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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

CASCADIA WILDLANDS, et al.,

Petitioners,

vs.

OREGON DEPARTMENT OF STATE
LANDS,

Respondent.

Case No.

**MEMORANDUM IN SUPPORT OF MOTION
FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

(Expedited Review Requested)

I. INTRODUCTION AND FACTUAL BACKGROUND

The Elliott State Forest is a 93,000-acre publicly owned coastal rainforest between Reedsport and Coos Bay, Oregon, and contains some of the last unlogged native forest habitat in the entire Oregon Coast Range. As such, the Elliott State Forest provides unique and important recreational, educational, and professional opportunities for Petitioners, and is home to several threatened and endangered species, including coastal coho salmon, marbled murrelets, and northern spotted owls.

On April 15, 2014, Respondent entered into a Purchase and Sale Agreement, a final agency order, to sell 788 acres of the Elliott State Forest to Seneca Jones Timber Company. Declaration of Daniel Kruse, Attachment 1. The vast majority of this parcel, called the East Hakki Ridge parcel, was part of the National Forest System on February 25, 1913, and was selected by, and patented to, the State of Oregon for the purpose of establishing the Elliott State Forest. Declaration of Nicholas Cady. The sale of such land is expressly prohibited by law. ORS 530.450.

1 Petitioners are three non-profit organizations and one individual who use and enjoy the
2 Elliott State Forest, including the East Hakki Ridge parcel, and who have worked to protect the
3 Elliott State Forest for continued public use and enjoyment and for the unique forest habitat
4 and wildlife that live there. As explained more fully below, Petitioners would be immediately
5 and irreparably harmed by the sale and privatization of this public forestland.

6 Petitioners were not provided a copy of the final agency order at issue here until after
7 5:00pm on Friday, April 18, 2014, and are thus submitting this motion at the earliest possible
8 time. Based on information from Respondents, Petitioners understand that the sale of the East
9 Hakki Ridge parcel is expected to close imminently, even though the Purchase and Sale
10 Agreement was not finalized until April 15, 2014 or provided to the public until April 18, 2014.

11 Petitioners request that the Court (1) issue an *ex parte* temporary restraining order
12 immediately, (2) order a briefing schedule and a hearing for the motion for preliminary
13 injunction, and (3) require only a nominal bond or security. The motion should be granted to
14 maintain the *status quo*, thereby temporarily protecting both Petitioners' interests and the
15 Court's jurisdiction, until the matter can be more thoroughly argued and decided.

16 **II. LEGAL BACKGROUND**

17 Under Oregon law, "any lands in the national forests on February 25, 1913, selected by,
18 and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are
19 withdrawn from sale except as provided in ORS 530.510. The state forest shall be known as the
20 Elliott State Forest." ORS 530.450. The only exception to this statute applies when land is
21 exchanged for other land "of approximately equal aggregate value," and when that exchange
22 occurs "for the consolidation of the forest." ORS 530.510.

23 Review of agency orders occurs in the Circuit Courts, either in Marion County or in the
24 county where the Petitioner resides or has its principle business office. ORS 183.484(1). The
25 Court "shall" remand the order if it finds the agency's exercise of discretion to be "outside the
26 range of discretion delegated to the agency by law" or "otherwise in violation of a
27 constitutional or statutory provision." ORS 183.484(5)(b). "The court shall set aside or
28 remand the order if it finds that the order is not supported by substantial evidence in the record.

1 Substantial evidence exists to support a finding of fact when the record, viewed as a whole,
2 would permit a reasonable person to make that finding.” ORS 183.484(5)(c).

