findings of destruction. (ECF Nos. 17-8, 25-1). The letter urged immediate action to preserve
 3 the buckwheat, including a 12-month finding from FWS on plaintiff's October 2019 listing
 4 petition. (*Id.*).

5 Two days later, plaintiff renewed its listing petition under the APA through a letter to
 6 FWS and BLM. (ECF Nos. 17-9, 25-4). That same day, plaintiff filed a separate petition to
 7 BLM, requesting "immediate action consistent with its legal authorities and responsibilities
 8 under [the Federal Land Policy and Management Act ("FLPMA")] and its sensitive species
 9 policy to protect the Tiehm's buckwheat from any further harm and mitigate harm caused by the
 10 recent destruction and/or removal." (ECF Nos. 17-10, 25-2).

11 On September 22, 2020, FWS informed plaintiff that it had received its petition and was
 12 evaluating next steps. (ECF No. 17). BLM also emailed plaintiff to confirm receipt of its
 13 petition as well. (*Id.*).

14 Plaintiff initiated the instant suit on September 29, 2020. (ECF No. 1). On October 8,
 15 2020, plaintiff notified FWS of its intent to sue the agency for failure to issue a timely 12-month
 16 finding on its listing petition—the notice stated plaintiff's intent to sue immediately due to the
 17 emergency risk to the buckwheat as authorized under the ESA, 16 U.S.C. § 1540(g)(2)(C). (ECF
 18 No. 17-21).

19 On October 14, 2020, plaintiff amended its complaint, alleging three claims:

- 20 1) *Claim One*: "The [FWS] Has Unreasonably Delayed in Concluding the Center's
 21 Request to Emergency List the Tiehm's Buckwheat.

22 In the Alternative, [FWS] Has Arbitrarily and Capriciously and/or Abused its
 23 Discretion in Concluding the Center's Request and Failing to Emergency List the
 24 Tiehm's Buckwheat."

25
 26 was responsible for the damage to Tiehm's buckwheat, as reported in Dr. Grant's 2020 eDNA
 27 Report.")).

- 1 2) *Claim Two*: “The [BLM] Has Unreasonably Delayed in Concluding the Center’s
2 Request that BLM Comply with its Protection Mandate and Sensitive Species Policy
3 to Protect the Tiehm’s Buckwheat from Destruction and/or Removal.

4 In the alternative, BLM Has Arbitrarily and Capriciously and/or Abused its
5 Discretion in Concluding the Center Request and Failing to Comply with its
6 Protection Mandate and Sensitive Species Policy to Protect the Tiehm’s Buckwheat
7 from Destruction and/or Removal.”

- 8 3) *Claim Three*: “The [FWS] Has Violated the [ESA] by Failing to Make a Timely 12-
9 Month Finding on the Center’s Petition to List Tiehm’s Buckwheat as Endangered or
10 Threatened Under the ESA.”

11 (ECF No. 11). Defendants David Bernhardt, Aurelia Skipwith, and Douglas Furtado are sued in
12 their official capacities.² (*Id.*).

13 On October 27, 2020, FWS informed plaintiff that it was not “currently” planning to
14 issue an emergency listing, reiterating its position that “the [ESA] does not provide a process to
15 petition an emergency listing.” (ECF No. 17-22). Furthermore, FWS did not intend on making
16 another finding until the end of 2021. (*Id.*).

17 Plaintiff again surveyed the buckwheat on October 31, 2020, and November 16, 2020, to
18 find that the species had continued to suffer destruction alongside “new off-highway vehicle
19 impacts.” (ECF Nos. 11, 17). Plaintiff then sent letters to FWS and BLM, apprising them of
20 these recent findings and requesting steps to protect the species from imminent extinction—the
21 current pace of destruction signaled that the species may “go extinct before its next bloom cycle
22 (May/June 2020).” (ECF No. 17-23, 17-24).

23 The parties have now briefed the instant motions to dismiss and for summary judgment
24 on an expedited schedule. (ECF Nos. 17, 20, 22, 24, 25, 29, 34). On January 21, 2021, the
25 parties jointly informed this court that “discovery is not necessary . . . [and that] the parties do
26 not anticipate disclosures or discovery in this case.” (ECF No. 39).

