

## Description of Events

During the 2016 short legislative session, Representatives Barreto, Witt, and Esquivel appear to have made a series of knowingly false representations to the Oregon House of Representatives in order to secure passage of HB 4040, a measure designed to block judicial review of a controversial decision by the Oregon Fish and Wildlife Commission. It is a violation of Oregon state ethics rules for a public official to knowingly give false information to the Oregon legislature.

By way of background, in November of 2015, the Oregon Fish and Wildlife Commission voted 4 to 2 to remove the gray wolf from the state list of threatened and endangered species. Three conservation organizations Cascadia Wildlands, Oregon Wild, and the Center for Biological Diversity petitioned for judicial review of this delisting decision, alleging that it did not meet various requirements under Oregon law.

In anticipation of this petition for judicial review, Representative Barreto drafted House Bill 4040 (HB4040). The relevant text of the bill is as follows:

SECTION 1. The administrative rule amendment adopted by the State Fish and Wildlife Commission on November 9, 2015, to remove *Canis lupus*, commonly known as the gray wolf, from the state lists of threatened species or endangered species established pursuant to ORS 496.172 (2), is ratified as satisfying the elements of ORS 496.176 and approved.

On February 4, 2016, Rep. Barreto introduced HB4040 before the House Committee on Agriculture and Natural Resources.<sup>1</sup> Numerous parties at this hearing raised concerns that the bill was designed block judicial review of the Commission's delisting decision, thus restricting judicial review.<sup>2</sup> In response to this testimony, and in subsequent public statements, floor letters, and other materials, Rep. Barreto and two other legislators (Representatives Brad Witt and Sal Esquivel) asserted that HB4040 would not affect judicial review of the Commission's wolf delisting decision.<sup>3</sup>

The assertion that HB4040 would not impact judicial review was untrue and a clear misrepresentation of the bill. Responding to a request by Senator Michael Dembrow to address these misrepresentations of the bill, on February 16, 2016 the Legislative Counsel Committee produced a report<sup>4</sup> that stated that “...*the only legal effect of HB 4040-A is to legislatively correct*

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<sup>1</sup> [http://oregon.granicus.com/MediaPlayer.php?clip\\_id=01e8234c-d336-45d8-af1c-33ea6f700a72&meta\\_id=d296d8f6-2220-4dd2-89ca-d91a57b4e814](http://oregon.granicus.com/MediaPlayer.php?clip_id=01e8234c-d336-45d8-af1c-33ea6f700a72&meta_id=d296d8f6-2220-4dd2-89ca-d91a57b4e814)

<sup>2</sup> Exhibit 1; Exhibit 6

<sup>3</sup> On February 12, 2016, Rep. Greg Barreto made the assertion that HB 4040 would not affect judicial review on the Floor of the Oregon House. Relevant statements can be found here beginning at the 7:10 mark ([https://youtu.be/X8Ujc\\_iNeS0](https://youtu.be/X8Ujc_iNeS0)). This statement was also found in materials distributed by his office. Exhibit 2

<sup>4</sup> Exhibit 3

*any real or perceived irregularities in the commission's application of ORS 496.176 in reaching its delisting decision...*" In essence, the only effect of the bill was to preclude judicial review of the Commission's delisting decision. Despite testimony from numerous parties including attorneys and the efforts of the Legislative Counsel Committee, the repeated assertions that the bill would not impact judicial review effectively mislead their fellow Legislators as to the intent and purpose of the bill.<sup>5</sup>

During the course of legislative discussions, Representatives Barreto, Witt, and Esquivel made numerous misleading statements and misrepresentations of HB4040 to fellow members of the Oregon Legislature concerning the impact of the bill on the ongoing judicial challenge of the delisting:

Rep. Barreto statements during the Feb 4, 2016 hearing:

*13:32: "It [HB4040] does nothing more than shore up the decision by the Fish and Wildlife Commission".*

*14:21: "Our objective in this is not to usurp the authority of the Commission, it is only to shore up the decision that they have made and to make the plan a workable plan as was written.*

Rep. Witt in response to Rep. Gorsek:

*1:52:11: Gorsek: The only thing I would say is that I think judicial review is what we have when we disagree. I understand that people who are invested in the wolf plan and want it to go forward, but by having it go to judicial review, that is not a failing on the part of the government, that is actually the government allowing the system to work the way it's intended... We could have a better mediation system that's not so slow and clunky and expensive but the idea is that we do have some place we can go and that's why I think judicial review is so important.*

*Witt: I agree with you Representative Gorsek, and I have done the utmost to make sure that this bill does not preclude that possibility.*

On February 10<sup>th</sup>, 2016, Rep. Barreto distributed a document<sup>6</sup> to fellow members legislators which stated:

*"HB 4040-1 contains no language that precludes or prevents judicial review. It ratifies and approves the decision by ODFW Commission to remove Canis lupus (grey wolf) from state list of threatened and endangered species."*

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<sup>5</sup> Exhibit 4

<sup>6</sup> Exhibit 2

On February 12<sup>th</sup>, during the House floor debate on HB4040, Rep. Barreto stated:

*49:03: “This is where we are right now. The question is, ‘what are we doing in the legislature? Does this basically prevent litigation?’ And this has been a question that has come up from Representative Gorsek and the answer that I have come up with is “no it doesn’t”.*

Also during the February 12<sup>th</sup> floor debate, in an exchange with Rep. Doherty, Rep. Barreto again represented HB4040 as having no effect on judicial review of the Commission’s action:

*54:00: Doherty: ” Is there any legislative intent in this bill to have it be used to influence any part of pending or future litigation? And I’m referring to line 7 page 2 with the words “satisfying the elements” of ORS?”*

*Barreto: “Thank you for the question in advance because that was something that I checked into this morning and as far as the question, 7 ‘ratified as satisfying the elements, ‘Ratified’ just means approval affirmed that what the decision came up with. ‘Satisfying the elements’ it basically satisfied the Endangered Species Act as in those statutes, so as far as the motive in that there’s no motive on my part as far as disrupting anything. It’s basically just affirming...the motive is just to affirm what they [ODFW Commission] have come up with they have voted on and decided in order to manage the wolves.*

Floor letter on behalf of the Oregon Sportsmen’s Caucus,<sup>7</sup> signed by Rep. Esquivel and Rep. Witt:

*“This bill contains no language that precludes or prevents judicial review.”*

When HB4040 was eventually referred to the Oregon Senate, the Chairman of the Senate Environment Committee acknowledged the intentionally misleading statements that were made in the House in his opening comments in a Feb. 18<sup>th</sup>, 2016 hearing on the bill.

*“I also agree that everything wasn’t aboveboard, I wanted everything laid out on the table, in terms of why we have the bill, what the intent of the bill is to do...”*

ORS 171.764(1) maintains that no public official shall make any false statement or misrepresentation to any legislative or executive official. Rep. Barreto, a public official, made false statements and misrepresentations regarding HB4040’s effect on judicial review of the Commission’s wolf delisting decision before the Oregon House. HB4040 passed through the House with the bill’s sponsor declaring the bill would not preclude judicial review. As later

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<sup>7</sup> Exhibit 5

revealed, this was the one and only effect of the bill, and Rep. Barreto's false statements are fully documented in the legislative record, and in his own public statements and documents.

In addition, Representatives Brad Witt and Sal Esquivel also made intentionally false and misleading statements on HB4040 and its effect on judicial review during deliberations on the measure during the 2016 session. Both Representatives falsely represented the intent and effect of the legislation in written materials provided to members of the House of Representatives, and on several occasions Rep. Witt made false and misleading verbal statements that are recorded in the legislative record.



February 4, 2016

Dear Chair Witt and Committee Members:

I am writing you to **urge you to not entertain HB4040**. This bill precludes judicial review of a recent decision by Oregon Fish and Wildlife Commission (“Commission”) to remove gray wolves from Oregon’s list of threatened and endangered species.

As you are well aware, our government is constructed with a system of checks and balances. The executive branch and administrative agencies are provided with powers and duties by the legislature. Administrative actions are subject to impartial review by the judicial branch to ensure compliance with these legislative guidelines. This system of checks and balances is the foundation of our democratic system of government.

