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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
13 official capacity as the Director of Oregon
14 Department of Fish and Wildlife,

15 Respondents.

MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY
RESTRAINING ORDER and ORDER TO
SHOW CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT ISSUE

(Oral Argument Requested)
(Expedited Review Requested)

15 Petitioners respectfully submit this memorandum in support of their Motion for
16 Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not
17 Issue against Respondents pursuant to ORCP 79.

18 **INTRODUCTION**

19 Once believed extinct, the Humboldt marten was rediscovered in coastal forests in
20 northern California and southern Oregon in 1996. However, less than 200 martens remain state-
21 wide, and human-caused mortalities from activities such as trapping pose a significant risk to the
22 survival of these remaining, small populations. Ex. 1 at 8. Despite this threat, recreational and
23 commercial trapping for the species remains legal in Oregon. OAR 635-050-0110.

24 This led Petitioners and others to submit a petition on May 9, 2018, seeking a ban on all
25 Humboldt marten trapping in Oregon. The Oregon State Fish and Wildlife Commission

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CAUSE RE: PRELIMINARY
INJUNCTION - 1

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1 (“Commission”) accepted that petition on August 3, 2018, and directed the Oregon Department
2 of Fish and Wildlife (“ODFW”) and Director Curt Melcher (collectively, “Respondents”) to
3 initiate rulemaking that bans trapping of critically imperiled Humboldt martens. To date,
4 Respondents have failed to act on that directive despite the trapping season opening on
5 November 1, 2018. Thus, a temporary restraining order should issue to ensure that no more
6 Humboldt martens die because of Respondents’ delay.

7 Petitioners respectfully request that the Court issue an immediate temporary restraining
8 order to stop the trapping of Humboldt martens. Petitioners further request that the Court set a
9 briefing schedule and hearing date for the motion for preliminary injunction. The motion should
10 be granted to maintain the *status quo*, thereby temporarily protecting both Petitioners’ interests
11 and the Court’s jurisdiction, until the matter can be more thoroughly argued and then decided.

12 **FACTUAL BACKGROUND**

13 The Humboldt marten was once found throughout the coastal forests of British Columbia,
14 Washington, Oregon, and northern California. Ex. 1 at 3. But the Humboldt marten’s historic
15 range has declined by greater than 95 percent because of trapping and logging. *Id.* Now only
16 three small, isolated populations remain in Oregon and northern California.

17 Human-caused mortalities risk the survival of these small populations, with models
18 indicating that as few as two human-caused marten deaths per year may lead to their extirpation.
19 *Id.* at 8. However, despite the imperiled status of these populations, Oregon still allows the
20 recreational and commercial trapping of Humboldt martens, with a season lasting from
21 November 1 to January 31 each year and no limit on how many may be trapped. OAR 635-050-
22 0110. Absent a ban, trapping poses a significant and imminent risk to the Humboldt marten. Ex.
23 1 at 8. In turn, a trapping ban would reduce anthropogenic pressures on the marten, increasing
24 the chances that the current populations will survive in the long-term. *Id.* Such a ban would
25 redress Petitioners’ organizational, aesthetic, recreational, moral, scientific, ecological, and

1 professional interests in the Humboldt marten. *See generally* Declaration of Tierra Curry (“Curry
2 Decl.”).

3 **LEGAL BACKGROUND**

4 The Court has inherent authority to issue preliminary relief to preserve the status quo—
5 and thus the Court’s jurisdiction—including in actions arising under the Oregon Administrative
6 Procedure Act. *See Northwestern Title Loans, LLC v. Division of Finance and Corporate*
7 *Securities, Div.*, 180 Or App 1, 10 (2002) (courts of equity have “inherent powers” including
8 “the authority to grant provisional, including injunctive, relief”).

9 Oregon law provides that “[t]he judge of any county court having judicial functions shall
10 grant preliminary injunctions or orders in any suit in the circuit court commenced in the county,
11 upon application made in the manner prescribed by ORCP 79.” ORS 5.030. Subject to the
12 posting of a security, a temporary restraining order or preliminary injunction may be granted
13 under ORCP 79 “when it appears that a party is entitled to relief demanded in a pleading, and
14 such relief, or any part thereof, consists of restraining the commission or continuance of some
15 act, the commission or continuance of which during the litigation would produce injury to the
16 party seeking the relief.” ORCP 79(A)(1)(a).

