

Dear Chair Witt and Committee Members:

Thank you for giving me the opportunity to clarify my assertion that HB 4040-1 effectively precludes judicial review of the Fish and Wildlife Commission's decision to delist wolves. HB 4040, as amended, has no other practical effect than to preclude the public's right to judicial review of the Commission's decision to delist wolves.

In reviewing an agency rule, like the delisting rule, a court considers whether the agency's adoption of the rule exceeded the authority granted by statute and, whether the agency departed from a legal standard expressed or implied in the particular law being administrated, or contravened some other applicable statute. *Friends of Columbia Gorge v. Columbia River*, 346 Or 366, 377 (2009) (quoting *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565 (1984)).

When determining whether or not to delist a species, the Fish and Wildlife Commission must satisfy the requirements of Oregon's Endangered Species Act, specifically ORS 496.176, and make certain required findings. These findings are scientific. If these findings were not made or a court determined the findings were inadequate, the Commission would be exceeding the authority granted to it by the legislature.

However, HB4040 would explicitly provide the Commission with legislative authority to delist, rendering meaningless the requirements of ORS 496.176 and the Oregon Endangered Species Act. In this way, a legislative act, like HB4040, that reiterates or reaffirms an agency decision, effectively precludes judicial review because it cannot be said that the agency was acting without legislative authority.

This approach is problematic because it sets precedent for every contested agency decision. Instead of these decisions properly proceeding before an administrative or judicial body, they become a full-fledged legislative issue. Judicial review of agency decisions was created to resolve contests around fact-specific application of laws and policy. This was created not just for efficiency's sake (the legislature does not want to get involved in every contested parking ticket handed out in front of the capital), but also to ensure that laws and policies are applied fairly and evenly.

In other words, it undermines the democratic system and defeats the whole purpose of the existence of the judicial branch of government, if the legislature sets policy and then that same body retroactively determines who has or has not complied with it. This was a problem with the English Monarchy that founders of the United States were attempting to prevent with the creation of three branches of government and a system of checks and balances.

In summation, HB4040 prevents a wolf delisting decision from satisfy the listing/delisting requirements that every other species in Oregon is held to under our endangered species act. It amounts to the law not being applied fairly and equally, and precludes the public from its right to impartial judicial review.

I look forward to our next opportunity to work together to ensure that Oregon's wildlife is conserved and managed for the benefit of current and future generations of Oregonians, rather than a select few economic interests.

Sincerely,

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