

Lauren S. Holland
Circuit Judge
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**CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY**

August 1, 2019

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Re: Cascadia Wildlands, Defenders of Wildlife, Audubon Society of Portland, Oregon Wild, the Center for Biological Diversity, and David Eisler vs Oregon Fish and Wildlife Commission, Lane Co. Circuit Court Case #18CV34127, Summary Judgment Opinion Letter

Dear Counsel,

This matter came before the court on Plaintiffs' Motion and Memorandum for Summary Judgment and accompanying documents, and on Respondent's Motion for Summary Judgment and accompanying documents. The Court reviewed all filed documents including but not limited to Respondent's Response to Petitioners' Motion for Summary Judgment, Petitioners' Reply in Support of Motion for Summary Judgment and in Response to Respondent's Motion for Summary Judgment, Respondent's Reply in Support of Respondent's Motion for Summary Judgment, and Brief of Amicus Curiae Oregon Forest & Industries Council in Opposition to Petitioners' Motion for Summary Judgment. The Court also reviewed the record of the proceedings submitted and filed by the parties in this case.

The court heard oral argument on June 27, 2019. Petitioners appeared by and through attorneys Nicholas Cady and John Mellgren and Respondent appeared by and through attorneys Nina Englander and Darsee Staley. The court took the matter under advisement.

Based upon oral argument, the filed documents, and law, the Court is writing this letter opinion and makes the following findings and conclusions:

Undisputed Facts

On June 21, 2016, Cascadia Wildlands, the Center for Biological Diversity, Coast Range Forest Watch, Oregon Wild, the Audubon Society of Portland and the Oregon Chapter of the Sierra Club petitioned the Oregon Fish and Wildlife Commission (Commission) to reclassify, that is, to uplist, the marbled murrelet from threatened to endangered status pursuant to the Oregon Endangered Species Act. The Commission responded in writing within 90 days as required by statute. ORS 496.176(5)(c). The Commission found that the Petition presented “substantial scientific information to warrant the action requested.” ORS 496.176(5)(c). The Commission initiated the rulemaking process to consider the uplisting of the marbled murrelet and directed the Oregon Department of Fish and Wildlife (ODFW) to prepare a peer-reviewed Status Review of the marbled murrelet. The Status Review report was submitted to the Commission.

At its February 9, 2018, meeting, the Commission heard testimony from, inter alia, Oregon State University’s principal investigator for marbled murrelet research, Dr. Jim Rivers, ODFW staff, the Oregon Department of Forestry, representatives of the Oregon Forest Industries Council, foresters, representatives of the Oregon Small Woodlands Association, and considered written testimony and the ODFW peer-reviewed Status Review report. The Commission then voted 4 to 2 to “accept the petitioners’ recommendation and reclassify the marbled murrelet as endangered under the Oregon Endangered Species Act and direct staff to develop survival guidelines for adoption at the time of reclassification.” EISLER_ODFW003536. The record reflects that upon taking the vote, Vice Chair Webber stated, “...So the - - we have voted to up-list the marbled murrelet.” EISLER_ODFW003536.

At its June 7, 2018, meeting, the Commission took testimony from the, inter alia, County Commissioners from Coos County, Josephine County, Douglas County, and Tillamook County, forest industry representatives, staff from ODFW, representatives of the Petitioners and other members of the public, and received written materials. The Commission then voted 4 to 2 “to deny the petitions recommendation to reclassify the Marbled Murrelet as endangered under the Oregon Endangered Species Act.” EISLER_ODFW003901.

The Commission issued a Final Order Denying Petition on August 28, 2018. EISLER_ODFW003915. The Final Order provides:

“On June 21, 2016, Petitioners Cascadia Wildlands, the Center for Biological Diversity, Coast Range Forest Watch, Oregon Wild, the Audubon Society of Portland and the Oregon Chapter of the Sierra Club filed pursuant to ORS 496.175(5) a Petition to Uplist the Marbled Murrelet from Threatened to Endangered under the Oregon’s Endangered Species Act (the “Petition”) for consideration by the Oregon fish and Wildlife Commission (the “Commission”). This matter came before the Commission for action at regular meetings held on February 9, 2018 and June 8, 2018. Consistent with its obligations under the Oregon Endangered Species Act and Oregon administrative rules, the Commission considered pertinent materials and information, including the Petition, staff reports, presentations, scientific information, and comments submitted by staff, peer reviewers, federal and state agencies, local governments and the public.

“After due consideration, the Petition is hereby denied. The Commission reached this decision after evaluating the appropriate factors. See ORS 496.176(3); OAR 635-100-0105(6); OAR 635-100-0111(1).

“Dated this 28 day of August, 2018.”

The final order was signed by Michael Finley, Chair, Oregon Fish and Wildlife Commission.

Conclusions of Law

Pursuant to ORS 183.484 (5)(b)(B),

“The court shall remand the order to the agency if it finds the agency’s exercise of discretion to be:

...

(B) Inconsistent with an agency rule, an officially stated agency position, or a prior agency practice, if the inconsistency is not explained by the agency;”

The Court finds that at the February, 2018, meeting, the Commission voted to accept the petition to uplist the species. EISLER_ODFW003536, EISLER_ODFW003891. The court finds that, based upon the vote and the Record of the meeting, this was an officially stated agency position. When the Commission voted at the June, 2018, meeting to deny the petition, it was required to explain this contradiction. The Final Order Denying Petition does not provide any reasoned explanation for the inconsistency with the Commission’s position to accept the petition at the February, 2018, meeting. The Court does not find persuasive Respondent’s argument that an explanation was provided at the June, 2018, meeting or in these court proceedings. The Commission failed to provide a written basis for the denial.

The Court finds that the Commission failed to comply with ORS 183.484(5)(b)(B) as required.

The Court grants Petitioners' motion for summary judgment on the above-stated basis and remands the order to the agency.

The Court directs Petitioners to prepare and file the appropriate documents, submitting them first to counsel pursuant to court rule.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lauren S. Holland".

Lauren S. Holland
Circuit Court Judge, Lane County