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21 Counsel for Plaintiffs

22 **IN THE UNITED STATES DISTRICT COURT**
 23 **FOR THE DISTRICT OF ARIZONA**

24 Center for Biological Diversity,
 25 Defenders of Wildlife,

26 Plaintiffs,

27 v.

28 David Bernhardt, et al.,

Defendants.

No. 4:14-cv-02506-RM

**STIPULATED AGREEMENT
 TO AMEND JUDGMENT
 AND [PROPOSED] ORDER**

On December 12, 2014, the Center for Biological Diversity and Defenders of

1 Wildlife (collectively, “Plaintiffs”) filed this suit against the Secretary of the Interior¹ and
2 the Director of the U.S. Fish and Wildlife Service (“FWS”) (collectively, “Federal
3 Defendants”) challenging, among other things, FWS’ 12-month finding that the cactus
4 ferruginous pygmy owl (“pygmy owl”) did not warrant listing under the Endangered
5 Species Act (“ESA”), 16 U.S.C. § 1533(b)(3)(B)(i), 76 Fed. Reg. 61,856 (Oct. 5, 2011).
6 On March 29, 2017, the Court entered judgment for Plaintiffs and vacated and remanded
7 the challenged 12-month finding, but did not provide a date certain by which FWS must
8 issue a new 12-month finding for the pygmy owl. ECF Nos. 72 and 73. Given that (1)
9 FWS to date has not issued a new 12-month finding, and (2) Plaintiffs seek a court-ordered
10 date for such a finding, Plaintiffs and Federal Defendants have been engaged in discussions
11 regarding this issue. Giving due consideration to the steps required to make a new 12-
12 month finding and FWS’ present workload and resource limitations, Plaintiffs and Federal
13 Defendants have reached agreement on a date for a new 12-month finding for the pygmy
14 owl. Plaintiffs and Federal Defendants respectfully ask the Court to approve and enter this
15 stipulated agreement (“Agreement”) in order to avoid further litigation on this issue.²

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21 Through their undersigned counsel, Plaintiffs and Federal Defendants agree and
22 state as follows:
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25 ¹ Pursuant to Federal Rule of Civil Procedure 25, David Bernhardt is automatically
26 substituted for his predecessor as Secretary of the Interior, Ryan Zinke.

27 ² Counsel for Federal Defendants conferred with counsel for Intervenor National
28 Association of Home Builders and Southern Arizona Home Builders Association
 (“Intervenor”) prior to filing this Stipulation with the Court. Counsel for Intervenor
 indicated they do not oppose this motion.

1 1. No later than August 5, 2021, FWS shall submit to the Federal Register for
2 publication a 12-month finding as to whether listing the pygmy owl is warranted pursuant
3 to the ESA, 16 U.S.C. § 1533(b)(3)(B);
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5 2. The Order entering this Agreement may be modified by the Court upon good cause
6 shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between
7 Plaintiffs and Federal Defendants filed with and approved by the Court, or upon written
8 motion filed by Plaintiffs or Federal Defendants and granted by the Court. In the event
9 that either Plaintiffs or Federal Defendants seeks to modify the terms of this Agreement,
10 including the deadline specified in Paragraph 1, or in the event of a dispute arising out of
11 or relating to this Agreement, or in the event that either Plaintiffs or Federal Defendants
12 believe that the other party to this Agreement has failed to comply with any term or
13 condition of this Agreement, the party to this Agreement seeking the modification, raising
14 the dispute, or seeking enforcement shall provide the other party to this Agreement with
15 notice of the claim or modification. Plaintiffs and Federal Defendants agree that they will
16 meet and confer (either telephonically or in person) at the earliest possible time in a good-
17 faith effort to resolve the claim before seeking relief from the Court. If Plaintiffs and
18 Federal Defendants are unable to resolve the claim themselves, either may seek relief from
19 the Court.
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24 3. In the event that FWS fails to meet the deadline in Paragraph 1 and Federal
25 Defendants have not sought to modify this Agreement, Plaintiffs' first remedy shall be a
26 motion to enforce the terms of this Agreement, after following the dispute resolution
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1 procedures described above. This Agreement shall not, in the first instance, be enforceable
2 through a proceeding for contempt of court.