3 **III. STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER**
4 **AND PRELIMINARY INJUNCTION**

5 “The judge of any county court having judicial functions shall grant preliminary
6 injunctions or orders in any suit in the circuit court commenced in the county, upon application
7 made in the manner prescribed by ORCP 79.” ORS 5.030. Subject to the requirement of the
8 moving party to post security under ORCP 82(A), a temporary restraining order or preliminary
9 injunction may be granted under ORCP 79 “when it appears that a party is entitled to relief
10 demanded in a pleading, and such relief, or any part thereof, consists of restraining the
11 commission or continuance of some act, the commission or continuance of which during the
12 litigation would produce injury to the party seeking the relief.” ORCP 79(A)(1)(a). The Court
13 also has inherent authority to issue preliminary relief to preserve the *status quo* – and thus the
14 Court’s jurisdiction – including in actions arising under the Administrative Procedure Act. *See*
15 *Northwestern Title Loans, LLC v. Division of Finance and Corporate Securities, Div.*, 180 Or
16 App 1, 10, 42 P3d 313 (2002)(courts of equity have “inherent powers” including “the authority
17 to grant provisional, including injunctive, relief”).

18 “A preliminary injunction is only a provisional remedy, the sole object of which is to
19 preserve the subject in controversy in its then condition.” *Helms v. Gilroy*, 20 Or 517, 520, 26 P
20 851 (1891). “The purpose and office of a preliminary injunction should in no manner
21 anticipate the ultimate determination of the question of right involved. It should merely
22 recognize that a sufficient case has been or has not been made to warrant the preservation of
23 the property or rights in status quo until the hearing on the merits, without expressing a final
24 opinion as to such right.” *American Life & Accident Ins. Co. v. Ferguson*, 66 Or 417, 420, 134
25 P 1029 (1913).

26 The Court has authority to grant the temporary restraining order or preliminary
27 injunction “at any time after commencement of the action and before judgment.” ORCP
28 79(A)(2). A temporary restraining order may be granted without notice to the adverse party if

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1 “it clearly appears from specific facts shown by an affidavit, a declaration or a verified
2 complaint that immediate and irreparable injury, loss, or damage will result to the applicant
3 before the adverse party or the adverse party’s attorney can be heard in opposition, and * * *
4 [t]he applicant or applicant’s attorney submits an affidavit or a declaration setting forth the
5 efforts, if any, which have been made to notify defendant or defendant’s attorney of the
6 application, including attempts to provide notice by telephone, and the reasons supporting the
7 claim that notice should not be required.” ORCP 79(B)(1).

8 A temporary restraining order lasts for ten days unless the Court orders otherwise,
9 ORCP 79(B)(2), and a hearing on a motion for preliminary injunction shall occur “at the
10 earliest possible time” but not less than five days after the adverse party is given notice. ORCP
11 79(B)(3), (C)(1).

12 **IV. PETITIONERS’ MOTION SHOULD BE GRANTED**

13 Petitioners’ motion for a temporary restraining order and preliminary injunction should
14 be granted because Petitioners are entitled to relief demanded in the pleading, and such relief,
15 or a part thereof, consists of restraining the commission or continuance of the sale and
16 privatization of the East Hakki Ridge parcel, the commission or continuance of which during
17 the litigation would produce injury to the Petitioners. *See* ORCP 79(A)(1)(a).

18 To grant a temporary restraining order or preliminary injunction, the Court need not
19 conclusively rule on the merits of the case or find that Petitioners are certain to prevail. Rather,
20 the Court must find that it “appears” that the movant is entitled to the relief demanded in a
21 pleading. ORCP 79(A)(1)(a). The Court need only “recognize that a sufficient case has been *
22 * * made to warrant the preservation of the property or rights in status quo until the hearing on
23 the merits, without expressing a final opinion as to such right.” *American Life*, 66 Or at 420;
24 *see also* ORS 183.482(3)(a)(requiring the court to find only a “colorable claim of error” to
25 justify a preliminary injunction in a contested case hearing); *Winter v. Nat. Res. Def. Counsel*,
26 555 U.S. 7, 20 (2008)(requiring the court to find only that the movant is “likely” to succeed on
27 the merits to justify a preliminary injunction in federal cases).

