

WHEREAS, on December 16, 2009, the Service published a 90-day finding pursuant to 16 U.S.C. § 1533(b)(3)(A) in which the Service found that a petition presented substantial information indicating that the listing of the Chisos coral-root (*Hexalectris revoluta*) throughout all or a significant portion of its range may be warranted, and initiated a status review of the species (*see* 74 Fed. Reg. 66,866, 66,902); and on December 1, 2011, the Service sent the Center a letter stating that it considered this 90-day finding on the Chisos coral-root to constitute a positive 90-day finding for the Coleman's coral-root as well;

WHEREAS, on September 28, 2010, the Center submitted to the Service a petition requesting that the Service list the Humboldt marten (*Martes americana humboldtensis*) as a threatened or endangered species pursuant to the ESA;

WHEREAS, on January 12, 2012, the Service published a 90-day finding pursuant to 16 U.S.C. § 1533(b)(3)(A) in which the Service found that the September 28, 2010 petition presented substantial information indicating that the listing of the Humboldt marten throughout all or a significant portion of its range may be warranted, and initiated a status review of the species (*see* 77 Fed. Reg. 1900);

WHEREAS, the Center filed the three above-captioned actions to compel the Service to publish 12-month findings on these three species pursuant to 16 U.S.C. § 1533(b)(3)(B): No. 12-CV-00861 (EGS) (filed May 30, 2012, regarding the Big Sandy crayfish); No. 12-CV-01073 (EGS) (filed June 29, 2012, regarding the Coleman's coral-root); No. 12-CV-01091 (EGS), (filed July 2, 2012, regarding the Humboldt marten);

WHEREAS, on July 12, 2011, the Center and Defendants filed the second of two stipulated settlement agreements in *In re Endangered Species Act Section 4 Litigation*, Misc.

Action No. 10-377 (EGS), MDL Docket No. 2165, Docket No. 42-1 (“MDL Agreement”), which was approved by the Court on September 9, 2011;

WHEREAS, paragraph B.10 of the MDL Agreement states that if the Center “[i]n a single fiscal year from FY 2012 through FY 2016, obtains from any deadline suit, challenge to any warranted-but-precluded finding, or from deadline suits and challenges to warranted-but-precluded findings combined, a total of more than three remedies requiring the Service to make additional findings, listing determinations, or critical habitat determinations prior to April 1, 2017, then the dates specified in paragraphs B(1) through B(3) of [the MDL] Agreement (with the exception of the dates for the greater sage-grouse range-wide (including Columbia DPS), west coast fisher DPS, and Pacific Walrus) shall be replaced with the date of FY 2016.”;

WHEREAS, on September 25, 2012, the Court in the three above-captioned actions granted the Center’s motions for summary judgment (*see* No. 12-CV-00861, Docket No. 20), and ordered the parties into mediation with Magistrate Judge Facciola to negotiate dates by which the overdue findings would be made;

WHEREAS, the Court’s September 25, 2012 order stated that the dates agreed to by the parties for issuing the three 12-month findings “shall constitute the plaintiff’s three remedies for Fiscal Year 2012 under the terms of the” MDL Agreement;

WHEREAS, the parties, through their authorized representatives, have engaged in mediation under Magistrate Judge Facciola’s supervision, and have reached agreement as to the dates for the Service’s submission of the three 12-month findings at issue in the three above-captioned actions, as required by the Court’s September 25, 2012 order;

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

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

1. The terms “ESA,” “species,” “critical habitat,” “90-day finding,” “12-month finding,” “Listing Program,” “Service,” “deadline suit,” “deadline suits,” and “finding,” have the same meaning and definitions as provided in section A of the MDL Agreement.

2. On or before the following dates, the Service shall review the status of the following species and submit to the Federal Register a 12-month finding as to whether listing of that species as a threatened or endangered species is (a) not warranted; (b) warranted; or (c) warranted but precluded by other pending proposals, pursuant to 16 U.S.C. § 1533(b)(3)(B):

- a. Coleman’s coral-root by December 31, 2013.
- b. Humboldt marten by April 1, 2015.
- c. Big Sandy crayfish by April 1, 2015.

3. Either party may seek to modify the deadlines specified in paragraph 2 for good cause shown, consistent with the Federal Rules of Civil Procedure. In that event, or in the event that either party believes that the other party has failed to comply with any term or condition of this Settlement Agreement (“Agreement”), the parties shall use the dispute resolution procedures specified in paragraph 4 below.

4. 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 paragraph 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. 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. In the event that Defendants fail to meet a deadline and have not sought to modify it, Plaintiff's first remedy shall be a motion to enforce the terms of this Agreement. This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt of court.