HB4040 attempts to circumvent this democratic process by precluding judicial review of the Fish and Wildlife Commission’s decision to remove endangered wolves from Oregon’ list of threatened and endangered species. The public is thereby deprived of an impartial review of the agency’s decision, which we, and leading wolf scientists, believe is premature. For this reason alone, this bill must be rejected.

Additionally, HB4040 amends Oregon’s Endangered Species Act and mandates when wolves can and cannot be listed. This species by species approach is inappropriate. Leave wildlife management to sound science, and do not deprive the public of its right to have listing or delisting decisions subject to impartial review by the courts.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Nick Cady", written in a cursive style.

Nick Cady  
Legal Director, Cascadia Wildlands

**HB 4040-1**  
**House Ag & Natural Resources**  
**Wolf Delist bill**

**HB 4040-1** is simply a confirmation of the Oregon Wolf Conservation and Management Plan: Phase 2.

Phase 2 of the Wolf Plan calls for wolf management to delist when the state has *four* breeding pairs of wolves for three consecutive years. We are now at over *ten* breeding pairs.

**HB 4040-1** does not allow public hunting of wolves. There will be no hunting permits issued and the penalties for poaching any wolf will remain a felony.

**HB 4040-1** contains no language that precludes or prevents judicial review. It ratifies and approves the decision by ODFW Commission in 2015 to remove *Canis lupus* (grey wolf) from state list of threatened and endangered species.

**HB 4040-1** will not prevent ODFW Commission from making necessary adjustments to the Oregon wolf management plan. The -1 provides direction to consider re-listing if needed.

It is time for Oregon to allow ODFW to implement the Oregon Wolf Conservation and Management Plan as it was intended.

**Please support HB 4040-1**



STATE OF OREGON  
Legislative Counsel Committee

February 16, 2016

To: Senator Michael Dembrow  
From: Maureen McGee, Deputy Legislative Counsel  
Subject: -A2 amendments to House Bill 4040-A

Enclosed are the amendments you requested to House Bill 4040-A. The substantive portion of HB 4040-A provides that the November 9, 2015, decision of the State Fish and Wildlife Commission to remove the gray wolf from the state list of endangered species is ratified and approved as being in compliance with ORS 496.176. ORS 496.176 is the statute that sets forth the procedures that the commission must follow to remove a species from the state list of endangered species. The only legal effect of A-engrossed House Bill 4040 is to validate or cure any real or perceived irregularities in the commission's application of ORS 496.176 in deciding to delist the gray wolf. "A [L]egislature may pass a retroactive law which could validate any act which it could in the first instance have authorized, subject to the restriction that it could not impair the obligation of contract or a vested right." *Northern Wasco County People's Utility Dist. v. Wasco County*, 210 Or. 1, 14, *quoting Smith v. Cameron*, 123 Or. 501, 507.

The -A2 amendments modify the substantive language of HB 4040-A to provide that the ratification and approval of the commission's decision to delist the gray wolf is effective only if the commission's decision was adopted in compliance with ORS 496.176 and associated administrative rules. Because the only legal effect of HB 4040-A is to legislatively correct any real or perceived irregularities in the commission's application of ORS 496.176 in reaching its delisting decision, your amendments, if enacted, would cause the bill to have no legal effect.

Encl.

Exhibit 4

From: **Rep Krieger** <[rep.waynekrieger@state.or.us](mailto:rep.waynekrieger@state.or.us)>  
Date: Fri, Feb 12, 2016 at 10:42 AM  
Subject: RE: Imperiled Wolves Deserve a Day in Court: NO on SB1557 and HB4040  
To: "[kathyanon00@gmail.com](mailto:kathyanon00@gmail.com)" <[kathyanon00@gmail.com](mailto:kathyanon00@gmail.com)>

HB 4040-1  
House Ag & Natural Resources  
Wolf Delist bill

HB 4040-1 is simply a confirmation of the Oregon Wolf Conservation and Management Plan: Phase 2.

Phase 2 of the Wolf Plan calls for wolf management to delist when the state has four breeding pairs of wolves for three consecutive years. We are now at over ten breeding pairs.

HB 4040-1 does not allow public hunting of wolves. There will be no hunting permits issued and the penalties for poaching any wolf will remain a felony.

