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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH
6

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

10 Petitioners,

11 v.

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

16 Respondents.

PETITION FOR JUDICIAL REVIEW

(Oregon Administrative Procedures Act,
ORS 183.490)

**NOT SUBJECT TO MANDATORY
ARBITRATION**

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Petitioners allege as follows:

1. On August 3, 2018, the Oregon State Fish and Wildlife Commission (“Commission”) directed the Oregon Department of Fish and Wildlife (“ODFW”) and Director Curt Melcher (collectively, “Respondents”) to initiate rulemaking to ban trapping of critically imperiled Humboldt martens. The Commission’s directive was in response to the “Petition to Initiate Rulemaking to Amend OAR 635-050-0110 to Prohibit Marten Trapping in Portions of Western Oregon” (“Petition”), attached and incorporated by reference as Exhibit (“Ex.”) 1, which Petitioners and others submitted in May 2018. Respondents have failed to take any action to implement the Commission’s directive in advance of or since Oregon’s statewide trapping

PETITION FOR REVIEW-1

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1 season for marten began on November 1, 2018. As such, Petitioners the Center for Biological
2 Diversity, Cascadia Wildlands, and Tierra Curry (collectively “Petitioners”) submit this petition
3 for judicial review seeking an order requiring Respondents to immediately amend the “Marten
4 Harvest Seasons” regulation to ban trapping of the critically imperiled Humboldt marten.

5 **PARTIES**

6 2.

7 The CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a non-profit conservation
8 organization with more than a million members and supporters dedicated to the conservation of
9 endangered species and wild places, including more than 24,000 members and supporters in
10 Oregon. Through legal petitions and other advocacy, discussed below, the Center has been
11 working to protect the Humboldt marten and its habitat for nearly a decade.

12 3.

13 Petitioner CASCADIA WILDLANDS is a non-profit, public interest environmental
14 organization headquartered in Eugene, Oregon. Cascadia Wildlands educates and inspires a
15 movement to protect and restore Cascadia’s wild ecosystems, including the Humboldt marten
16 and other species therein. Cascadia Wildlands envisions vast old-growth forests, rivers full of
17 wild salmon, wolves howling in the backcountry, and vibrant communities sustained by the
18 unique landscapes of the Cascadia bioregion. Cascadia Wildlands has worked for more than a
19 decade on marten issues in the Pacific Northwest.

20 4.

21 TIERRA CURRY is a member of the Center and an individual residing in Multnomah
22 County, Oregon. She has worked as a scientist at the Center since 2007. She has been working to
23 gain protections for the Humboldt marten since 2010. She was the lead author on the 2010
24 petition seeking federal Endangered Species Act protection for the marten. She was a co-author
25 on the 2015 petition seeking California Endangered Species Act protection for the marten. She

1 was the lead author on the 2018 petitions to the state of Oregon seeking a ban on marten trapping
2 west of the I-5 corridor and on the petition seeking Oregon Endangered Species Act protection
3 for the marten.

4 5.

5 For years, Petitioners have collectively invested significant time, energy, money, and
6 other resources to strengthen protections for the Humboldt marten by educating the public;
7 monitoring and collecting information; communicating with and petitioning state and federal
8 agencies; and engaging in other advocacy.

9 6.

10 Petitioners Cascadia Wildlands and the Center are adversely affected and aggrieved by
11 Respondents' failure to act on the Commission's directive to initiate rulemaking consistent with
12 their Petition to prohibit trapping of Humboldt martens. Both organizations have invested time
13 and financial resources into ensuring the continued survival of the Humboldt marten.
14 Respondents' failure to act prior to this year's trapping season adversely undermines Cascadia
15 Wildland's and the Center's work to protect Humboldt martens, and it puts the species—and
16 Petitioners' interests in the species—at risk of irreparable harm. A court order would redress
17 these harms by forcing Respondents to take direct and immediate action to ban the trapping of
18 the critically imperiled Humboldt marten.

19 7.

20 Petitioners Cascadia Wildlands and the Center are further adversely affected and
21 aggrieved by Respondents' failure and unreasonable delay in acting on the Commission's
22 directive because it undermines the efficacy of Petitioners' right to petition ODFW to
23 promulgate, amend, or repeal a rule pursuant to ORS 183.390. A court order would redress this
24 harm by directing Respondents to act in accordance with the Petition, which the Commission
25
26

1 accepted. It would also help ensure that agencies are held to commitments made consistent with
2 governing wildlife policy in response to petitions.

3 8.