27 ² David Bernhardt was Secretary of the U.S. Department of Interior until January 20,
28 2021. (ECF No. 25). Aurelia Skipwith was Director of U.S. Fish and Wildlife Service until
29 January 19, 2021. (*Id.*). Douglas Furtado is Bureau of Land Management Battle Mountain
30 District Manager. (*Id.*). “An action does not abate when a public officer who is a party in an
31 official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. . . .
32 Later proceedings should be in the substituted party’s name, but any misnomer not affecting the
33 parties’ substantial rights must be disregarded.” Fed. R. Civ. P. 25(d). In closing, this court will
34 instruct the clerk’s office to make the appropriate substitutions.

II. Legal Standard

A. Motion to Dismiss

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.*

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that defendant is liable for the alleged misconduct. *Id.* at 678.

When the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed the post-*Iqbal* pleading standard in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court held that:

1 First, to be entitled to the presumption of truth, allegations in a complaint or
 2 counterclaim may not simply recite the elements of a cause of action, but must
 3 contain sufficient allegations of underlying facts to give fair notice and to enable
 4 the opposing party to defend itself effectively. Second, the factual allegations that
 5 are taken as true must plausibly suggest an entitlement to relief, such that it is not
 6 unfair to require the opposing party to be subjected to the expense of discovery
 7 and continued litigation.

8 *Id.*

9 *B. Motion for Summary Judgment*

10 Rule 56 allows summary judgment when the pleadings, depositions, answers to
 11 interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no
 12 genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of
 13 law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate and dispose
 14 of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

15 The court must view all facts and draw all inferences in the light most favorable to the
 16 nonmoving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990); *Kaiser Cement Corp.*
 17 *v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). The court’s role is not to weigh
 18 the evidence but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty*
 19 *Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, to avoid summary judgment, the nonmoving
 20 party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.*

21 In determining summary judgment, the court applies a burden-shifting analysis. The
 22 moving party must first satisfy its initial burden. “When the party moving for summary
 23 judgment would bear the burden of proof at trial, it must come forward with evidence which
 24 would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case,
 25 the moving party has the initial burden of establishing the absence of a genuine issue of fact on
 26 each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d
 27 474, 480 (9th Cir. 2000) (citations omitted).

28 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an
 essential element of the non-moving party’s case; or (2) by demonstrating that the nonmoving

1 party failed to make a showing sufficient to establish an element essential to that party's case on
 2 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If
 3 the moving party fails to meet its initial burden, summary judgment must be denied and the court
 4 need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S.
 5 144, 159–60 (1970).

6 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
 7 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
 8 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
 9 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
 10 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
 11 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,
 12 809 F.2d 626, 631 (9th Cir. 1987).

13 In other words, the nonmoving party cannot avoid summary judgment by relying solely
 14 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d
 15 1040, 1045 (9th Cir. 1989). Instead, the nonmovant must go beyond the assertions and
 16 allegations of the pleadings and set forth specific facts by producing competent evidence that
 17 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

18 The evidence of the nonmovant is “to be believed, and all justifiable inferences are to be
 19 drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable
 20 or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

21 **III. Discussion**

22 Plaintiff requests defendants’ prompt action on its petitions to protect Tiehm’s
 23 buckwheat. (ECF Nos. 11, 17). Defendants argue that they are not legally mandated to take
 24 such action. (ECF Nos. 25, 29).

25 Relevant to this court’s determination, plaintiff has submitted the following to defendant
 26 agencies:

- 27 1) a 30-day notice of petition to FWS and BLM on June 12, 2019 (“30-day notice”),
- 28 (ECF No. 17-3);

- 2) an emergency listing petition to FWS under the ESA and APA on October 7, 2019 (“listing petition”), (ECF Nos. 17-4, 25-3);
- 3) a petition renewal letter to FWS on September 17, 2020 (“petition renewal”), (ECF Nos. 17-8, 25-1);
- 4) a petition letter to BLM under the FLPMA and APA on September 17, 2020 (“BLM petition”), (ECF Nos. 17-10, 25-2); and
- 5) a notice letter of intent to sue defendants on October 8, 2020 (“NOI”), (ECF No. 17-21).

To date, FWS has responded by issuing a 90-day finding in July 2020, 85 Fed. Reg. at 44,267, and sending a letter to plaintiff that it was not “currently” planning to issue an emergency listing in October 2020, (ECF No. 17-22).

