

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**PACIFIC NORTHWEST REGIONAL
COUNCIL OF CARPENTERS; SISKIYOU
COUNTY, CALIFORNIA; AMERICAN
FOREST RESOURCE COUNCIL;
HAMPTON AFFILIATES; THE MURPHY
COMPANY; ROUGH & READY LUMBER
LLC; PERPETUA FORESTS COMPANY;
SENECA SAWMILL COMPANY; SENECA
JONES TIMBER COMPANY; SWANSON
GROUP MFG. LLC; and TRINITY RIVER
LUMBER COMPANY,**

Plaintiffs,

**LEWIS COUNTY; SKAMANIA COUNTY;
and KLICKITAT COUNTY,**

Plaintiff-Intervenors,

v.

DAVID L. BERNHARDT, Secretary of the
Interior; and **AURELIA SKIPWITH**, Director,
U.S. Fish and Wildlife Service,

Defendants.

Case No. 13-361-RJL

**STIPULATED SETTLEMENT
AGREEMENT AND [PROPOSED]
ORDER**

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between Plaintiffs Pacific Northwest Regional Council of Carpenters, et al. (“Plaintiffs”), Plaintiff-Intervenors Lewis County, et al. (“Plaintiff-Intervenors”), and Defendants David Bernhardt, in his official capacity as Secretary of the Interior, and Aurelia Skipwith, in her official capacity as Director of the U.S. Fish & Wildlife Service (“Service”) (collectively, “Defendants”).

By and through their undersigned counsel, Plaintiffs, Plaintiff-Intervenors, and Defendants (collectively, the “Parties”) state:

WHEREAS, in 1990, the Service listed the northern spotted owl, *Strix occidentalis caurina* (“NSO”), as a threatened species pursuant to Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(a), 55 Fed. Reg. 26,114 (June 26, 1990);

WHEREAS, pursuant to Section 4(b) of the ESA, 16 U.S.C. § 1533(b), the Service designated approximately 6.9 million acres as critical habitat for the NSO in Washington, Oregon, and California, 57 Fed. Reg. 1796 (Jan. 15, 1992);

WHEREAS, the Service revised the critical habitat designation in 2008 to cover approximately 5.3 million acres, 73 Fed. Reg. 47,326 (Aug. 13, 2008), and that 2008 designation was remanded to the Service by the United States District Court for the District of Columbia in *Carpenters Industrial Council v. Salazar*, No. CV 08–1409 (EGS), 734 F. Supp. 2d 126 (D.D.C. 2010);

WHEREAS, in March 2012, the Service issued a proposed revised critical habitat rule, 77 Fed. Reg. 14,096 (Mar. 8, 2012), and in December 2012 a final revised designation, which designated approximately 9.5 million acres as critical habitat for the NSO, 77 Fed. Reg. 71,876 (Dec. 4, 2012) (“2012 Final Rule”);

WHEREAS, this action was filed in 2013 alleging that the 2012 Final Rule violated the ESA, Administrative Procedure Act (“APA”), and other statutes; the Court dismissed the action in 2015, *Carpenters Indus. Council v. Jewell*, 139 F. Supp. 3d 7 (D.D.C. 2015), and the United States Court of Appeals for the District of Columbia Circuit reversed and remanded, *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017);

WHEREAS, in November 2018, the United States Supreme Court issued its opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (“*Weyerhaeuser*”), concerning a designation of critical habitat, and Plaintiffs maintain that the 2012 Final Rule is unlawful under the holding of *Weyerhaeuser*;

WHEREAS, the Parties, through their authorized representatives, and without any admission or final adjudication of the issues of fact or law with respect to Plaintiffs’ and Plaintiff-Intervenors’ claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiffs’ and Plaintiff-Intervenors’ respective Complaints in this action;

WHEREAS, the Service intends to engage in a rulemaking to consider whether areas designated under the 2012 Final Rule should be excluded from the critical habitat designation pursuant to Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), and at the Service’s discretion, the Service may, but is not required by this Agreement to, consider whether there is any basis on which to revisit any other aspect or aspects of the 2012 critical habitat designation for the NSO as a whole.

NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. The Service shall submit a proposed revised critical habitat rule that identifies

proposed exclusions under ESA Section 4(b)(2) to the Federal Register on or before July 15, 2020.

2. The Service shall submit to the Federal Register a final revised critical habitat rule on or before December 23, 2020, or withdraw the proposed rule by that date if the Service determines not to exclude any areas from the designation under ESA Section 4(b)(2).

3. Although Defendants currently expect to meet the deadlines in paragraphs 1 and 2, Defendants may move the Court to extend the deadlines for good cause. Plaintiffs and Plaintiff-Intervenors expressly reserve the right to object to any such request. Any disputes between the Parties regarding satisfaction of the Service's obligations under paragraphs 1-2 of this Agreement are subject to the dispute resolution procedures set forth in paragraph 10 below.

4. Upon approval by the Court of this Agreement, the Court shall dismiss Plaintiffs' and Plaintiff-Intervenors' claims in this case with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2), except the Court shall retain jurisdiction to resolve any motion for attorneys' fees and costs presented to the Court pursuant to paragraph 6 below.

5. Nothing in this Agreement shall be construed or offered as evidence in any proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact or law concerning the claims settled under this Agreement or any similar claims brought in the future. Except as expressly provided in this Agreement, none of the Parties waives or relinquishes any legal rights, claims, or defenses it may have. This Agreement is executed for the sole purpose of settling Plaintiffs' and Plaintiff-Intervenors' Complaints in this action, and nothing herein shall be construed as having any precedential value and/or preclusive effect as to the merit of any claims.

6. Upon dismissal of this lawsuit pursuant to paragraph 4, the Parties agree to seek

to resolve Plaintiffs' and Plaintiff-Intervenors' claims for reasonable attorneys' fees and costs incurred in connection with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), or any other applicable authority. If the Parties are unable to resolve this issue, Plaintiffs and Plaintiff-Intervenors reserve the right to file motions for attorneys' fees and costs. Defendants reserve all defenses to any motion for attorneys' fees and costs, including with respect to Plaintiffs' and Plaintiff-Intervenors' entitlement to fees and costs and the amount of any fees and costs.

7. This Agreement only requires the Service to take the actions specified in paragraphs 1-2. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Defendants take action in contravention of the ESA, the 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.

8. The obligations imposed on the Service under this Agreement can only be undertaken using appropriated funds. No provision of this Agreement shall be interpreted as, or shall constitute, a commitment or requirement that the United States is obligated to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provisions of law.

9. 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 except as expressly stated in this Agreement. This Agreement contains all of the agreement between the Parties, and is intended to be the final and sole agreement between the Parties. The Parties agree that any

prior or contemporaneous representations or understanding not explicitly contained in this written Agreement, whether written or oral, are of no further legal or equitable force or effect.

10. In the event of a disagreement between the Parties concerning the interpretation or completion of any aspect of this Agreement, the dissatisfied party shall provide the other parties with written notice of the dispute and a request for negotiations. The Parties shall meet and confer (in-person meeting not required) in order to attempt to resolve the dispute within 15 business days of the written notice, or such time thereafter as is mutually agreed. The Parties agree that contempt of court is not an available remedy under this Agreement.

11. The Parties agree that Plaintiffs and Plaintiff-Intervenors reserve the right to challenge the final determination on the proposed revised critical habitat rule required under paragraph 2 in a separate action, and Defendants and the Service reserve all defenses to such action.

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

13. 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.

14. 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 or enforce such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

IT IS HEREBY STIPULATED, this 13th day of April, 2020.

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Deputy Assistant Attorney General

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MEREDITH L. FLAX, Assistant Chief

/s/ Clifford E. Stevens, Jr.

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