17 Provisional injunctive relief may issue upon a showing that (1) threatened or existing
18 irreparable injury is occurring or will occur before the case can be decided in the regular
19 course, and (2) the injury is of such nature that later monetary or material compensation would
20 be inadequate. *See State ex rel. Tidewater Shaver Barge Lines v. Dobson*, 195 Or 533, 580–581
21 (1952).¹ The issuance of a preliminary injunction is committed to the broad discretion of the trial
22 court. *See State ex rel. Keisling v. Norblad*, 317 Or 615, 623 (1993). The Court may enter a
23

24
25 ¹ Opinions issued prior to ORCP 79’s adoption remain good law. *Or. Educ. Ass’n v. Or.*
Taxpayers United PAC, 227 Or. App. 37, 45 n.4 (2009).

1 temporary restraining order or preliminary injunction “at any time after commencement of the
2 action and before judgment.” ORCP 79(A)(2).

3 **ARGUMENT**

4 Petitioners’ motion for a temporary restraining order should be granted because
5 Petitioners are entitled to relief demanded in the pleading, and such relief, or a part thereof,
6 consists of restraining the recreational and commercial trapping of Humboldt martens, the
7 commission or continuance of which during litigation would injure Petitioners. *See* ORCP
8 79(A)(1)(a). Monetary or material compensation for Petitioners’ injury would be wholly
9 inadequate.

10 **I. Petitioners are Entitled to the Relief Sought in Their Petition for** 11 **Judicial Review**

12 Petitioners are likely to succeed on their claim that Respondents failed to act in
13 accordance with the Commission’s directive to initiate rulemaking to ban Humboldt marten
14 trapping. *See generally* Petitioners’ Petition for Judicial Review. To grant a temporary
15 restraining order or preliminary injunction, the Court need not conclusively rule on the merits of
16 the case or find that Petitioners are certain to prevail. Rather, the Court must find that it
17 “appears” that the movant is entitled to the relief demanded in a pleading. ORCP 79(A)(1)(a).
18 The Court need only “recognize that a sufficient case has been . . . made to warrant the
19 preservation of the property or rights *in statu quo* until the hearing on the merits, without
20 expressing a final opinion as to such right.” *Am. Life Ins. Co. v. Ferguson*, 66 Or. 417, 420
21 (1913); *see also* ORS 183.482(3)(a) (requiring the court to find only a “colorable claim of error”
22 to justify a preliminary injunction in a contested case hearing).

23 Here, however, Petitioners can show much more than just a likelihood of success. On
24 May 9, 2018, Petitioners submitted a petition to the Commission requesting that the Commission
25 ban commercial trapping for critically endangered Humboldt martens. *See* Ex. 1. On August 3,

1 2018, the Commission accepted the petition and directed staff “to initiate rulemaking on the
2 concepts contained in the petition.” Ex. 2 at 11. The Commission issued its directive nearly three
3 months prior to the opening of the marten trapping season on November 1, 2018. OAR 635-050-
4 0110. However, Respondents have taken no action to comply with the Commission’s directive, a
5 directive they are statutorily required to follow. ORS 496.118(1)(c) (noting that the Director of
6 ODFW is responsible for the administration and enforcement of the wildlife laws of the state
7 “[s]ubject to policy direction by the State Fish and Wildlife Commission”). Respondents
8 have thus “unlawfully refused to act.” ORS 183.490.

9 Respondents have also unreasonably delayed taking action in response to the
10 Commission’s directive. ORS 183.490. Courts assess the reasonableness of a delay based on
11 whether an agency’s action was “timely enough” for the affected party to obtain effective relief.
12 *See Lombardo v. Warner*, 340 Or. 264, 273–74 (2006) (noting that “what is reasonable may not
13 be the same in every instance[,]” and that a court reviewing an agency’s inaction should look to
14 the circumstances to determine whether the delay was unreasonable). Here, Petitioners submitted
15 their petition in May and the Commission granted it in August, long before the start of this year’s
16 trapping season, which now directly and irreparably injures Petitioners. *See infra* at subsection
17 II. By failing to take conclusive action pursuant to the Commission’s directive prior to the start
18 of this year’s trapping season, the Department has unreasonably delayed implementation of a
19 Commission’s order and risked a catastrophic population-level event for Humboldt martens.