1 A motion for temporary restraining order is, by definition, submitted in haste and
2 without the benefit of a complete record. Here, however, Petitioners can show much more than
3 just a likelihood of success. Petitioners' claim is straightforward. The vast majority of the East
4 Hakki Ridge parcel was part of the National Forest System on February 25, 1913, and was
5 selected by, and patented to, the State of Oregon for the purpose of establishing the Elliott State
6 Forest. Declaration of Nicholas Cady. This parcel is withdrawn from sale as a matter of law.
7 ORS 530.450. The final agency order for the sale of the East Hakki Ridge parcel is outside the
8 range of discretion delegated to the agency by law, not supported by substantial evidence in the
9 record, and otherwise in violation of ORS 530.450. The final agency order must therefore be
10 vacated, reversed, set aside, or remanded. ORS 183.484(5).

11 Respondent's sale of the East Hakki Ridge parcel is clearly precluded by law, ORS
12 530.450, and the only exception to this preclusion is for the exchange of equivalently valued
13 land for the purpose of consolidation. ORS 530.510. No land exchange has occurred here, and
14 the exception simply does not apply. The Constitution itself gives validity to ORS 530.450 and
15 other legislative constraints on Respondents' authority to manage and dispose of state lands.
16 Oregon Constitution, Article VIII, section 5 (the powers and duties of the State Land Board to
17 dispose of and manage state lands "shall be prescribed by law"). Petitioners are very likely to
18 succeed on the merits of their claim, and the motion for temporary restraining order and
19 preliminary injunction should be granted.

20 Petitioners must also establish that the relief demanded in their pleading, or any part
21 thereof, "consists of restraining the commission or continuance of some act, the commission or
22 continuance of which during the litigation would produce injury to the party seeking the relief."
23 ORCP 79(A)(1)(a). Petitioners seek to have the final agency order for the sale of the East
24 Hakki Ridge parcel reversed, vacated, set aside, and/or remanded to the agency, each of which
25 would necessarily restrain the commission or continuance of the sale of the East Hakki Ridge
26 parcel.

27 The sale and privatization of the East Hakki Ridge parcel during the litigation would
28 produce injury to Petitioners. Declaration of Joshua Laughlin. Petitioner Joshua Laughlin has

1 visited the Elliott State Forest on numerous occasions, including the East Hakki Ridge parcel.

2 *Id.* Mr. Laughlin has spent years of his life working to protect the forests, waters, and wildlife
3 of the Elliott State Forest from clearcutting and other environmentally harmful practices. *Id.*

4 Mr. Laughlin enjoys visiting the Elliott State Forest and the East Hakki Ridge parcel, including
5 hiking, looking for wildlife, and experiencing the peace and solitude of some of the last intact
6 and unlogged coastal forests in Oregon. *Id.* Mr. Laughlin has definite plans to return to the
7 Elliott State Forest and the East Hakki Ridge parcel. *Id.*

8 Mr. Laughlin will be injured and adversely affected by the sale of the East Hakki Ridge
9 parcel because privatization of the public land will prevent him from using, enjoying, and
10 experiencing the land that he currently uses and has legal access to. *Id.* The moment the sale
11 of the East Hakki Ridge parcel is finalized and closed, including if during the litigation, Mr.
12 Laughlin's use of that area becomes criminal. ORS 164.245. The loss of public land and legal
13 access to that land causes real and direct injury to Mr. Laughlin. Declaration of Joshua
14 Laughlin. Selling the land to Seneca Jones Timber Company to be clearcut and industrially
15 managed will further injure and aggrieve Mr. Laughlin because clearcutting causes severe
16 environmental damage to the native forests and unique forested habitat that Mr. Laughlin uses
17 and enjoys. *Id.* The native forests of the East Hakki Ridge parcel are more than one hundred
18 years old, and provide a unique and increasingly rare outdoor experience for Mr. Laughlin. *Id.*
19 If logged, these forests will not grow back within Mr. Laughlin's lifetime. *Id.* Once the land is
20 sold, it can be clearcut with fifteen days notice, and the state may authorize shorter timeframe if
21 a waiver is requested. ORS 527.670(6); OAR 629-605-0150(1), (2).

