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ENDORSED
FILED
ALAMEDA COUNTY
JAN 31 2019
CLERK OF THE SUPERIOR COURT
By CURTIYAH GANTER
Deputy

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 IN AND FOR THE COUNTY OF ALAMEDA

11 ENVIRONMENTAL PROTECTION
12 INFORMATION CENTER, and CENTER FOR
13 BIOLOGICAL DIVERSITY, non-profit
14 organizations,
15 Petitioners and Plaintiffs,
16 v.
17 CALIFORNIA DEPARTMENT OF FISH AND
18 WILDLIFE, a state agency,
19 Respondent and Defendant.
20 and
21 GREEN DIAMOND RESOURCE COMPANY, a
for-profit corporation, and DOES I through V,
22 Real Parties in Interest.

Case No.
RG19004883
**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF**

1 **INTRODUCTION**

2 1. This lawsuit is the latest chapter in an ongoing effort to ensure that the small,
3 surviving population of Humboldt martens in California does not succumb to extinction. Intensive
4 logging and fur trapping so devastated Humboldt martens that for 50 years scientists presumed the
5 forest-dwelling mammal to be extinct, until it was rediscovered in remote northern California in
6 1996. The surviving population of martens is still perilously close to extinction, due in large part to
7 ongoing logging in the old-growth coastal forests it calls home.

8 2. Petitioners and plaintiffs in this case (collectively, the Centers) have been working to
9 bring the Humboldt marten back from the brink of extinction for nearly a decade. The Centers
10 submitted a petition to list the Humboldt marten as endangered under the federal Endangered
11 Species Act in 2010. When the U.S. Fish and Wildlife Service declined to list the species, the
12 Centers challenged that decision in federal court and won. In October 2018, the Service proposed to
13 list the Humboldt marten as threatened under federal law, and a final listing rule is due this year.

14 3. Meanwhile, the Centers also petitioned the California Fish and Game Commission
15 (the Commission) to list the Humboldt marten under the California Endangered Species Act
16 (CESA). The Commission granted the Centers’ petition and designated the Humboldt marten as
17 endangered under CESA in August 2018.

18 4. However, at the same time the Commission was considering the Centers’ petition to
19 protect Humboldt martens under CESA, the Commission’s sister agency, the California Department
20 of Fish and Wildlife (the Department), was simultaneously undercutting the protections CESA
21 would afford by approving a “safe harbor agreement” with Green Diamond Resource Company
22 (Green Diamond). Green Diamond is one of the largest timber companies in the marten’s current
23 range, and it owns a key piece of land that lies between the core population of Humboldt martens
24 and an area of prime habitat in the Redwood State and National Parks. Green Diamond’s logging
25 practices pose a significant ongoing threat to the marten’s survival.

26 5. Under the California State Safe Harbor Agreement Program Act (Safe Harbor Act),
27 the Department has authority to permit private landowners to undertake activities that harm species
28 protected by CESA—activities that CESA would therefore otherwise prohibit—if the landowner

1 United States. CBD is actively involved in environmental protection issues throughout California
2 and North America and has over 50,000 members, including many throughout California. CBD's
3 mission includes protecting and restoring habitat and populations of imperiled species, reducing
4 greenhouse gas pollution to preserve a safe climate, and protecting air quality, water quality, and
5 public health. CBD has a long history of environmental protection through science, policy,
6 education, and legal advocacy in California.

7 10. Collectively, the Centers' members and staff include individuals with a wide variety
8 of interests in Humboldt martens and their habitat, ranging from scientific, professional, and
9 educational to recreational, aesthetic, moral, and spiritual interests. The Centers jointly authored and
10 submitted the petitions to protect the Humboldt marten under CESA and the federal Endangered
11 Species Act, and their members and constituents are adversely affected and aggrieved by the
12 Department's approval of a safe harbor agreement that does not provide a net conservation benefit
13 and otherwise fails to comply with the law. An actual controversy has arisen and now exists between
14 the Centers and the Department regarding their respective rights and duties. The Department's
15 decision to grant Green Diamond the authority to take Humboldt marten without complying with law
16 has made it more likely that Humboldt martens will continue to decline and become extinct. The
17 Centers and their members are therefore injured, because their use and enjoyment of Humboldt
18 martens is threatened by Department's decision to enter into the Green Diamond Resource Company
19 Humboldt Marten Safe Harbor Agreement. These are actual, concrete injuries to the Centers, caused
20 by the Department's failure to comply with the Safe Harbor Act. The relief requested will fully
21 redress those injuries.