4 Petitioner Tierra Curry is adversely affected and aggrieved by Respondents' failure and
5 delay in acting on the Commission's directive, which allowed another marten trapping season to
6 commence and risk extirpating the critically endangered Humboldt marten in Oregon. Ms. Curry
7 has and will continue to seek out opportunities to observe martens (as well as their tracks and
8 other signs) in the Oregon Dunes National Recreation Area and elsewhere in Oregon. Because of
9 ODFW's unlawful failure and delay in banning marten trapping in accordance with the
10 Commission's directive, marten trapping may now occur on the Dunes and elsewhere where Ms.
11 Curry seeks to observe martens. These marten deaths will lead to reduced opportunities for her to
12 encounter and otherwise enjoy martens. This, in turn, injures her aesthetic, recreational,
13 scientific, moral and ecological interests in these rare animals. These injuries would be redressed
14 by the requested relief, namely, rulemaking by ODFW consistent with the Commission's
15 directive to ban marten trapping.

16 9.

17 Respondent OREGON DEPARTMENT OF FISH AND WILDLIFE is an agency of the
18 State of Oregon with its principal place of business in Polk County, Oregon. Respondent CURT
19 MELCHER is the current Director of Respondent ODFW and has his office in Polk County,
20 Oregon.

21 **LEGAL BACKGROUND**

22 10.

23 The Director of ODFW is responsible for administering and enforcing the wildlife laws
24 of the state "[s]ubject to policy direction by the State Fish and Wildlife Commission" ORS
25 496.118(1)(c).

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11.

The Commission must manage wildlife in the State of Oregon consistent with the wildlife policy of the State of Oregon. ORS 496.138(1). Pursuant to this duty, “the [C]ommission shall adopt such rules and standards as it considers necessary and proper to implement the policy and objectives of ORS 496.012 and perform the functions vested by law in the commission.” ORS 496.138(2).

12.

The wildlife policy of Oregon states that “wildlife shall be managed to prevent serious depletion of any indigenous species and to provide the optimum recreational and aesthetic benefits for present and future generations of the citizens of this state.” ORS 496.012. It further explains that one of the “coequal goals of wildlife management” is to “maintain all species of wildlife at optimum levels.” ORS 496.012.

13.

Oregon law requires issuance of rules governing the take of wildlife species “at appropriate times each year” only “after investigation of the supply and condition of wildlife.” ORS 496.162(1). The rules shall “prescribe the times, places and manner in which wildlife may be taken by angling, hunting, trapping or other method and the amounts of each of those wildlife species that may be taken and possessed.” ORS 496.162(1)(a); *see also* ORS 496.162(2). They must also “[p]rescribe such other restrictions or procedures regarding the angling, taking, hunting, trapping or possessing of wildlife as the [C]ommission determines will carry out the provisions of wildlife laws.” ORS 496.162(1)(b).

14.

Anyone may “petition an agency requesting the promulgation, amendment or repeal of a rule.” ORS 183.390(1). “Not later than 90 days after the date of submission of a petition, the

1 agency either shall deny the petition in writing or shall initiate rulemaking proceedings in
2 accordance with ORS 183.335 (Notice).” ORS 183.390(1).

3 15.

4 A court may “compel an agency to act where it has unlawfully refused to act or make a
5 decision or unreasonably delayed taking action or making a decision.” ORS 183.490.

6 16.

7 “‘Agency’ means any state board, commission, department, or division thereof, or an
8 officer authorized by law to make rules or to issue orders, except those in the legislative and
9 judicial branches.” ORS 183.310(1).

10 **FACTUAL BACKGROUND**



20
21 **The Humboldt Marten’s Population Status and Threats**

22 17.

23 The Pacific marten, *Martes caurina*, is a small, carnivorous forest-dweller in the family
24 Mustelidae, which includes fisher, mink, and otters, among others. It is distinct from the pine
25 marten, *Martes americana*, which is found east of the Rocky Mountains.

1 18.

2 Two subspecies of Pacific marten were historically recognized in Oregon: *M.c. vulpina* in
3 the Blue Mountains of northeastern Oregon, and *M.c. caurina* in the Coastal and Cascade
4 Ranges. Genetic studies have now determined that the Oregon coastal marten population is part
5 of the Humboldt marten subspecies, *M.c. humboldtensis*.

6 19.

7 Due to high rates of historical trapping and large-scale logging of its preferred habitat, the
8 Humboldt marten is now known to exist only in four isolated populations: one located on
9 Oregon's central coast, the "Central Coast Population;" another on the southern Oregon coast,
10 the "South Coast Population;" and two isolated small populations in northern California. The two
11 remnant populations in Oregon exist within the Siuslaw and Siskiyou national forests. The
12 Humboldt marten is an old-growth and dense-shrub specialist, so it fares poorly in fragmented
13 and early-seral forest habitat.