22 Petitioners Cascadia Wildlands, Center for Biological Diversity, and Audubon Society
23 of Portland are all registered non-profit corporations with charitable missions that include
24 protecting and restoring Oregon's environment, wildlife, and biological diversity. Petitioners
25 have a specific and particular interest in the preservation of public land and the protection and
26 recovery of the Elliott State Forest and the imperiled wildlife that lives there. Declaration of
27 Joshua Laughlin. The Elliott State Forest plays a unique and important role in restoring and
28 maintaining the balance and health of Oregon's greater natural environment. The Elliott State

1 Forest contains some of the last unlogged coastal rainforest in Oregon, and is critically
2 important habitat for endangered species such as coastal coho salmon, northern spotted owls,
3 and marbled murrelets. *Id.* For this reason and others, Petitioners have advocated for years for
4 the conservation and protection of the Elliott State Forest. *Id.*

5 Many of Petitioners' staff, boards, and members have been to the Elliott State Forest,
6 including the East Hakki Ridge parcel, and continue to work and recreate on the Elliott State
7 Forest on a regular basis. *Id.* Petitioners have hosted and continue to host public outreach and
8 educational events in and about the Elliott State Forest, including presentations, outdoor
9 excursions, and other on-site and off-site events. *Id.* The Elliott State Forest is regularly
10 featured in Petitioners' newsletters, on their websites, and other published materials. *Id.*

11 Petitioners have a real and direct interest in the conservation of the Elliott State Forest
12 as a public space, and have dedicated substantial time, money, and resources toward that goal.
13 Selling this public land to the highest bidder to be clearcut will injure and adversely affect
14 Petitioners in a variety of ways. Privatizing the East Hakki Ridge parcel will prevent
15 Petitioners from going there and using the land for public hikes, educational events, and other
16 outdoor activities. *Id.* Selling the land to Seneca Jones Timber Company to be clearcut,
17 aerially sprayed, and industrially managed will directly affect Petitioners' ongoing mission to
18 protect the land, its habitat, and the wildlife that live there. *Id.* Petitioners cannot fulfill their
19 organizational missions and goals to protect the Elliott State Forest if it is privatized. *Id.*

20 The injury to Petitioners from the sale of publicly owned and accessible forest, which
21 Petitioners use and enjoy, is significant and very real. The temporary restraining order and
22 preliminary injunction should be granted to preserve the *status quo* and to protect Petitioners'
23 interests and the Court's jurisdiction.

24 **V. PETITIONERS REQUEST IMMEDIATE RELIEF**

25 A temporary restraining order may be granted without even notice to the adverse party
26 if "it clearly appears from specific facts shown by an affidavit, a declaration or a verified
27 complaint that immediate and irreparable injury, loss, or damage will result to the applicant
28 before the adverse party or the adverse party's attorney can be heard in opposition, and * * *

1 [t]he applicant or applicant’s attorney submits an affidavit or a declaration setting forth the
2 efforts, if any, which have been made to notify defendant or defendant’s attorney of the
3 application, including attempts to provide notice by telephone, and the reasons supporting the
4 claim that notice should not be required.” ORCP 79(B)(1).