22 11. Respondent CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE is a state
23 agency charged with implementing and enforcing the state's fish and wildlife conservation laws,
24 including the Safe Harbor Act. The Department is responsible for providing data and expert analysis
25 to inform the decisions of the California Fish and Game Commission as they designate candidate,
26 threatened, and endangered species under CESA. This petition and complaint challenges the
27 Department's approval of a safe harbor agreement with Green Diamond Resource Company for the
28 Humboldt marten.

1 Department's approval of the Green Diamond Safe Harbor Agreement, which may cause the
2 Humboldt marten to further decline and become extinct.

3 STATEMENT OF FACTS

4 **The Humboldt Marten**

5 21. Humboldt martens (*Martes caurina humboldtensis*) are small, carnivorous mammals
6 with long, slender bodies, fox-like faces, and large triangular ears. They are close relatives of minks,
7 otters, and fishers. Humboldt martens inhabit old-growth forests with multi-layered canopy
8 structures that provide cover from predators, and dense, mature shrub layers that provide shelter for
9 resting and denning.

10 22. Though Humboldt martens were once widespread from Sonoma County north to the
11 Oregon–Washington border, today fewer than 200 Humboldt martens remain in California.

12 23. The coastal forests of northern California and Oregon that serve as the marten's
13 habitat are some of the most intensely logged forests in the country. After over a century of poorly
14 managed logging, the Humboldt marten has been eliminated from more than 90 percent of its
15 historical range.

16 24. Current and historical logging has also made Humboldt martens more vulnerable to
17 predation. Clear-cutting and short rotation forestry have replaced the diverse and complex forests of
18 northern California with tree plantations that lack the dense shrub layers and canopy structures that
19 martens depend on for shelter from predators. Humboldt martens experience much higher predation
20 rates in these commercially managed forests.

21 25. In addition to logging, extensive and unregulated fur trapping contributed to the
22 precipitous decline of Humboldt martens in California. Some early fur trappers reported capturing 50
23 martens—more than a quarter of the current population estimate—in a single winter.

24 26. From 1946 to 1996, there was not a single verified sighting of a Humboldt marten in
25 California, and the species was presumed extinct. In 1996, scientists rediscovered a single population
26 in far northern California on national forest lands.

27 27. Today, the Humboldt marten still teeters on the brink of extinction. Logging
28 continues to threaten the marten's remaining habitat, which is increasingly fragmented; these small,

1 geographically isolated patches of habitat cannot support the same population abundance as larger,
2 contiguous areas. The marten's small population size also reduces the resiliency of the species and
3 renders the marten vulnerable to extinction through disease, lack of genetic diversity, and
4 susceptibility to large-scale disturbances such as wildfires. Scientists estimate that a single wildfire
5 could burn 70 percent of the marten's occupied habitat. The widespread use of rodenticides and
6 other toxicants at illegal marijuana cultivation sites also poses a significant threat to the small marten
7 population.

8 28. California's remaining Humboldt martens live in two isolated populations: the core
9 population, in a 300-square-mile area that straddles Humboldt, Del Norte, and Siskiyou Counties;
10 and the California-Oregon border population, in 80 square miles of Del Norte County. The U.S. Fish
11 and Wildlife Service estimated in July 2018 that the core population consists of only 60 to 80
12 individual martens. The Service was unable to estimate the size of the border population, noting that
13 only 12 individual martens have been detected, and that the small patch of habitat would not support
14 more than 100 animals.