5. In entering into this Agreement, one of the Service's assumptions is that resources available to the Listing Program in each fiscal year the Agreement is in effect will not be substantially less than the FY 2011 level. If, at any time before all the requirements of this Agreement have been satisfied, the Service concludes that it will not have sufficient resources to complete the actions required by this Agreement and the actions required by other court orders or court-approved settlement agreements, the Service may seek the Center's consent to modify this Agreement through a written stipulation filed with the Court in accordance with paragraph 4 of this Agreement. If the Service is unable to obtain the Center's consent, the Service may seek to modify the terms of this Agreement in accordance with paragraph 4 of this Agreement.

6. If the Center in a single fiscal year from FY 2013 through FY 2016:

- a. files one or more deadline suits or challenges to warranted-but-precluded findings against the Service seeking, in total, findings, listing determinations, or critical habitat determinations for more than 10 species; or
- b. obtains from any deadline suit, challenge to any warranted-but-precluded finding, or from deadline suits and challenges to warranted-but-precluded findings combined, a total of more than three remedies requiring the Service to make additional findings, listing determinations, or critical habitat determinations prior to April 1, 2017;

then the dates specified in paragraphs 2(a)-(c) of this Agreement shall be replaced with the date FY 2017. For purposes of subsections (a) and (b) of this paragraph, a “remedy” shall mean a stipulated settlement agreement or judicially enforceable order requiring the Service to make any finding, listing determination, or critical habitat determination for a species. Such remedy is obtained as of the date of the parties’ filing of a stipulated settlement agreement with a court, or, if remedy is contested, the date of a court order. Nothing in this paragraph shall be construed as precluding the parties from separately seeking modification or enforcement of the terms in this Agreement in accordance with paragraph 4 of this Agreement.

7. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a reasonable timeline for issuing a 12-month finding under 16 U.S.C. § 1533 in any other proceeding regarding the Service’s implementation of the ESA.

8. Defendants agree that Plaintiff is the “prevailing party” in this action, and agree to pay Plaintiff’s reasonable attorneys’ fees and costs pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g).

9. The parties agree to the following schedule for addressing attorney's fees and costs:
- a. Within 30 days of the entry of the order by this Court approving this Agreement, the Center will provide to Defendants an itemization of the attorney's fees and costs it seeks to recover in the three above-captioned actions to allow Defendants to assess whether settlement of such fee claims is possible.
 - b. Within 60 days of Defendants' receipt of this itemization of the Center's proposed fees and costs, the parties will notify the Court of whether they have reached a settlement as to the payment of the Center's attorney's fees and costs by Defendants.
 - c. If the parties have not reached agreement on attorney's fees and costs at the time they provide this notice to the Court, the Center may move within 30 days of that date for the Court to award attorney's fees and costs. Briefing and adjudication of the Center's motion for fees and costs and Defendants' opposition will then proceed as provided in LCvR 7. In the event the Center files such a motion, Defendants reserve the right to contest the reasonableness of the amount of Plaintiff's claimed fees and costs, including hourly rates and the number of hours billed.
10. The parties agree that Plaintiff reserves the right to seek additional fees and costs incurred subsequent to this Agreement arising from a need to enforce or defend against efforts to modify the underlying schedule outlined in paragraph 2 or for any other continuation of this action. By this Agreement, Defendants do not waive any right to contest fees claimed by

Plaintiff or Plaintiff's counsel, including the hourly rate and number of hours billed, in any future litigation or continuation of the present action. Further, this Agreement as to attorneys' fees and costs has no precedential value and shall not be used as evidence in any other attorneys' fees litigation.

11. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the Administrative Procedure Act ("APA"), or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to the Service by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination. To challenge any final rule issued in accordance with this Agreement, Plaintiff will be required to file a separate action. Plaintiff reserves the right to challenge substantive decisions made by Defendants pursuant to paragraph 2, above, and Defendants reserve the right to raise any applicable claims or defenses.

12. 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.

13. The parties agree that this Agreement was negotiated in good faith and that this Agreement constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.

14. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to agree to the Court's entry of the terms and conditions of this Agreement and do hereby agree to the terms herein.

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

16. Upon approval of this Agreement by the Court, the parties agree that the terms of the Court's September 25, 2012 summary judgment order in the three above-captioned actions (Docket No. 21) have been satisfied with respect to the Court's requirement that the parties engage in mediation and resolve the "dates by which defendants shall make these overdue determinations," and that that the Court's adoption of an order to enforce the three deadlines provided in Paragraph 2 Agreement will constitute a final and complete adjudication of all counts in Plaintiff's three above-captioned actions, except for any further proceedings regarding attorney's fees and costs as provided for in Paragraphs 8 and 9. 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).

Respectfully submitted this 14th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2013, I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will send notification of such to the attorneys of record:

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