5 Respondent, in fact, has been provided far more notice of this motion than is required
6 by ORCP 79(B)(1), making the additional factors outlined in the paragraph above technically
7 inapposite. Specifically, on April 10 and 11, 2014 - prior even to the finalization of the agency
8 order at issue here - Petitioners mailed and emailed a notice letter to Respondent, the State
9 Land Board, and the Oregon Department of Justice setting forth the concerns raised herein and
10 requesting that Respondent hold off on closing the sale until the matter could be discussed and
11 resolved. Declaration of Daniel Kruse, Attachment 2. That letter specifically states that it was
12 Petitioners’ intent to commence legal action and seek an injunction upon finalization of the
13 Purchase and Sale Agreement. *Id.* Counsel for Petitioners then spoke with counsel for
14 Respondent on April 17 and 18, 2014, and on both occasions provided notice of the imminence
15 of this motion for temporary restraining order and preliminary injunction unless Respondent
16 agreed to voluntarily postpone the closing date. Declaration of Daniel Kruse. Petitioners
17 attempted to avoid the need for a temporary restraining order or preliminary injunction by
18 offering to expedite a briefing schedule on the merits of the case if Respondent would agree to
19 postpone the closing date, but Respondents indicated their intent to proceed with the imminent
20 sale of the parcel. *Id.*

21 Though ORCP 79(B)(1) does not apply as a result of the notice already provided to
22 Respondent, Petitioners still submit that their injuries will be immediate and irreparable in the
23 absence of a temporary restraining order. The closing of the sale and the transfer of the deed to
24 the East Hakki Ridge parcel are expected to occur imminently. Declaration of Daniel Kruse.
25 Petitioners’ access, use, and enjoyment of the now-public land are dissolved the moment the
26 sale occurs. Declaration of Joshua Laughlin. Once the deed is transferred, it is unclear
27 whether that transfer can be undone.

1 Preventing Petitioners from using and enjoying a now-public forest causes irreparable
2 injury. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). As the
3 Supreme Court has explained, “environmental injury, by its nature, can seldom be adequately
4 remedied by money damages and is often permanent or at least of long duration, *i.e.*,
5 irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually
6 favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co. v. Vill. of*
7 *Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396 (1987). The loss of mature and old-growth forest
8 habitat in particular, which Petitioners use and enjoy and which, by definition, cannot grow
9 back within Petitioners’ lifetimes, is irreparable. *Alliance for the Wild Rockies*, 632 F.3d at
10 1135 (logging causes “actual and irreparable injury” to environmental plaintiffs’ ability to
11 view, experience, and utilize forested areas in their natural state, even when other areas nearby
12 would remain unlogged); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or.
13 1992) (“Courts in this circuit have recognized that timber cutting causes irreparable damage
14 and have enjoined cutting when it occurs without proper observance of” law); *Pac. Rivers*
15 *Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994).

16 Respondent may attempt to argue that the continued availability of other parts of the
17 Elliott State Forest for Petitioners’ use annuls or negates any harm Petitioners have alleged.
18 This argument, however, has already been made and rejected. *See Alliance for the Wild*
19 *Rockies*, 632 F.3d at 1135 (“This argument proves too much. Its logical extension is that a
20 plaintiff can never suffer irreparable injury resulting from environmental harm in a forest area
21 as long as there are other areas of the forest that are not harmed. The Project will prevent the
22 use and enjoyment by [plaintiffs’] members of 1,652 acres of the forest. This is hardly a de
23 minimus injury”).

24 As explained above, counsel for Petitioners has made several efforts, some successful,
25 to notify counsel for Respondent of this motion. Declaration of Daniel Kruse. The Declaration
26 of Petitioners’ counsel sets forth the reasons supporting the claim that an injunction should
27 issue immediately. *Id.*

1 Injury to Petitioners is imminent and irreparable, and an injunction could be granted
2 immediately even if Respondents had not been given notice.

3 **VI. AN INJUNCTION IS IN THE PUBLIC INTEREST AND THE BALANCE OF**
4 **HARMS TIPS IN PETITIONERS' FAVOR.**

5 Though not required under Rule 79, Petitioners submit that it is in the public interest to
6 temporarily delay the sale and transfer of the deed to the East Hakki Ridge parcel, to allow a
7 reasoned and thorough determination by the Court of the legality of Respondent's action.