14 20.

15 Despite intensive surveys, the South Coast Population of Humboldt martens has been
16 found in only five percent of their historic range. The Central Coast Population occupies a
17 similarly limited remaining habitat area, largely confined to the Oregon Dunes National
18 Recreation Area in the Siuslaw National Forest. The most recent population estimate for the
19 Central Coast population is approximately 71 adult martens, and the Umpqua River divides that
20 population into two subpopulations.

21 21.

22 Trapping is a significant threat that could cause the extirpation of the Humboldt marten in
23 Oregon. Two or more annual human-caused marten mortalities—e.g., trapping or roadkill—
24 results in an estimated extinction risk for a subpopulation of 30 martens ranging from 32 percent
25 (two annual human-caused mortalities per year) to 99 percent (three human-caused mortalities per
26

1 year) within 30 years. The Central Coastal population already incurs human-caused mortalities
2 from vehicle strikes, so even a single trapping mortality risks the populations' survival.

3 22.

4 Precise numbers are not available because ODFW gathers trapping data on a county-by-
5 county basis and does not distinguish among different subspecies of Pacific marten, of which the
6 Humboldt marten is one. However, at least ten coastal martens have been trapped in Oregon
7 since 2006.

8 23.

9 Trapping that does not directly kill martens still poses the risk of injuries or stress-
10 induced mortality after live capture. Of note, three martens died following capture by researchers
11 in 2015 and 2016.

12 24.

13 Certain life history traits, including low reproductive capacity, make martens unable to
14 easily rebound from population declines. A population model the U.S. Forest Service developed
15 indicates that coastal marten population growth is most influenced by adult survival rate.
16 Therefore, higher rates of marten mortality, such as from trapping, have lasting impacts on
17 population growth, overall population size, and rate of recovery after population decrease.

18 25.

19 Trapping mortalities also lead to a loss of irreplaceable genetic variation within local
20 populations, reducing the population's ability to adapt to changing environs.

21 26.

22 Despite these significant threats to the species' survival, Oregon wildlife regulations
23 continue to list the marten as a "furbearer" with an annual trapping season statewide from
24 November 1 to January 31.

1 and will remain in effect until January 31, 2019. The current regulations also authorize next
2 year's open trapping season from November 1, 2019, to January 31, 2020.

3 **CLAIMS FOR RELIEF**

4 32.

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

10 33.

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 Petition.

13 34.

14 Respondents have unreasonably refused to act in accordance with the Commission's
15 directive to initiate rulemaking consistent with the Petition.

16 35.

17 Respondents have also unreasonably delayed taking action in accordance with the
18 Commission's directive to initiate rulemaking consistent with the Petition.

19 36.

20 Respondents' failure to initiate and conclude rulemaking prior to the 2018 Humboldt
21 marten trapping season has allowed the trapping of critically endangered Humboldt martens to
22 continue. Their inaction is irretrievably and irreparably harming the critical imperiled Humboldt
23 marten and Petitioners' interests in the rare animal.

1 **REQUEST FOR RELIEF**

2 WHEREFORE, Petitioners request that this Court exercise its authority under ORS
3 183.490 to:

4 (1) Compel Respondents to immediately initiate rulemaking in accordance with ORS
5 183.335(5)—the emergency rulemaking procedures—to amend its regulation on “Marten
6 Harvest Seasons,” OAR 635-050-0110, to prohibit the trapping of martens west of the Interstate
7 5 corridor, to eliminate all mammal trapping in the Oregon Dunes National Recreation Area, and
8 to eliminate all marten and tree trapping in the Siskiyou and Siuslaw national forests; or,
9 alternatively,

10 (2) Compel Respondents to immediately initiate rulemaking in accordance with ORS
11 183.335(1)–(4)—the non-emergency rulemaking procedure that follows public notice and
12 comment—to amend its regulation on “Marten Harvest Seasons,” OAR 635-050-0110, to
13 prohibit the trapping of martens west of the Interstate 5 corridor, to eliminate all mammal
14 trapping in the Oregon Dunes National Recreation Area, and to eliminate all marten and tree
15 trapping in the Siskiyou and Siuslaw national forests prior to the 2019–2020 trapping season; and

16 (3) Award Petitioners such other relief as this Court deems just.

17
18 DATED: December 19, 2018.

Respectfully submitted,

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PETITION FOR REVIEW-11

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PETITION FOR REVIEW-12

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