

1
2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

6 CENTER FOR BIOLOGICAL DIVERSITY,
7 CASCADIA WILDLANDS, and TIERRA
8 CURRY,

9 Petitioners,

10 v.

11 OREGON DEPARTMENT OF FISH AND
12 WILDLIFE, and CURT MELCHER, in his
official capacity as the Director of Oregon
Department of Fish and Wildlife,

13 Respondents.
14

MOTION FOR TEMPORARY
RESTRAINING ORDER and ORDER TO
SHOW CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT ISSUE
(Oral Argument Requested)

15 Pursuant to ORCP 79, Petitioners move the Court for a temporary restraining order
16 requiring Respondents to immediately comply with an August 3, 2018 mandatory directive from
17 the Oregon State Fish and Wildlife Commission (“Commission”) to ban trapping of critically
18 imperiled Humboldt martens. The Commission ordered the trapping ban in response to a
19 rulemaking petition presenting new science showing that Oregon’s remaining Humboldt marten
20 populations stand at the brink of collapse from the loss of even a single marten from trapping. A
21 temporary restraining order implementing the Commission’s directive and banning trapping is
22 needed to prevent irreparable harm to the Humboldt marten, as well as to Petitioners and their
23 interests in these extremely rare animals. Petitioners further move the Court for an Order
24 requiring Respondents to show cause, if any, why the temporary restraining order requested
25 should not continue and remain in effect during the pendency of this action.

26
27 MOTION FOR TEMPORARY
RESTRAINING ORDER, and
28 MOTION FOR ORDER TO SHOW
CAUSE RE: PRELIMINARY
INJUNCTION - 1

Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211-0374
(503) 283-5474 ext. 407
(503) 283-5528 (fax)

Cascadia Wildlands
PO Box 10455
Eugene, OR 97440
(541) 434-1463
(541) 434-6494 (fax)

1 This motion is supported by the declarations of Petitioner Tierra Curry and Josh
2 Laughlin; the science summarized in the “Petition to Initiate Rulemaking to Amend OAR 635-
3 050-0110 to Prohibit Marten Trapping in Portions of Western Oregon” (“Petition”), which
4 Petitioners and others submitted (attached as Exhibit 1 to the Petition for Judicial Review, filed
5 herewith); and the Memorandum in Support of Temporary Restraining Order and Order to Show
6 Cause Why Preliminary Injunction Should Not Issue, filed herewith.

7 Petitioners request that the surety amount pursuant to ORCP 82 be set at \$0.00 because
8 Respondents—the Oregon Department of Fish and Wildlife (“ODFW”) and Director Curt
9 Melcher—would incur no costs from the issuance of the requested temporary restraining order.
10 Such an order would only serve to effectuate the Commission’s directive, which Respondents
11 have a duty to implement.

12 **POINTS AND AUTHORITIES**

13 1.

14 Due to high rates of historical trapping and large-scale logging of its preferred habitat, the
15 Humboldt marten, once common along the Oregon coast, has been reduced to two remnant
16 populations in Oregon within the Siuslaw and Siskiyou national forests. The Siuslaw National
17 Forest population is located in the Oregon Dunes National Recreation Area, is subdivided by the
18 Umpqua River, and contains approximately 71 individuals. Ex. 1 at 7–8.

19 2.

20 Certain life history traits of the Humboldt marten, including low reproductive capacity,
21 make the species unable to easily rebound from population declines. Adult survival is the most
22 important variable in marten population persistence and growth. Therefore, higher rates of adult
23 marten mortality, such as from trapping, have lasting impacts on population growth, overall
24 population size, and rate of recovery after population decrease. Ex. 1 at 7.

1 3.

2 Trapping—unless immediately banned—could extirpate the Humboldt marten in Oregon.
3 Ex. 1 at 8. Recent science establishes that two or more annual human-caused marten
4 mortalities—e.g., trapping or roadkill—results in an estimated extinction risk for a subpopulation
5 of 30 martens ranging from 32 percent (two annual human-caused mortalities per year) to 99
6 percent (three human-caused mortalities per year) within 30 years. *Id.*

7 4.

8 Trappers have killed at least eight coastal martens in Oregon since 2011. Declaration of
9 Tierra Curry (“Curry Decl.”) at ¶ 23. Mortalities from automobile strikes exacerbate the impacts
10 of these trapping deaths, as they result in several more human-caused Humboldt marten deaths
11 annually. Ex. 1 at 8. As such, even a single death from trapping greatly increases the risk of
12 extirpating a population. *Id.*

13 5.

14 In addition to temporarily banning lethal traps specifically set for Humboldt marten, the
15 Court should also temporarily ban all mammal trapping in the Oregon Dunes National
16 Recreation Area, and eliminate all marten and tree trapping in the Siskiyou and Siuslaw national
17 forests. Ex. 1 at 11. Such restrictions are necessary because martens may be injured or die if
18 caught in restraint traps set for other mammals. *Id.* at 11–12.

19 6.

20 Given the very small size of remaining Humboldt marten populations, every marten that
21 dies from trapping leads to an irreversible loss of genetic variation within local populations,
22 reducing a population’s ability to maintain the ability to adapt to changing environments. Ex. 1 at
23 10.