20 **II. Failing To Restrain Humboldt Marten Trapping Now Would Injure**
21 **Petitioners**

22 Petitioners would be irreparably harmed if this Court does not stop the ongoing trapping
23 season in accordance with the Commission’s directive. Specifically, scientists have established
24 that Humboldt martens could be lost from Oregon if the species incurs as few as two or more
25 deaths from trapping or vehicle strikes each year. Ex. 1. at 8–9. The Central Coast population of

1 Humboldt marten, which occurs in the Oregon Dunes National Recreation Area along Highway
2 101, already incurs several human-caused mortalities each year as result of car strikes. *Id.* at 2, 8.
3 As a result, even a single trapping death greatly increase the likelihood that the population will
4 be extirpated. *Id.* at 8.

5 Respondents' inaction also injures Petitioner Tierra Curry's aesthetic, recreational, moral,
6 scientific, ecological, and professional interests in the Humboldt marten. Every single trapping
7 death decreases her chance of observing Humboldt martens in the wild, Curry Decl. at ¶33;
8 causes her moral outrage over Respondents' mismanagement of the marten population, *id.* at ¶
9 34; harms her ability to study the species as a scientist, *id.* at ¶ 35; and injures her ecological
10 interest in preserving the martens' role in the local ecosystem. *Id.* at ¶ 37. Furthermore, Petitioner
11 Curry is harmed by the existence of trapping season itself, as it flies in the face of sound
12 conservation and the wildlife she loves and works to protect. *Id.* at ¶ 41. Finally, Respondents'
13 inaction harms Petitioner Curry as continued trapping harms her ability to look for and enjoy
14 Humboldt martens in the wild with her son. *Id.* at ¶ 40.

15 Petitioners Cascadia Wildlands and the Center for Biological Diversity ("Center") are
16 also harmed by Respondents' failure to act as it undermines their organization's work and ability
17 to protect native wildlife. Both Cascadia Wildlands and the Center are registered nonprofit
18 corporations with charitable missions that include protecting and restoring Oregon's
19 environment, wildlife, and biological diversity. *Id.* at ¶ 3, Laughlin Decl. at ¶ 2. Cascadia
20 Wildlands and the Center also have a specific and particular interest in the protection and
21 recovery of the Humboldt marten. Curry Decl. at ¶¶ 5, 9–10; Laughlin Decl. at ¶ 3. For a species
22 once believed extinct due largely to human exploitation of coastal forests, the second chance for
23 the species is significant to Cascadia Wildlands, the Center, and their members. Curry Decl. at
24 ¶¶ 4, 8–12; Laughlin Decl. at ¶ 3. Cascadia Wildlands staff, board, and members annually paddle
25 into the heart of the Humboldt marten population's range in the Siuslaw National Forest to camp

1 for several nights in hope of viewing or photographing the species, as well as in appreciation of
2 this unique ecosystem. Laughlin Decl. at ¶ 7. Petitioners have hosted and continue to host public
3 outreach and educational events about Humboldt martens and within marten habitat, including
4 presentations by experts, outdoor excursions, and other on-site and off-site events. *Id.* at ¶¶ 6–8.
5 The Humboldt marten is regularly featured in Petitioners’ newsletters, on their websites, and
6 other published materials. Curry Decl. at ¶¶ 11–12; Laughlin Decl. at ¶ 8. Petitioners have a real
7 and direct interest in the recovery of the Humboldt marten, and have dedicated substantial time,
8 money, and resources toward that goal. Curry Decl. at ¶¶ 9–12; Laughlin Decl. at ¶ 10.

9 The ongoing trapping season for the Humboldt marten injures and adversely affects
10 Petitioners as it authorizes the trapping and killing of Humboldt martens without limit. OAR
11 635-050-0110. The death of an individual marten adversely affects Cascadia and the Center’s
12 members and organizational interests in the species’ recovery as each death makes it more likely
13 that the species will fail to recover and instead be extirpated from Oregon. Ex. 1 at 8. Petitioners
14 cannot fulfill their organizational missions or goals to protect the Humboldt marten while an
15 open trapping season for the animal exists.