Plaintiff’s first and third claims are brought against FWS, while its second claim is brought against BLM. (ECF No. 11). As to plaintiff’s first claim, the parties dispute whether private individuals can request emergency listing at all. (ECF No. 25). The second claim hinges on whether BLM has taken any final agency action. (*Id.*). Finally, the third claim turns on plaintiff’s compliance with the ESA’s notice requirements. (*Id.*).

This court grants defendants’ motion to dismiss claims 1 and 2 but denies the motion for claim 3. (*Id.*). Upon review of the cross-motions for summary judgment, this court finds that plaintiff prevails on claim 3. (ECF Nos. 17, 29). Upon surviving defendants’ procedural challenges, claim 3 rightfully requests action from FWS within 30 days of this order. (ECF No. 17). Each claim is discussed in turn.

A. Claim One: FWS’s delay in resolving plaintiff’s petition for emergency listing.

Plaintiff’s first claim alleges that FWS has unreasonably delayed responding to its request for emergency listing—or alternatively, that the FWS abused its discretion, or was arbitrary and capricious, in failing to act on the request. (ECF No. 11). Plaintiff filed its listing petition and petition renewal pursuant to APA section 553(e) which allows an “interested person . . . to petition [an agency] for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e)

1 Defendants move to dismiss, because there is no private right to petition FWS to
 2 emergency list a species; thus, FWS was not required to perform a discrete action in response to
 3 the petition. (ECF No. 25). This court agrees and dismisses plaintiff's first claim for lack of
 4 jurisdiction. *Flathead Irrigation Dist. v. Zinke*, 725 Fed. Appx. 507, 510 (9th Cir. 2018) (failure
 5 to assert a discrete action that an agency is required to take may result in claims being dismissed
 6 for lack of jurisdiction); Fed. R. Civ. P. 12(b)(1).

7 The plain language of the ESA's statutory emergency provision allows only the secretary
 8 of the interior ("Secretary")—and not private persons like plaintiff—to bypass the usual listing
 9 procedures in situations where an "emergency posing a significant risk to the well-being of any
 10 species of fish or wildlife or plants." 16 USC 1533(b)(7). This section expressly states that APA
 11 section 553 does not apply to the Secretary's decision to list a species on an emergency basis. *Id.*

12 Plaintiff argues that section 1533 "discusses rulemaking from 5 U.S.C. § 553 in the
 13 context of an issued rule and process for issuing a rule, not about petition rights to make a
 14 request for a rule in the first instance." (ECF No. 28).

15 However, the language of the provision is not so narrow. ESA section 1533 excludes the
 16 application of APA section 553. 16 U.S.C. § 1533(b)(7). This interpretation comports with
 17 other aspects of the statutory regime. *See Child. 's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090,
 18 1096 (9th Cir. 1999) ("[W]e examine not only the specific provision at issue, but also the
 19 structure of the statute as a whole, including its object and policy."). The ESA contains detailed
 20 instructions on the petition process to add a species to the threatened or endangered lists.³ 16
 21 U.S.C. § 1533(b)(3)(A).

22 In contrast, the statute does not establish any similar procedures or detail for emergency
 23 petitions. *Id.* § 1533. Finally, this interpretation of the ESA aligns with practical policy

25 ³ ESA section 1533 expressly creates procedures for "an interested person under section
 26 553(e) of Title 5" to submit a petition to list a species. 16 U.S.C. § 1533. Such procedural
 27 requirements include: "a 90-day time frame for the Secretary to act upon a petition; a standard of
 28 review that findings must be based on 'substantial scientific or commercial information
 indicating that the petitioned action may be warranted'; the requirement that the Secretary 'shall
 promptly commence a review of the status of the species' if it is found that the petitioned action
 may be warranted; and the requirement that each finding be published in the Federal Register.'" (ECF No. 25 (citing 16 U.S.C. § 1533)).

1 concerns: “[E]very petitioner would simply declare that their request constituted an emergency,
 2 thus forcing the agency to respond immediately regardless of the validity of the request or the
 3 existence of prior resource commitments or budgetary constraints. Congress knows how to
 4 fashion mandatory statutory language.” *Institute for Wildlife Protection v. Norton*, 303 F Supp.
 5 2d 1175, 1180 (W.D. Wash. 2003), *aff’d*, 149 Fed. Appx. 627 (9th Cir. 2005). This court
 6 declines to create new obligations for FWS, especially where its obligations are abundantly clear
 7 under the present statutory regime. *See Fund for Animals v. Hogan*, 428 F.3d 1059, 1063-64
 8 (D.C. Cir. 2005).