15 29. Recognizing the perilous status of the Humboldt marten and the challenges to its
16 survival, the Centers sought to secure protection for the marten under the federal and state
17 Endangered Species Acts.

18 30. In 2010, the Centers petitioned the U.S. Fish and Wildlife Service to list the
19 Humboldt marten as threatened or endangered under the federal Endangered Species Act, 16 U.S.C.
20 § 1531 *et seq.* In 2015, the Service found listing was not warranted, and the Centers challenged that
21 determination in federal court. The Centers' lawsuit was successful, and in 2017 a federal judge
22 ordered the Service to reevaluate its scientific findings on the Humboldt marten. In October 2018,
23 the Service released its updated findings and proposed to list the Humboldt marten as threatened. (83
24 Fed. Reg. 50574 (Oct. 9, 2018).)

25 **The CESA Listing Process**

26 31. On a parallel track, the Centers petitioned the Commission to list the Humboldt
27 marten under CESA on June 1, 2015.

1 32. CESA is modeled after the federal Endangered Species Act and declares “it is the
2 policy of the state to conserve, protect, restore, and enhance any endangered species” (Fish &
3 G. Code § 2052.) In enacting CESA, the Legislature recognized that numerous species have been
4 rendered extinct as a result of human activities; that other species are in danger of extinction; that
5 California’s native species are of substantial ecological, educational, historical, recreational,
6 aesthetic, economic, and scientific value to the people of the state; and that the protection and
7 enhancement of such species and their habitat is of statewide concern. (*Id.* § 2051.)

8 33. CESA directs the Commission to compile a list of endangered and threatened species.
9 An “endangered species” is “a native species or subspecies . . . which is in serious danger of
10 becoming extinct throughout all, or a significant portion, of its range,” and a “threatened species” is
11 “likely to become an endangered species in the foreseeable future.” (*Id.* §§ 2062, 2067.)

12 34. CESA allows interested parties to petition the Commission to add to the list of
13 endangered or threatened species. (*Id.* § 2071.) The Commission refers such petitions to the
14 Department for preparation of a preliminary scientific analysis referred to as a “petition evaluation.”
15 (*Id.* § 2073.) After reviewing the Department’s petition evaluation and soliciting public comment,
16 the Commission must then determine whether there is sufficient information to indicate that listing
17 the species may be warranted. (*Id.* § 2074.2.) If there is, the Commission must accept the petition,
18 designate the species as a “candidate” for listing, and direct the Department to prepare a more
19 thorough, peer-reviewed status report for the species. (*Id.* §§ 2074.2, 2074.6.) Upon receipt of the
20 Department’s final status report, the Commission then holds an additional public hearing and
21 determines finally whether to list the species as endangered or threatened. (*Id.* § 2075.5.)

22 35. Once a species is listed as endangered or threatened, CESA grants certain legal
23 protections to those species. For example, CESA prohibits the “take” of any endangered or
24 threatened species. (*Id.* § 2080.) “Take” means to “hunt, pursue, catch, capture, or kill, or attempt to
25 hunt, pursue, catch, capture, or kill.” (*Id.* § 86.) CESA also prohibits importing, exporting,
26 possessing, purchasing, and selling listed species, or attempting any of those actions. (*Id.* § 2080.)
27 Any person who takes an endangered or threatened species will be guilty of a misdemeanor, the
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1 punishment for which is a fine between \$25,000 and \$50,000, and/or less than one year of
2 imprisonment. (*Id.* §§ 12000, 12008.1.)

3 36. On February 11, 2016, the Commission accepted the Centers’ petition to list
4 Humboldt martens under CESA and directed the Department to prepare a comprehensive scientific
5 review of the marten’s status in California. On August 23, 2018, after considering the Department’s
6 status review and other information, the Commission voted to list the Humboldt marten as
7 endangered.

