

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

CENTER FOR BIOLOGICAL DIVERSITY;	)	
CITIZENS' ALLIANCE FOR SMART	)	
EXPANSION; AQUIFER GUARDIANS IN	)	
URBAN AREAS,	)	
	)	
	)	
Plaintiffs,	)	
v.	)	Civ. No. 1:09-cv-00031-LY
	)	
	)	
KENNETH L. SALAZAR, Secretary of the Interior,	)	
SAM HAMILTON, Director, U.S. Fish and Wildlife	)	
Service,	)	
	)	
Defendants.	)	
	)	

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**SETTLEMENT AGREEMENT**

Plaintiffs Center for Biological Diversity, Citizens' Alliance for Smart Expansion, Aquifer Guardians in Urban Areas, and Defendants Kenneth Salazar, in his official capacity as Secretary of the United States Department of the Interior, and Sam Hamilton, in his official capacity as Director of United States Fish and Wildlife Service ("Service"), by and through their undersigned counsel, state as follows:

WHEREAS, on December 26, 2000, pursuant to the Endangered Species Act ("ESA"), the Service placed the following nine karst invertebrate species on the ESA's list of endangered and threatened species: (1) *Cicurina venii*; (2) Robber Baron Cave harvestman (*Texella cokendolpheri*); (3) vesper cave spider (*Cicurina vespera*); (4) Government Canyon cave spider (*Neoleptoneta microps*); (5) Madla's cave spider (*Cicurina madla*); (6) Robber Baron cave spider (*Cicurina baronia*); (7) *Rhadine exilis*; (8) *Rhadine infernalis*; and (9) Helotes mold beetle

(*Batrisodes venyivi*), 65 Fed. Reg. 81,419 (“Karst Invertebrates”);

WHEREAS, on April 8, 2003, pursuant to the ESA, the Service published a final rule designating critical habitat for seven species of Karst Invertebrates. *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Seven Bexar County, Texas, Invertebrate Species, 68 Fed. Reg. 17,156 (“Karst Invertebrates Final Rule”);

WHEREAS, on December 18, 1997, pursuant to the ESA, the Service placed the following freshwater invertebrate species on the ESA’s list of endangered and threatened species: (1) Peck’s Cave amphipod (*Stygobromus pecki*); (2) Comal Springs dryopid beetle (*Stygoparnus comalensis*); and (3) Comal Springs riffle beetle (*Heterelmis comalensis*), 62 Fed. Reg. 66,295 (“Freshwater Invertebrates”)

WHEREAS, on July 17, 2007, pursuant to the ESA, the Service published a final rule designating critical habitat for the Freshwater Invertebrates, 72 Fed. Reg. 39,248 (Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Peck’s Cave amphipod, Comal Springs dryopid beetle, and Comal Springs riffle beetle) (“Freshwater Invertebrates Final Rule”);

WHEREAS, on August 28, 2007, Plaintiffs provided the Service with a 60-day notice of intent to sue the Service regarding the Karst Invertebrates Final Rule and Freshwater Invertebrates Final Rule (collectively, “Final Rules”);

WHEREAS, on January 14, 2009, Plaintiffs filed the above-captioned action to challenge the Final Rules and compel the Service to revise its critical habitat designation for the Karst Invertebrates and Freshwater Invertebrates;

WHEREAS, on June 5, 2009, the Service filed an answer to Plaintiffs’ complaint,

denying that the Final Rules were unlawful;

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' claims, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiffs' complaint;

WHEREAS, the parties agree that settlement of this action 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. On or before February 7, 2011, the Service shall submit to the Federal Register a new proposed rule to designate critical habitat for the Karst Invertebrates. On or before February 7, 2012, the Service shall submit to the Federal Register a final determination on the proposed rule for the Karst Invertebrates. On or before October 17, 2012, the Service shall submit to the Federal Register a new proposed rule to designate critical habitat for the Freshwater Invertebrates. On or before October 13, 2013, the Service shall submit to the Federal Register a final determination on the proposed rule for the Freshwater Invertebrates. This Settlement Agreement ("Agreement") only requires Defendants to take action by the deadlines specified herein and does not limit the Service's authority with regard to the substantive outcome of any determination. To challenge any final rule issued in accordance with this Agreement, Plaintiffs will be required to file a separate action.

2. Until the effective date of the final determination referenced in Paragraph 1, the existing Final Rule and designation of critical habitat for the Karst Invertebrates and Freshwater Invertebrates shall remain in full force and effect. *See* 68 Fed. Reg. 17156; 72 Fed. Reg. 39248.

3. Either party may seek to modify the deadlines specified in Paragraph 1 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 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 1, 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, Plaintiffs' 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. No party shall use this Agreement or the terms herein as evidence of what does or does not constitute a lawful designation of critical habitat, or a lawful timetable for

designation of critical habitat, in any other proceeding involving the Service's implementation of the ESA.

6. Defendants agree that Plaintiffs are the "prevailing party" in this action, and agree to pay Plaintiffs' reasonable attorneys' fees and costs pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540 (g). Defendants therefore agree to settle all of Plaintiffs' claims for costs and attorneys' fees in this matter for a total of \$4,049.28. A check will be made payable in that amount to the Aquifer Guardians in Urban Areas, c/o William G. Bunch, Save Our Springs Alliance, 221 E. 9th St., Suite 300, Austin, TX 78701. Defendants agree to submit all necessary paperwork for the processing of the attorneys' fee award to the Department of the Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10) business days of receipt of the order approving this Agreement.

7. Plaintiffs agree to accept payment of \$4,049.28 in full satisfaction of any and all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in this matter through and including the date of this Agreement.

8. Plaintiffs agree that receipt of this payment from Defendants shall operate as a release of Plaintiffs' claims for attorneys' fees and costs in this matter, through and including the date of this Agreement.

9. The parties agree that Plaintiffs reserve 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 1 or for any other continuation of this action. By this Agreement, Defendants do not waive any right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate, 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.

10. Subject to the qualifications in Paragraph 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.

11. 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.

12. 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.

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 terms of this Agreement shall become effective upon entry of an order by the Court ratifying the Agreement.

15. Upon approval of this Agreement by the Court, all counts of Plaintiff's complaint shall be dismissed with prejudice. Notwithstanding the dismissal of this action, 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).

Dated: December 18, 2009

Respectfully submitted,

*s/ William G. Bunch*

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