9 FWS owes no duty to act or respond to plaintiff’s requests for an emergency listing. *See*
 10 *id.* at 1180 (“Nothing about the language of this subsection indicates, either directly or indirectly,
 11 that the Congress intended that the option of emergency listing was non-discretionary with the
 12 Secretary.”); *Am. Bird Conservancy v. Kempthorne*, No. 06-cv-2641 (JAP), 2007 WL 2972548,
 13 at *7 (D.N.J. Oct. 11, 2007) (“Congress intended to leave the decision as to whether to exercise
 14 the emergency rulemaking powers. . . to the discretion of the Secretary.”). Claim 1 is dismissed
 15 because there is no justiciable claim for unreasonable delay. *Accord S.F. Baykeeper v. Whitman*,
 16 297 F.3d 877, 886 (9th Cir. 2002) (“EPA does not presently have a statutory duty to act.
 17 Therefore, there can be no unreasonable delay”).

18 Plaintiff’s alternate claim is dismissed as well because there was no final agency action
 19 subject to review under the APA. (ECF No. 11); *see* 5 U.S.C. § 551(13) (defining agency action
 20 as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or
 21 denial thereof, or failure to act”). As discussed, plaintiff does not have a right to petition FWS
 22 for an emergency listing under the ESA, and thus its petitions fail to mandate action from the
 23 agency. FWS’s responses to date were gratuitous—they were not “the consummation of the
 24 agency’s decision-making process and determine rights or legal obligations that have legal force
 25 or expected immediate compliance.” *Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084,
 26 1095 (9th Cir. 2014).

27 This court dismisses the first claim with prejudice.

28 . . .

1 *B. Claim Two: BLM's delay in resolving plaintiff's petition.*

2 Plaintiff alleges that BLM has unreasonably delayed its response to plaintiff's petition—
3 or alternatively, that BLM abused its discretion, or was arbitrary and capricious, in failing to act.
4 (ECF No. 11). Plaintiff seeks an order directing BLM to respond to its petition by a “date
5 certain,” (ECF No. 17), in light of BLM's failure to act within a “reasonable amount of time,” 5
6 U.S.C. § 555(b).

7 Defendants argue that plaintiff fails to allege any ongoing agency proceeding or
8 adjudication that warrants action from BLM. *See Block v. Securities and Exchange Commission*,
9 50 F.3d 1078 (D.C. Cir. 1995) (rejecting the notion that merely submitting a request to an agency
10 compels the agency's action).

11 APA section 555 permits interested persons to appear in an ongoing agency proceeding.
12 5 U.S.C. § 555(b) (“[A]n interested person may appear before an agency . . . in a proceeding . . .
13 in connection with an agency function.”); *see Corp. v. LTV Corp.*, 496 U.S. 633, 635 (1990).
14 The section is “frequently invoked by third parties seeking to participate in agency proceedings.”
15 *Animal Legal Def. Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15, 21 (D.D.C. 2017) (citing Jeffrey D.
16 Litwack, *Guide to Federal Agency Adjudication* 73 (2d ed. 2012)). However, “[n]o court or
17 agency has ever suggested that § 555(b) grants any interested person a right to *compel* agency
18 action. Rather, § 555(b) is universally understood to establish the right of an interested person to
19 *participate* in an on-going agency proceeding.” *Block*, 50 F.3d at 1085 (emphasis added)

20 Plaintiff does not identify any ongoing BLM proceedings relating to the buckwheat.
21 (ECF No. 11). Courts have only read section 555 to compel an agency response when the
22 agency has failed to respond for an “egregious” period of time. *See In re Nat. Res. Def. Council*,
23 *Inc.*, 956 F.3d 1134, 1140 (9th Cir. 2020) (finding unreasonable delay of more than ten years in
24 responding to a petition); *In re A Cmty. Voice*, 878 F.3d 779, 787 (9th Cir. 2017) (finding
25 unreasonable delay of eight years in acting upon a petition).