HB 4040-1 contains no language that precludes or prevents judicial review. It ratifies and approves the decision by ODFW Commission in 2015 to remove *Canis lupus* (grey wolf) from state list of threatened and endangered species.

HB 4040-1 will not prevent ODFW Commission from making necessary adjustments to the Oregon wolf management plan. The -1 provides direction to consider re-listing if needed.

It is time for Oregon to allow ODFW to implement the Oregon Wolf Conservation and Management Plan as it was intended.

Colleen Krieger  
Legislative Assistant for  
Representative Wayne Krieger  
District 1  
[503-986-1401](tel:503-986-1401)

-----Original Message-----

From: Kathleen Nelson [mailto:[kathyanon00@gmail.com](mailto:kathyanon00@gmail.com)]  
Sent: Thursday, February 11, 2016 11:41 AM  
To: Rep Krieger <[KriegeW@leg.state.or.us](mailto:KriegeW@leg.state.or.us)>  
Subject: Imperiled Wolves Deserve a Day in Court: NO on SB1557 and HB4040



## Exhibit 4

I encourage you to reject SB 1557 and HB 4040, which preclude judicial review of the Fish and Wildlife Commission's premature decision to remove wolves from our state's list of threatened and endangered species.

This delisting decision was made despite overwhelming public opposition and scientific criticism. 96% of public feedback favored retaining Endangered Species Act protections because wolves still number around 80 individuals in the state and occupy a very small percentage of their historic range. I believe the decision is not based in sound science and want to see the decision reviewed by the courts.

SB 1557 and HB 4040 precludes my right to have this decision reviewed by an impartial judiciary. This is undemocratic, and the mere existence of these bills underscores the questionable foundation of the delisting decision.

Please stand up for Oregon's recovering wolves. Species management should be based on sound scientific decisions, not politics, and Oregonians deserve better. Thank you for your consideration.

Sincerely,

Kathleen Nelson  
510 Byron Creek Rd.  
Winston, OR 97496

From the Desks of: Representative Sal Esquivel – Co-Chair Oregon Sportsmen Caucus



Representative Brad Witt – Co-Chair Oregon Sportsmen Caucus



## **HB 4040-A**

### **House Ag & Natural Resources**

### **Affirming the decision of the ODF&W Commission**

**HB 4040-A** is a confirmation of the Oregon Wolf Conservation and Management Plan (Wolf Plan): Phase 2.

This bill contains no language that precludes or prevents judicial review. It ratifies and approves the decision by ODF&W Commissioners in 2015 to remove *Canis lupus* (grey wolf) from the state's list of threatened and endangered species.

**It does NOT** allow public hunting of wolves. There will be no hunting permits issued and the penalties for poaching any wolf will remain a felony.

**HB 4040-A** will not prevent the ODF&W Commission from making necessary adjustments to the Oregon Wolf Conservation and Management Plan. The -1 amendment approval provides direction to consider re-listing if needed.

Phase 2 of the Wolf Plan calls for delisting when the state has *four* breeding pairs of wolves for three consecutive years. We are now at over *ten* breeding pairs and Oregon's wolf population is doubling every 2.5 years.

It is time for Oregon to allow ODF&W to implement the Oregon Wolf Conservation and Management Plan as it was intended.

**Please support HB 4040-A**



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Q: Does HB4040-1 sidestep a legal review?

A: Yes.

The Wildlife Commission's 4-2 decision to delist wolves in November, 2015 is subject to a legal review. The primary basis of the legal challenge is that the decision did not satisfy the requirements of ORS 496.176.

HB4040-1 states:

*"SECTION 1. The administrative rule amendment adopted by the State Fish and Wildlife Commission on November 9, 2015, to remove *Canis lupus*, commonly known as the gray wolf, from the state lists of threatened species or endangered species established pursuant to ORS 496.172 (2), is ratified as satisfying the elements of ORS 496.176 and approved.*

If adopted as statute, the bill's only practical effect would be to sidestep the public's right to hold government agencies accountable to their own laws.

Wolves are delisted. The wolf plan is in effect.

For more detail contact:

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541.886.0212

Nick Cady  
Legal Director  
Cascadia Wildlands  
Eugene, OR  
541.434.1463