16 Finally, Respondents’ failure to act adversely affects Petitioners’ right to petition the
17 Commission to protect Oregon’s native wildlife. Respondents’ failure to act upon the accepted
18 petition discourages public participation and undermines Petitioners’ and the public’s faith in
19 Respondents and the public process.

20 **III. Monetary Or Material Compensation For Petitioners’ Injury Would Be**
21 **Wholly Inadequate**

22 Monetary or material compensation cannot adequately compensate for Petitioners’ injury.
23 As the Supreme Court has noted, “environmental injury, by its nature, can seldom be adequately
24 remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.
25 If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance

1 of an injunction to protect the environment.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531,
2 545 (1987).

3 The loss of even one or two Humboldt martens from Oregon’s trapping season could
4 have disastrous implications for the statewide population and could lead to the extirpation of the
5 species. Ex. 1 at 8. No amount of funds can return an extinct species to the wild. For a species on
6 brink of extinction, the only meaningful relief available is an injunction requiring Respondents to
7 act in accordance with the Commission’s directive to ban Humboldt marten trapping.

8 Nor can any amount of funds alleviate Petitioner Curry’s injuries as, for her, “the value of
9 having coastal martens living in [Oregon] is priceless.” Curry Decl. at ¶ 28. The take of even a
10 single marten this year will decrease her ability to study Humboldt martens, *id.* at ¶ 35;
11 undermine her work to protect Humboldt martens, *id.* at ¶ 36; hurt the local ecosystem, *id.* at ¶
12 37; and lessen her and her son’s chances of seeing a Humboldt marten in the wild. *Id.* at ¶ 40. An
13 injunction enforcing the Commission’s directive will redress those injuries by protecting the rare
14 animals from trapping.

15 **IV. Petitioners Have Notified Respondents and Request Immediate Relief**

16 A temporary restraining order may be granted without notice to the adverse party if (1)
17 “immediate and irreparable injury, loss, or damage will result to the applicant before the adverse
18 party or the adverse party’s attorney can be heard in opposition,” and (2) “[t]he applicant or
19 applicant’s attorney submits an affidavit or a declaration setting forth the efforts, if any, which
20 have been made to notify defendant or defendant’s attorney of the application, including attempts
21 to provide notice by telephone, and the reasons supporting the claim that notice should not be
22 required.” ORCP 79(B)(1).

23 Respondents were provided notice of this motion. Specifically, on November 27, 2018,
24 counsel for Petitioners spoke to Derrick Broman, Carnivore-Furbearer Coordinator at ODFW,
25 concerning the trapping season that just started for Humboldt martens and inquiring about

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1 ODFW's progress concerning the Commission's order. Cady Decl. at ¶ 5. Mr. Broman
2 responded that the Department had not taken any action on the order and had no concrete plans
3 to do so. *Id.*² On December 10, 2018, Petitioners emailed a notice letter to ODFW, the
4 Commission, and the Governor's office setting forth the concerns raised herein and requesting
5 that ODFW suspend trapping for the Humboldt marten in line with the Commission's directive
6 until this matter could be discussed and resolved. *Id.* at ¶ 6. That letter specifically states that it
7 was Petitioners' intent to commence legal action absent a resolution. *Id.* Petitioners' counsel then
8 spoke with counsel for ODFW on December 17 and 18, and on both occasions provided notice
9 of the imminence of this motion for a temporary restraining order and preliminary injunction. *Id.*
10 Respondents' counsel stated her intent to appear at the hearing for the temporary restraining
11 order.

12 **V. This Court Should Require Only a Nominal Security, If Any**

13 Petitioners respectfully request that the Court require only a nominal security in the
14 present case. Under ORCP 82, "no restraining order or preliminary injunction shall issue except
15 upon the giving of security by the applicant, in such sum as the court deems proper, for the
16 payment of such costs, damages, and attorney fees as may be incurred or suffered by any party
17 who is found to have been wrongfully enjoined or restrained." However, courts have consistently
18 required only a nominal bond in public interest environmental litigation. *See, e.g., People ex rel.*
19 *Van de Kamp v. Tahoe Reg'l Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Wilderness Soc'y v.*
20 *Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), *rev'd on other grounds*, 918 F.2d 813 (9th Cir.
21 1990) (\$100 bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *W. Va. Highlands*
22 *Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (\$100 bond); *Sierra Club v.*

23 _____
24 ² *See also* ODFW's Notices of Proposed Rulemakings, *available at*
25 https://www.dfw.state.or.us/OARs/rules_proposed.asp (showing that as of Dec. 18, 2018, ODFW
26 had not provided notice of any proposed rulemaking in accordance with the Commission's
27 directive).