26 This court finds that BLM's response is not egregiously delayed. (ECF No. 25). Plaintiff
27 submitted the BLM petition on September 17, 2020, and filed the instant suit only twelve days
28 later. (ECF No. 11). Considering that timeline, it is fair to accept defendants' argument that

1 “BLM reasonably continues to develop its plan, because management of this situation is an
 2 iterative process that necessarily evolves in response to changing conditions such as decreases in
 3 herbivory and increases in human foot traffic caused by unwanted public attention.” (ECF No.
 4 25).

5 This court also finds that BLM has not “unreasonably delayed” its compliance with the
 6 FLPMA, 43 U.S.C. § 1732, or the agency’s Sensitive Status Species Management Manual—
 7 neither of which contain a discrete mandate to the agency. (ECF No. 11).

8 FLPMA section 1732 is not a “specific statutory command requiring” agency action.
 9 *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004) (hereinafter “SUWA”); *see*
 10 43 U.S.C. § 1732 (requiring BLM to “manage the public lands . . . in accordance with the land
 11 use plans . . . when they are available”); 43 U.S.C. § 1782(c) (requiring BLM “to manage
 12 [wilderness study areas] . . . in a manner so as not to impair the suitability of such areas for
 13 preservation as wilderness”). Indeed, section 1732(b) “directs the BLM to achieve the broad
 14 objectives of preventing unnecessary or undue degradation of public lands . . . [and] ‘leaves [the]
 15 BLM a great deal of discretion in deciding how to achieve’ these objectives, because it does not
 16 specify precisely how the BLM is to meet them.” *Gardner v. U.S. Bureau of Land Mgmt.*, 638
 17 F.3d 1217, 1222 (9th Cir. 2011) (quoting *SUWA*, 542 U.S. at 66). Here, BLM remains
 18 comfortably within its discretion in deciding how best to comply with section 1732(b)’s broad
 19 mandate.

20 Similarly, mere policy documents such as BLM’s manual cannot serve as the basis for a
 21 claim under APA section 706(1). Plaintiff attempts to invoke the manual in demanding BLM’s
 22 protection of “BLM sensitive species” through specific actions. (ECF No. 11). However, the
 23 manual only outlines broad objectives and duties—it does not dictate specific action. U.S. Dep’t
 24 of Interior Bureau of Land Mgmt. Manual Transmittal 6840, (Special Status Species Mgmt. (Rel.
 25 6-125 (12/12/2008))).

26 Here, BLM has acted within its discretion, and this court declines to oversee and dictate
 27 the actions of the agency unless expressly required by law. *SUWA*, 542 U.S. at 66 (“The
 28 prospect of pervasive oversight by federal courts over the manner and pace of agency

1 compliance with such congressional directives is not contemplated by the APA.”). Accordingly,
 2 plaintiff’s second claim is dismissed with prejudice.

3 *C. Claim 3: FWS’s failure to make its 12-month finding on plaintiff’s petition.*

4 Finally, plaintiff alleges that FWS has failed to make its mandatory 12-month finding on
 5 its petition to list the Tiehm’s buckwheat as “endangered” or “threatened” under the ESA. (ECF
 6 No. 11).

7 ESA section 1540(g) permits “citizen suits” where “any person may commence a civil
 8 suit on his own behalf” against “any person, including the United States and any other
 9 governmental instrumentality or agency.” 16 U.S.C. § 1540(g).

10 Plaintiff has appropriately brought its third claim under this provision, and not APA
 11 section 706(1). *See BremAir Disposal v. Cohen*, 156 F.3d 1002, 1004-05 (9th Cir. 1998)
 12 (finding that federal courts lack jurisdiction over APA claims whenever Congress has provided
 13 another adequate remedy). Indeed, plaintiff’s notice of intent to sue (“NOI”) directly cites the
 14 ESA’s citizen suit provision as the basis for the immediate filing of its suit. (ECF No. 11). The
 15 amended complaint fashions claim 3 as an ESA citizen suit and requests declaratory and
 16 injunctive relief as provided under the statute. (*Id.*).

17 However, citizen suits under ESA section 1540 require a 60-day written notice to the
 18 Secretary “setting forth the reasons why an emergency is thought to exist with respect to
 19 an endangered species or a threatened species in the State concerned.” 16 U.S.C. § 1540(g)(2).
 20 But this notice requirement includes an exception: “[n]o action may be commenced under
 21 subparagraph (1)(C) of this section prior to sixty days after written notice has been given to
 22 the Secretary; except that such action may be brought immediately after such notification in the
 23 case of an action under this section respecting an emergency posing a significant risk to the well-
 24 being of any species of fish or wildlife or plants.” *Id.* § 1540(g)(2)(C).