1 7.

2 Despite these significant and immediate threats to the species' survival, ODFW lists the
3 marten as a "furbearer" with an annual trapping season statewide from November 1 to January
4 31. OAR 635-050-0050(7).

5 8.

6 To address the grave threat trapping poses to the Humboldt marten's continued survival,
7 Petitioners submitted a rulemaking Petition to the Commission on May 9, 2018, requesting that
8 ODFW amend its regulation on "Marten Harvest Seasons," OAR 635-050-0110, to (1) prohibit
9 the trapping of martens west of the Interstate 5 corridor, (2) eliminate all mammal trapping in
10 the Oregon Dunes National Recreation Area, and (3) eliminate all marten and tree trapping in
11 the Siskiyou and Siuslaw national forests. The Petition contained a proposed amended version
12 of the regulation to that effect. *See* Ex. 1 at 10–11.

13 9.

14 The rulemaking Petition requested the amendment well in advance on this year's trapping
15 season "[b]ecause the Oregon and California populations of Humboldt marten are so small,
16 population models show that the survival of every individual, including both juveniles and
17 adults, is important for population persistence." Ex. 1 at 10.

18 10.

19 The Commission met on August 3, 2018, and—after an opportunity for public comment
20 and a presentation by ODFW's Carnivore-Furbearer Coordinator—accepted the Petition and
21 directed staff to initiate rulemaking on the concepts contained in Petition. *See* Ex. 2 at 11–12,
22 incorporated by reference.

23 11.

24 Since August 3, 2018, Respondents have taken no action to initiate rulemaking on the
25 concepts contained in the rulemaking petition. This year's trapping season opened on November
26

1 1, 2018, and will remain in effect until January 31, 2019. OAR 635-050-0110. The current
2 regulations also authorize next year’s open trapping season from November 1, 2019 to January
3 31, 2020. *Id.*

4 12.

5 This Court has jurisdiction to consider the Petition for Judicial Review submitted
6 herewith. Respondents have unlawfully refused to act or unreasonably delayed taking action to
7 initiate rulemaking consistent with the Petitioners’ rulemaking petition. This Court has authority
8 pursuant to ORS 183.490 to compel an agency to act where it has unlawfully refused to act or
9 make a decision, or where it has unreasonably delayed taking action or making a decision.

10 13.

11 Given the Commission’s August 2018 directive, Respondents have a mandatory,
12 immediate duty to initiate rulemaking to ban marten trapping consistent with the rulemaking
13 petition. ORS 496.118(1)(c).

14 14.

15 Because Respondents have failed to act on their mandatory duty and because the Court
16 has jurisdiction pursuant to ORS 183.490 to compel such unlawfully withheld or delayed action,
17 Petitioners are entitled to the Relief demanded in their Petition for Review, namely, a court order
18 compelling Respondents to immediately initiate rulemaking to amend its regulation on “Marten
19 Harvest Seasons,” OAR 635-050-0110, to (1) prohibit the trapping of martens west of the
20 Interstate 5 corridor, (2) eliminate all mammal trapping in the Oregon Dunes National Recreation
21 Area, and (3) eliminate all marten and tree trapping in the Siskiyou and Siuslaw national forests.
22 ORCP 79(A)(1)(a); *see* Ex 1 at 10–11.

23 15.

24 The continuance of marten trapping “during the litigation would produce injury” both to
25 Petitioners and the Humboldt marten. ORCP 79(A)(1)(a); *see also* Memorandum in Support at

1 subsection II. Respondents' failure to initiate and conclude rulemaking prior to the 2018
2 Humboldt marten trapping season has allowed the trapping of critically endangered Humboldt
3 martens to continue. Their inaction is irretrievably and irreparably harming the critically
4 imperiled Humboldt marten and Petitioners' interests in its survival.

5 **CONCLUSION**

6 The loss of even one Humboldt marten from trapping will cause irreparable harm to the
7 species and Petitioners. Respondents have failed to act in accordance with the Commission's
8 directive to ban the trapping of Humboldt martens. A temporary restraining order requiring
9 Respondents to initiate temporary rulemaking in accordance with ORS 183.335(5) to (1) prohibit
10 the trapping of martens west of the Interstate 5 corridor, (2) eliminate all mammal trapping in the
11 Oregon Dunes National Recreation Area, and (3) to eliminate all marten and tree trapping in the
12 Siskiyou and Siuslaw national forests during the pendency of this action would prevent
13 irreparable harm to both the species and Petitioners.

14 DATED: December 19, 2018.

15 Respectfully submitted,

16 /s/ Ryan Adair Shannon
17 Ryan Adair Shannon (OSB #155537)
18 Center for Biological Diversity
19 P.O. Box 11374
20 Portland, OR 97211-0374
21 (503) 283-5474 ext. 407
22 rshannon@biologicaldiversity.org

23 Nicholas S. Cady (OSB # 113463)
24 Cascadia Wildlands
25 P.O. Box 10455
26 Eugene, Oregon 97440
27 Ph: (541) 434-1463
28 Fax: (541) 434-6494
nick@cascwild.org

Counsel for Petitioners