1 *Block*, 614 F. Supp. 488 (D. D.C. 1985) (\$20 bond). Petitioners submit that Respondents would
2 incur no compensable costs or damages from an order requiring them to undertake action they
3 are statutorily required to take. Furthermore, Petitioners consist of two public interest nonprofit
4 organizations and a private citizen concerned with Humboldt marten conservation. Requiring a
5 large security amount is contrary to the public interest as it would have a chilling effect on
6 litigation to protect the environment.

7 **VI. The Specific Relief Requested By Petitioners Is Necessary To Prevent**
8 **Irreparable Harm**

9 Petitioners request that this Court issue a temporary restraining order compelling
10 Respondents to immediately initiate rulemaking in accordance with ORS 183.335(5)—the
11 emergency rulemaking procedures—to amend its regulation on “Marten Harvest Seasons,” OAR
12 635-050-0110. Specifically, the emergency rulemaking should prohibit the trapping of martens
13 west of the Interstate 5 corridor, eliminate all mammal trapping in the Oregon Dunes National
14 Recreation Area, and eliminate all marten and tree trapping in the Siskiyou and Siuslaw national
15 forests, as set forth in the rulemaking petition accepted by the Commission. Ex. 1 at 10–12
16 (detailing amendment); *see also* Ex. 2 at 11 (ordering ODFW to initiate rulemaking on the
17 concepts contained in the petition).

18 Nothing less than a complete ban on trapping of Humboldt marten would ensure that no
19 martens are harmed as a result of Respondents’ failure to act during the pendency of this
20 litigation, thereby preventing immediate irreparable harm to both Petitioners and the Humboldt
21 marten. The areas outlined in the rulemaking petition are narrowly tailored to cover the areas of
22 the state where the Humboldt marten lives. Ex. 1 at 12. A prohibition on trapping in the areas set
23 forth above and in the rulemaking petition will help ensure the survival of the less than 200
24 martens remaining in Oregon’s coastal forests. Curry Decl. at ¶ 42.

1 Although ORS 183.335(5) contains specific requirements for initiating temporary
2 rulemaking, those requirements are easily met in this case. First, based on the information
3 contained in Petitioners' Motion for a Temporary Restraining Order, this memorandum, and in
4 Petitioners' declarations, Respondents' failure to act promptly in accordance with the
5 Commission's directive will result in serious prejudice to the public interest and the interests of
6 the parties concerned. ORS 183.335(5)(a). Second, Respondents have legal authority to initiate
7 the temporary rulemaking under ORS 183.335, ORS 496.138, ORS 496.162, and ORS 496.118.
8 ORS 183.335(5)(b). Third, the need for the rule is first and foremost based on Respondents' duty
9 to comply with the Commission's directives pursuant to ORS 496.118. ORS 183.335(c). The
10 rule is also necessary to ensure the survival of Oregon's remaining Humboldt martens. Curry
11 Decl. at ¶ 42; *see also* Ex. 1. Finally, the documents, reports, and studies necessary for preparing
12 the rule are cited in the rulemaking petition. *See* Ex. 1 at 13–15; ORS 183.335(d). Any harm
13 caused by an alleged lack of public notice is alleviated by the fact that the Commission accepted
14 public comment on the rulemaking petition when it adopted it on August 3, 2018. *See* Ex. 2
15 at 11.

16 CONCLUSION

17 The loss of even one Humboldt marten from trapping will cause irreparable harm to the
18 species and Petitioners. Respondents have failed to act in accordance with the Commission's
19 directive to ban the trapping of Humboldt martens. To prevent irreparable harm to both the
20 species and Petitioners, the Court should enter a temporary restraining order requiring
21 Respondents to (1) prohibit the trapping of martens west of the Interstate 5 corridor, (2) eliminate
22 all mammal trapping in the Oregon Dunes National Recreation Area, and (3) eliminate all marten
23 and tree trapping in the Siskiyou and Siuslaw national forests during the pendency of this action.
24

1 DATED: December 19, 2018.

Respectfully submitted,

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