25 Defendants argue that plaintiff’s claim should be dismissed for failure to comply with
 26 this notice requirement. (ECF No. 25). Indeed, plaintiff provided a notice of intent to bring a
 27 citizen suit on October 8, 2020, and amended its complaint to add claim 3 only six days later.
 28 (ECF No. 11).

1 This court finds that plaintiff plausibly alleges an “emergency posing a significant risk to
 2 the well-being of any species of fish or wildlife or plants” sufficient to bypass the notice
 3 requirement. 16 U.S.C. § 1540(g)(2)(C). Plaintiff’s pleadings demonstrate a well-founded
 4 concern for the species, and all parties acknowledge the steep decline in the buckwheat’s
 5 population. (ECF No. 11).

6 Defendants respond that plaintiff cannot label its own case as an emergency, especially
 7 when the agency has already “denied” its petition to emergency list and signaled its position that
 8 an emergency does not exist. (ECF No. 25). However, FWS’s denial of emergency listing was
 9 mainly based on the agency’s position that plaintiff has no right to ask for such listing. (*Id.*).
 10 Although this court agrees with defendants that plaintiff cannot request emergency listing, that
 11 does not mean that an emergency cannot exist in the context of the ESA’s notice requirement.

12 Accordingly, plaintiff’s third claim survives defendants’ procedural challenges. This
 13 court denies defendants’ request to dismiss claim 3, and proceeds to examine the cross-motions
 14 for summary judgment on this claim. (ECF No. 25).

15 Plaintiff moves for summary judgment on the question of FWS’s failure to issue a timely
 16 12-month finding. (ECF No. 17). Plaintiff requests that FWS submit “a proposed listing rule
 17 and proposed critical habitat rule for the species” within 30 days of the court’s order for
 18 publication in the Federal Register. (*Id.*). To date, FWS has not done so. *See* Environmental
 19 Conservation Online System, Tiehm’s Buckwheat (*Eriogonum tiehmii*),
 20 <https://ecos.fws.gov/ecp/species/4217> (“Listing Status: Under Review”).

21 Defendants admit liability and do not “oppose a remedy directing [FWS] to make the 12-
 22 month finding by a reasonable and feasible date set by the Court.” (ECF No. 29). However,
 23 FWS requests additional time to make its finding—until September 30, 2021, citing FWS’s
 24 investigation of this matter and workload. (*Id.*). Courts may exercise their discretion to fashion
 25 a remedy by considering whether “the official involved . . . has in good faith employed the
 26 utmost diligence in discharging his statutory responsibilities.” *Nat. Res. Def. Council v. Train*,
 27 510 F.2d 692, 713 (D.C. Cir. 1975).

1 Upon review of defendants' obligations, this court finds no reason to grant additional
 2 time for FWS to make its admittedly overdue finding. *See Telecommunications Research Action*
 3 *Center v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984). This court does not do so "to punish a
 4 delinquent agency." *Sierra Club v. Thomas*, 658 F. Supp. 165, 172 (N.D. Cal. 1987). Instead,
 5 defendants fail to persuasively argue that the 30-day deadline is impossible or infeasible. *See*
 6 *Am. Lung Ass'n v. Browner*, 884 F. Supp. 345, 347 (D. Ariz. 1994); *see also Ctr. for Biological*
 7 *Diversity v. Kempthorne*, No. C 08-1339 CW, 2008 U.S. Dist. LEXIS 34753, *14 (N.D. Cal.
 8 Apr. 28, 2008) (ordering final listing determination for polar bear within 17 days of order);
 9 *Marbled Murrelet v. Lujan*, No. C91-522WDR, 1992 U.S. Dist. LEXIS 14645, *3 (W.D. Wash.
 10 Sept. 15, 1992) (ordering final listing determination for marbled murrelet three days after the
 11 order). Indeed, by the time of this order, more than enough time has passed for defendants' 12-
 12 month finding on plaintiff's petition. Plaintiff is correct to note that "[t]o effectuate the purpose
 13 underlying Section 4's mandatory, nondiscretionary timelines, courts order injunctive relief to
 14 require the Service to make overdue ESA listing determinations by a date certain according to a
 15 reasonableness standard." (ECF No. 17).