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4 4. This Agreement requires only that FWS take the action specified in Paragraph 1.
5 No provision of this Agreement shall be interpreted as, or constitute, a commitment or
6 requirement that Federal Defendants or FWS take action in contravention of the ESA, the
7 Administrative Procedure Act (“APA”), or any other law or regulation, either substantive
8 or procedural. Nothing in this Agreement shall be construed to limit or modify the
9 discretion accorded to Federal Defendants or FWS by the ESA, APA, or general principles
10 of administrative law with respect to the procedures to be followed in making any
11 determination required herein, or as to the substance of any determination made pursuant
12 to Paragraph 1 of the Agreement. To challenge any final determination issued pursuant to
13 Paragraph 1, Plaintiffs must file a separate action. Federal Defendants and FWS reserve
14 the right to raise any applicable claims or defenses to such challenges.
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18 5. No part of this Agreement shall have precedential value in any litigation or in
19 representations before any court or forum or in any public setting. No party to this
20 Agreement shall use this Agreement or the terms herein as evidence of what does or does
21 not constitute a reasonable timeline for issuing a 12-month finding for any species.
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23 6. Nothing in this Agreement shall be construed or offered as evidence in any
24 proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact
25 or law concerning the claims settled under this Agreement or any similar claims brought
26 in the future by any other party to this Agreement. Except as expressly provided in this
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1 Agreement, none of the parties to this Agreement waives or relinquishes any legal rights,
2 claims, or defenses it may have. This Agreement is executed for the sole purpose of
3 avoiding litigation regarding a date for a 12-month finding for the pygmy owl, and nothing
4 herein shall be construed as precedent having preclusive effect in any other context.
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6 7. The parties agree to bear their own attorneys' fees and expenses in connection with
7 this Agreement and their efforts to obtain a court-ordered date for the 12-month finding for
8 the pygmy owl.
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10 8. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement
11 that Federal Defendants are obligated to incur or pay any funds exceeding those available,
12 or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any
13 other applicable appropriations law.
14

15 9. By entering into this Agreement, neither Plaintiffs nor Federal Defendants waive
16 any legal rights, claims, or defenses except as expressly stated herein. This Agreement
17 contains all of the terms of agreement between Plaintiffs and Federal Defendants
18 concerning Plaintiffs' demand for a date for a 12-month finding for the pygmy owl, and is
19 intended to be the final and sole agreement between Plaintiffs and Federal Defendants with
20 respect thereto. Plaintiffs and Federal Defendants agree that any prior or contemporaneous
21 representations or understanding not explicitly contained in this written Agreement,
22 whether written or oral, are of no further legal or equitable force or effect.
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26 10. The undersigned representatives of Plaintiffs and Federal Defendants certify that
27 they are fully authorized by the party or parties they represent to agree to the terms and
28

1 conditions of this Agreement and do hereby agree to the terms herein. Further, Plaintiffs
2 and Federal Defendants, by and through their undersigned representative, represent and
3 warrant that they have the legal power and authority to enter into this Agreement and bind
4 themselves to the terms and conditions contained in this Agreement.
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6 11. The terms of this Agreement shall become effective upon entry of an Order by the
7 Court ratifying this Agreement.
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9 12. Plaintiffs and Federal Defendants hereby stipulate and respectfully request that the
10 Court retain jurisdiction to oversee compliance with the terms of this Agreement and to
11 resolve any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*,
12 511 U.S. 375 (1994).
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14 Dated: November 14, 2019

15 Respectfully submitted,

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18 Deputy Assistant Attorney General
19 SETH M. BARSKY
20 Section Chief
21 MEREDITH L. FLAX
22 Assistant Section Chief

23 s/Clifford E. Stevens, Jr.
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