8 37. According to final findings adopted by the Commission on December 13, 2018, the
9 Commission based its decision to list the Humboldt marten as endangered “most fundamentally on
10 the fact that historic trapping and habitat loss has extirpated Humboldt martens from significant
11 portions of the species’ range.” The Commission cited with approval a finding from the U.S. Fish
12 and Wildlife Service’s report on the Humboldt marten that “habitat loss and degradation from
13 historical and current logging is the most plausible reason the marten is absent from much of its
14 historical range.” The Commission also considered the ongoing threats of habitat fragmentation,
15 small population size, wildfires, increased predation due to degraded habitat, and exposure to
16 toxicants. Considering the cumulative effects of these varied threats, the Commission found that
17 listing Humboldt martens as endangered under CESA is warranted.

18 **The Green Diamond Safe Harbor Agreement**

19 38. On February 9, 2016—two days before the Commission accepted the Centers’
20 petition to list Humboldt martens under CESA—Green Diamond informed the Department that it
21 wished to develop a safe harbor agreement for the Humboldt marten on its property.

22 39. Recognizing that “[a] significant portion of the state’s current and potential habitat for
23 [endangered and threatened] species exists on property owned by private citizens,” the Legislature
24 enacted the Safe Harbor Act in 2009 to “encourage landowners to manage their lands voluntarily to
25 benefit endangered, threatened, or candidate species . . . and not be subject to additional regulatory
26 restrictions as a result of their conservation efforts.” (Fish & G. Code § 2089.2, subs. (b), (c).)
27 Though the Act does not “relieve landowners of any legal obligation with respect to endangered,
28

1 threatened, or candidate species,” it allows the Department to authorize incidental take if certain
2 statutory conditions are met. (*Id.* §§ 2089.2, 2089.6.)

3 40. The Department may approve a safe harbor agreement only if it makes a finding that
4 “implementation of the agreement is reasonably expected to provide a net conservation benefit to the
5 species listed in the application.” (*Id.* § 2089.6, subd. (3).) In addition, the agreement must specify
6 “baseline conditions,” which describe the existing population size and/or the extent and quality of
7 habitat for the protected species on the private land. (*Id.* § 2089.4, subd. (b).) All safe harbor
8 agreements must also include a monitoring program that allows the Department to evaluate whether
9 the agreement is achieving the promised conservation benefits, as compared to the baseline
10 conditions. (*Id.* § 2089.6, subd. (6).)

11 41. In addition to providing a net conservation benefit, a safe harbor agreement must “not
12 jeopardize the continued existence of the species.” (*Id.* § 2089.6, subd. (4).) This determination must
13 be “based on the best scientific and other information that is reasonably available,” and must take
14 into account known population trends, known threats to the species, and “reasonably foreseeable
15 impacts on the species.” (*Id.* §§ 2089.6, subd. (4); 2081, subd. (c).)

16 42. The Department may only approve a safe harbor agreement if the private landowner
17 submits a complete application package that includes: detailed descriptions of the management
18 actions the landowner plans to take; how those management actions will provide a net conservation
19 benefit for the species in the timeframe provided in the agreement; the possible incidental take that
20 may be caused by the management actions; anticipated changes in species populations and habitat
21 over the duration of the agreement; and the proposed monitoring program. (*Id.* § 2089.8.)

22 43. Green Diamond’s industrial timberlands are essential to the conservation and
23 recovery of the Humboldt marten. A five- to ten-mile-wide band of Green Diamond’s property
24 overlaps with the Humboldt marten’s core population area on its east side, and abuts the Redwood
25 State and National Parks to the west. This portion of Green Diamond’s property, if managed
26 properly, could serve as a critical link between one of the remaining populations of martens in
27 California and areas of suitable habitat where scientists have periodically detected martens in recent
28 years.

1 44. Reproduced below is a map that appears as Figure 4 in the Green Diamond Safe
2 Harbor Agreement, which purports to show the Humboldt marten's extant population areas.