8 Petitioners further submit that the balance of harms tips in favor of preliminary relief.

9 The land at issue here is currently public land, which every person in the state has an
10 interest in and access to. Privatizing that land permanently removes this asset from the public
11 domain, and precludes public use and enjoyment of a now-common space. Under the Oregon
12 Constitution, this land is to be managed by the state "with the object of obtaining the greatest
13 benefit for the people of this state, consistent with the conservation of this resource under
14 sound techniques of land management." Oregon Constitution, Article VIII, section 5. Selling
15 the land to a private timber company to be clearcut, aerially sprayed, and industrially managed
16 is not consistent with this principle.

17 Conversely, there is little if any harm that will come to Respondent or the prospective
18 purchaser from a temporary delay in the closing of the sale while this Court reviews the legality
19 of Respondent's action. If the Court grants preliminary relief and ultimately rules against
20 Petitioners, then Respondent and the prospective purchaser can proceed as planned with only a
21 temporary delay. By the terms of the Purchase and Sale Agreement, neither party to the
22 agreement had any guarantee of closing until June 1, 2014 (forty-five days after April 15). On
23 the other hand, if the Court denies preliminary relief but ultimately rules in Petitioners' favor
24 after the land is sold and logged, it may be too late to undo the harm caused to Petitioners'
25 interests. Respondent may claim injury from delaying the receipt of the proceeds of the sale,
26 but such injury is purely financial and thus, by definition, not irreparable. *Levasseur v. Armon*,
27 240 Or. App. 250, 259, 246 P.3d 1171 (2010) (irreparable injury is injury for which there is no
28 adequate remedy at law).

1 A temporary restraining order and preliminary injunction are in the public interest and
2 the balance of harms tips in favor of preliminary relief. Petitioners' motion should be granted.

3 **VII. ONLY NOMINAL SECURITY SHOULD BE REQUIRED**

4 Under ORCP 82, "no restraining order or preliminary injunction shall issue except upon
5 the giving of security by the applicant, in such sum as the court deems proper, for the payment
6 of such costs, damages, and attorney fees as may be incurred or suffered by any party who is
7 found to have been wrongfully enjoined or restrained."

8 Petitioners respectfully request that the Court deem it proper to require only a nominal
9 security in the present case, of not more than \$1,000. First, Petitioners are three public interest
10 non-profit organizations with charitable missions that include protecting and restoring
11 Oregon's lands, waters, and wildlife, for the benefit of the natural environment and for the use
12 and enjoyment by the public. Courts have consistently required only a nominal bond in public
13 interest environmental litigation. *See, e.g., People ex rel. Van de Kamp v. Tahoe Reg'l Plan*,
14 766 F.2d 1319 (9th Cir. 1985) (no bond); *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473 (E.D.
15 Cal. 1988), *rev'd on other grounds*, 918 F.2d 813 (9th Cir. 1990) (\$100 bond); *Scherr v. Volpe*,
16 466 F.2d 1027 (7th Cir. 1972) (no bond); *W. Va. Highlands Conservancy v. Island Creek Coal*
17 *Co.*, 441 F.2d 232 (4th Cir. 1971) (\$100 bond); *Sierra Club v. Block*, 614 F. Supp. 488 (D.
18 D.C. 1985) (\$20 bond).

19 As the Court determines a proper security amount, it should consider the very
20 temporary nature of the relief that Petitioners are requesting. The Court should further consider
21 that this is a public interest case, and that requiring a large security would have a potential
22 chilling effect on litigation to protect the environment and the public interest in general.

23 **VIII. CONCLUSION**

24 For all of the reasons above, Petitioners' motion for a temporary restraining order and
25 preliminary injunction should be granted. The Court should immediately grant a temporary
26 restraining order and then order a briefing schedule and hearing before deciding on the motion
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1 for preliminary injunction.

2 Respectfully submitted and dated this 21st day of April, 2014.

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