

## FISH AND WILDLIFE SERVICE SETTLES LAWSUITS ON LISTING DEADLINES

*August 5, 2011 by **Keith Garner** & **Charlotte Cunningham***

On July 12, 2011, the U.S. Fish and Wildlife Service (“FWS”) and the Center for Biological Diversity (“CBD”) settled litigation concerning the FWS’s obligations to render decisions on whether species warrant protection under the Endangered Species Act (“ESA”). The settlement does not guarantee that the subject species will be listed as threatened or endangered. Rather, under the terms of the **settlement**, the FWS agreed to make petition findings and final listing decisions for more than 700 species by 2018. The FWS also agreed to attempt concurrent critical habitat designations.

The FWS had separately settled with WildEarth Guardians (“WEG”) in twelve related lawsuits that had been consolidated with CBD’s action in *In Re Endangered Species Act Section 4 Deadline Litigation*, MDL Docket No. 2165 (D.D.C.). The WEG/FWS settlement required the FWS to complete initial petition findings for over 600 species and issue proposed listing rules or not-warranted findings for 251 species, including many at issue in the CBD litigation. CBD had opposed the FWS/CBD settlement and sought to attach specific deadlines to findings for specific species. The FWS/CBD agreement has specific timeframes for FWS to publish proposed listing rules or not-warranted findings on three dozen species, adds requirements for FWS to issue 12-month findings on three species not covered by the FWS/WEG agreement, and pushes up the deadline for a decision on the Mono Basin sage-grouse to Fiscal Year 2013.

In exchange, the FWS gets a reprieve from listing litigation that **it states** had dominated its workload. Since 2007, environmental organizations including CBD have petitioned to list more than 1,230 species, nearly as many as were listed during the previous 30 years. Not surprisingly, these actions have generated an enormous administrative backlog and mired the FWS’s endangered species program in litigation. Both the

FWS/CBD and FWS/WEG agreements include provisions intended to reduce the amount of litigation regarding listing decisions in order to allow the FWS to focus its resources on species in need of protection under the ESA. The FWS/WEG agreement provides that WEG shall not file any suit nor actively solicit or materially support any other such parties to enforce the statutory listing deadlines or challenge any warranted-but-precluded finding prior to March 31, 2017. The FWS/CBD agreement pushes back the FWS's decision deadlines to 2016 if certain litigation volume and remedy triggers are exceeded. However, neither settlement precludes other groups from filing suit, and challenges to the FWS's final determinations that listing is not warranted can even be filed by the plaintiffs. Thus, it is unclear to what extent the settlements will truly reduce the FWS's litigation burden.

While the settlements do not require listing of the species at issue, additional listings and critical habitat designations are likely on the way. This, in turn, could affect property owners and land managers. The settlements address several California species, including the California golden trout, the Mojave fringe-toed lizard, the Mojave ground squirrel, the Tehachapi slender salamander, San Bernardino flying squirrel, Mono Basin distinct population segment of greater sage grouse, the mountain yellow-legged frog, the North American wolverine, the Yosemite toad, and the Tahoe yellow cress.

Authored By:

**Keith Garner**

(415) 774-2991

[KGarner@sheppardmullin.com](mailto:KGarner@sheppardmullin.com)

and

Charlotte Cunningham, *Summer Associate*