16 Thus, this court grants summary judgment for plaintiff on claim 3. By its own admission,
 17 FWS has violated the ESA by failing to issue a timely 12-month finding as to whether it intends
 18 to list Tiehm's buckwheat as an endangered species. (ECF Nos. 17, 29). FWS is ordered to
 19 submit a proposed listing rule and proposed critical habitat rule for the species within 30 days of
 20 this order for publication in the Federal Register.

21 Finally, in light of the change in administration, the clerk's office is instructed to
 22 substitute Secretary of Interior Deb Haaland in place of David Bernhardt, and Acting Director of
 23 FWS Martha Williams in place of Aurelia Skipwith. A "[public] officer's successor is
 24 automatically substituted as a party. Later proceedings should be in the substituted party's
 25 name." Fed. R. Civ. P. 25(d) ("The court may order substitution at any time, but the absence of
 26 such an order does not affect the substitution.").

27 ...

28 ...

1 **IV. Conclusion**

2 Accordingly,

3 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that plaintiff's motion for
4 summary judgment (ECF No. 17) be, and the same hereby is, GRANTED in part and DENIED
5 in part. Summary judgment is granted for plaintiff on its third claim.

6 IT IS FURTHER ORDERED that defendants' cross-motion for summary judgment
7 (ECF No. 34) be, and the same hereby is, DENIED as moot.

8 IT IS FURTHER ORDERED that defendants' motion to dismiss (ECF Nos. 20, 25) be,
9 and the same hereby is, GRANTED in part and DENIED in part. Plaintiff's first and second
10 claims are dismissed with prejudice.

11 IT IS FURTHER ORDERED that defendant FWS submit a proposed listing rule and
12 proposed critical habitat rule for the species, within 30 days of this order, for publication in
13 the Federal Register.

14 The clerk is ordered to substitute Deb Haaland in place of defendant David
15 Bernhardt, and Martha Williams in place of defendant Aurelia Skipwith.

16 The clerk is further ordered to enter judgment and close the case accordingly.

17 DATED April 21, 2021.

18 
19 UNITED STATES DISTRICT JUDGE

DTS # 074780

Please provide a brief description in bullet format.

- We lost a court case brought by the Center for Biological Diversity (CBD) challenging our denial of their petition for emergency listing of the Tiehm's buckwheat and alleging we missed the 12-month listing finding deadline.
- The court ordered us to issue a proposed listing rule and proposed critical habitat rule by May 21, 2021, which is a very unfavorable outcome for us.
- DOJ has filed a motion for reconsideration with the court, but we are trying to settle with CBD before the court rules on the motion in an effort to get more favorable terms.
- We request the Director's concurrence with this recommendation.
- CBD's responsive brief is due Thursday, May 6, so we need to make an offer before then to ensure we are in the best position.

Controversial:

Non-Controversial: X

Contact for additional information: Mike Senn, Assistant Regional Director for Ecological Services, at 916-414-6533 or michael_senn@fws.gov



United States Department of the Interior

FISH AND WILDLIFE SERVICE

2800 Cottage Way, Suite W-2606
Sacramento, California 95825



In Reply Refer to:
FWS/IR10/ DCN074780

Memorandum

To: Principal Deputy Director, Exercising the Delegated Authority of the Director

Through: Assistant Director, Ecological Services

From: Regional Director, Region 10

Subject: Request for Concurrence on Recommendation to Settle Tiehm's Buckwheat Litigation

We are in litigation with the Center for Biological Diversity (CBD) over their complaints alleging that we unreasonably delayed our 12-month finding on a petition to list the Tiehm's buckwheat and arbitrarily and capriciously denied a petition to emergency list the species. *CBD v. Bernhardt*, No. 2:20-CV-01812. On April 21, 2021, the court issued an order concluding that we violated the Endangered Species Act (Act) by missing the 12-month finding deadline and ordered us to send a proposed listing rule and proposed critical habitat rule to the Federal Register by May 21, 2021.

