

112TH CONGRESS
2D SESSION

S. 3500

To amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements.

IN THE SENATE OF THE UNITED STATES

AUGUST 2, 2012

Mr. CORNYN (for himself, Mr. BARRASSO, Mr. COBURN, Mr. INHOFE, Mr. LEE, Ms. MURKOWSKI, Mr. ROBERTS, Mr. VITTER, and Mr. WICKER) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. DEFINITIONS.**

4 Section 3 of the Endangered Species Act of 1973 (16
5 U.S.C. 1532) is amended—

6 (1) by redesignating—

7 (A) paragraphs (1) through (4) as para-
8 graphs (2) through (5), respectively;

1 (B) paragraphs (5) through (10) as para-
 2 graphs (7) through (12), respectively; and

3 (C) paragraphs (12) through (21) as para-
 4 graphs (13) through (22), respectively;

5 (2) by adding before paragraph (2) (as so re-
 6 designated) the following:

7 “(1) AFFECTED PARTIES.—The term ‘affected
 8 party’ means any person, including a business enti-
 9 ty, or any State, tribal government, or local subdivi-
 10 sion the rights of which may be affected by a deter-
 11 mination made under section 4(a) in a suit brought
 12 under section 11(g)(1)(C).”; and

13 (3) by adding after paragraph (5) (as so redes-
 14 ignated) the following:

15 “(6) COVERED SETTLEMENT.—The term ‘cov-
 16 ered settlement’ means a consent decree or a settle-
 17 ment agreement in an action brought under section
 18 11(g)(1)(C).”.

19 **SEC. 2. INTERVENTION; APPROVAL OF COVERED SETTLE-**
 20 **MENT.**

21 Section 11(g) of the Endangered Species Act of 1973
 22 (16 U.S.C. 1540) is amended—

23 (1) in paragraph (3), by adding at the end the
 24 following:

1 “(C) PUBLISHING COMPLAINT; INTERVEN-
 2 TION.—

3 “(i) PUBLISHING COMPLAINT.—

4 “(I) IN GENERAL.—Not later
 5 than 30 days after the date on which
 6 the plaintiff serves the defendant with
 7 the complaint in an action brought
 8 under paragraph (1)(C) in accordance
 9 with Rule 4 of the Federal Rules of
 10 Civil Procedure, the Secretary of the
 11 Interior shall publish the complaint in
 12 a readily accessible manner, including
 13 electronically.

14 “(II) FAILURE TO MEET DEAD-
 15 LINE.—The failure of the Secretary to
 16 meet the 30-day deadline described in
 17 subclause (I) shall not be the basis for
 18 an action under paragraph (1)(C).

19 “(ii) INTERVENTION.—

20 “(I) IN GENERAL.—After the end
 21 of the 30-day period described in
 22 clause (i), each affected party shall be
 23 given a reasonable opportunity to
 24 move to intervene in the action de-
 25 scribed in clause (i), until the end of

1 which a party may not file a motion
2 for a consent decree or to dismiss the
3 case pursuant to a settlement agree-
4 ment.

5 “(II) REBUTTABLE PRESUMP-
6 TION.—In considering a motion to in-
7 tervene by any affected party, the
8 court shall presume, subject to rebut-
9 tal, that the interests of that party
10 would not be represented adequately
11 by the parties to the action described
12 in clause (i).

13 “(III) REFERRAL TO ALTER-
14 NATIVE DISPUTE RESOLUTION.—

15 “(aa) IN GENERAL.—If the
16 court grants a motion to inter-
17 vene in the action, the court shall
18 refer the action to facilitate set-
19 tlement discussions to—

20 “(AA) the mediation
21 program of the court; or

22 “(BB) a magistrate
23 judge.

24 “(bb) PARTIES INCLUDED IN
25 SETTLEMENT DISCUSSIONS.—

1 The settlement discussions de-
 2 scribed in item (aa) shall include
 3 each—

4 “(AA) plaintiff;
 5 “(BB) defendant agen-
 6 cy; and
 7 “(CC) intervenor.”;

8 (2) by striking paragraph (4) and inserting the
 9 following:

10 “(4) LITIGATION COSTS.—

11 “(A) IN GENERAL.—Except as provided in
 12 subparagraph (B), the court, in issuing any
 13 final order in any suit brought under paragraph
 14 (1), may award costs of litigation (including
 15 reasonable attorney and expert witness fees) to
 16 any party, whenever the court determines such
 17 award is appropriate.

18 “(B) COVERED SETTLEMENT.—

19 “(i) CONSENT DECREES.—The court
 20 shall not award costs of litigation in any
 21 proposed covered settlement that is a con-
 22 sent decree.

23 “(ii) OTHER COVERED SETTLE-
 24 MENTS.—

1 “(I) IN GENERAL.—For a pro-
 2 posed covered settlement other than a
 3 consent decree, the court shall ensure
 4 that the covered settlement does not
 5 include payment to any plaintiff for
 6 the costs of litigation.

7 “(II) MOTIONS.—The court shall
 8 not grant any motion, including a mo-
 9 tion to dismiss, based on the proposed
 10 covered settlement described in sub-
 11 clause (I) if the covered settlement in-
 12 cludes payment to any plaintiff for the
 13 costs of litigation.”; and

14 (3) by adding at the end the following:

15 “(6) APPROVAL OF COVERED SETTLEMENT.—

16 “(A) DEFINITION OF SPECIES.—In this
 17 paragraph, the term ‘species’ means a species
 18 that is the subject of an action brought under
 19 paragraph (1)(C).

20 “(B) IN GENERAL.—

21 “(i) CONSENT DECREES.—The court
 22 shall not approve a proposed covered set-
 23 tlement that is a consent decree unless
 24 each State and county in which the Sec-

retary of the Interior believes a species occurs approves the covered settlement.

“(ii) OTHER COVERED SETTLEMENTS.—

“(I) IN GENERAL.—For a proposed covered settlement other than a consent decree, the court shall ensure that the covered settlement is approved by each State and county in which the Secretary of the Interior believes a species occurs.

“(II) MOTIONS.—The court shall not grant any motion, including a motion to dismiss, based on the proposed covered settlement described in subclause (I) unless the covered settlement is approved by each State and county in which the Secretary of the Interior believes a species occurs.

“(C) NOTICE.—

“(i) IN GENERAL.—The Secretary of the Interior shall provide each State and county in which the Secretary of the Interior believes a species occurs notice of a proposed covered settlement.

1 “(ii) DETERMINATION OF RELEVANT
 2 STATES AND COUNTIES.—The defendant in
 3 a covered settlement shall consult with
 4 each State described in clause (i) to deter-
 5 mine each county in which the Secretary of
 6 the Interior believes a species occurs.

7 “(D) FAILURE TO RESPOND.—The court
 8 may approve a covered settlement or grant a
 9 motion described in subparagraph (B)(ii)(II) if,
 10 not later than 45 days after the date on which
 11 a State or county is notified under subpara-
 12 graph (C)—

13 “(i)(I) a State or county fails to re-
 14 spond; and

15 “(II) of the States or counties that re-
 16 spond, each State or county approves the
 17 covered settlement; or

18 “(ii) all of the States and counties fail
 19 to respond.

20 “(E) PROOF OF APPROVAL.—The defend-
 21 ant in a covered settlement shall prove any
 22 State or county approval described in this para-
 23 graph in a form—

24 “(i) acceptable to the State or county,
 25 as applicable; and

1 “(ii) signed by the State or county of-
2 ficial authorized to approve the covered
3 settlement.”.

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