Our legal counsel advises that the court has made an error of law by ordering us to issue a proposed rule and proposed critical habitat instead of a 12-month finding. Therefore, DOJ filed a motion requesting alteration of the court's judgment, asking the court to order us to complete a 12-month finding instead. The motion noted that if we find that listing is warranted, we would develop a proposed rule and proposed critical habitat in a timely manner. DOJ is also filing a motion seeking to stay the proceedings until we have a ruling from the judge on the alteration of judgment motion and seeking a ruling from the judge by May 10th. On April 29, the court set a briefing schedule on our motion; CBD must reply by Thursday, May 6, and DOJ will have a final reply on Sunday, May 9th.

The Act does not require us to issue a proposed listing rule immediately upon making or concurrently with a warranted 12-month finding; it only requires us to "promptly" issue a proposed rule. We normally publish proposed listing rules simultaneously with warranted findings but, given the time constraints imposed by the court's order, in this case we plan to issue a proposed rule a few months later. CBD opposes our motion for reconsideration, as they see an order for us to complete a 12-month finding as a way for us to delay issuing protections for the Tiehm's buckwheat, given that we could issue a warranted-but-precluded finding. However, CBD has offered to settle with us and would agree to a stipulated order requiring the Service to deliver to the Federal Register a 12-month finding within 30 days and that if the finding is warranted, to publish a proposed listing rule and proposed critical habitat "shortly thereafter."

Since CBD's idea of "shortly" is likely different from the Service's, we also propose to agree to submit final rules to the FR in accordance with the statutory timeframes to encourage settlement.

Specifically, we are seeking authorization to offer to CBD the following dates:

- Complete a 12-month finding by May 31, 2021.
- If we find that listing is warranted (which is the recommendation from the Region), propose to list the species by September 30, 2021.
- Complete final listing and critical habitat rules in accordance with statutory timeframes.
- If CBD will not agree to those terms, offer that we will complete a 12-month finding by May 21, 2021 instead of by May 31, 2021.
- If CBD will not agree to the above offers, then also offer to propose critical habitat by January 31, 2022 (if listing is warranted) or May 2, 2022 if OMB determines the rule significant under E.O. 12866 (this will not be offered immediately, but only if necessary).

Even if the court rules in our favor and we issue a warranted 12-month finding without a proposed listing rule on May 21, 2021, CBD could file a new lawsuit or motion challenging our interpretation of "promptly," attempting to force us to issue a proposed listing rule quickly. We might be able to persuade CBD not to challenge a warranted finding by entering into a settlement with them. Additionally, we have serious concerns about the possibility of the judge issuing an adverse ruling on our alteration of judgment motion or simply not issuing a new ruling at all before the expiration of 30 days. Should we receive an adverse ruling on May 10th, 2021, we could recommend that DOJ appeal, but it may take longer than the time between May 10th and May 21st to obtain internal approvals to file an appeal, and we have no guarantee that an appeal would be taken up in time or at all. Settling would eliminate these risks.

After discussion with counsel, considering the above, and evaluating our workload, we request your concurrence to recommend that DOJ negotiate with CBD by committing to the above regulatory timeframes. Our window for settlement narrows significantly on May 6 once CBD files their reply, so we request your concurrence by Monday, May 3, to give DOJ time to negotiate.

If you have any questions, please contact Mike Senn, acting Assistant Regional Director for Ecological Services, at 916-225-7086 or michael_senn@fws.gov.

Concur: _____ Do not Concur: _____

Date: _____ Date: _____

From: [Gale, Michael](#)
To: [Williams, Martha M](#)
Subject: [FOR SIGNATURE](#)
Date: Tuesday, May 4, 2021 4:22:51 PM
Attachments: [Settlement Memo Tiehm s Buckwheat DTS074780 SIGN.pdf](#)

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Michael Gale | Chief of Staff, Office of the Director | U.S. Fish & Wildlife Service | (202) 273-3288 (office), (571) 982-2158 (cell) | Pronouns: he/him



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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Sacramento, California 95825



In Reply Refer to:
FWS/IR10/ DCN074780

Memorandum

To: Principal Deputy Director, Exercising the Delegated Authority of the Director

Through: Assistant Director, Ecological Services **GARY FRAZER**
Digitally signed by GARY FRAZER
Date: 2021.05.03 21:47:21 -04'00'

From: Regional Director, Region 10 **PAUL SOUZA**
Digitally signed by PAUL SOUZA
Date: 2021.05.03 12:41:02 -07'00'

Subject: Request for Concurrence on Recommendation to Settle Tiehm's Buckwheat Litigation

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Concur: _____ Do not Concur: _____

Date: _____ Date: _____