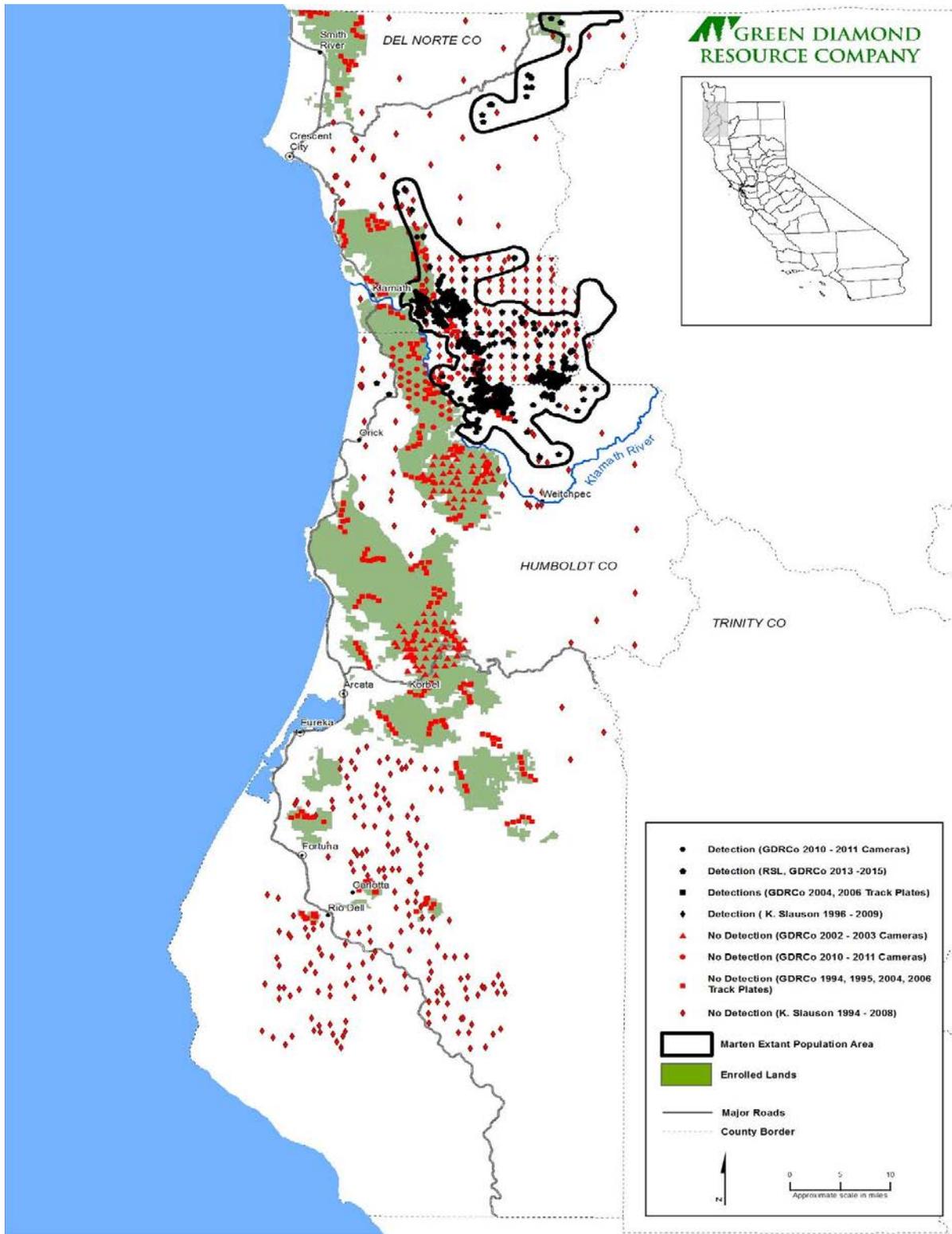


Figure 4. Marten Extant Population Area

1 45. Reproduced below is a map that appears as Figure 1 in the Green Diamond Safe
2 Harbor Agreement, which purports to show primary land ownership within the Green Diamond Safe
3 Harbor Agreement area.

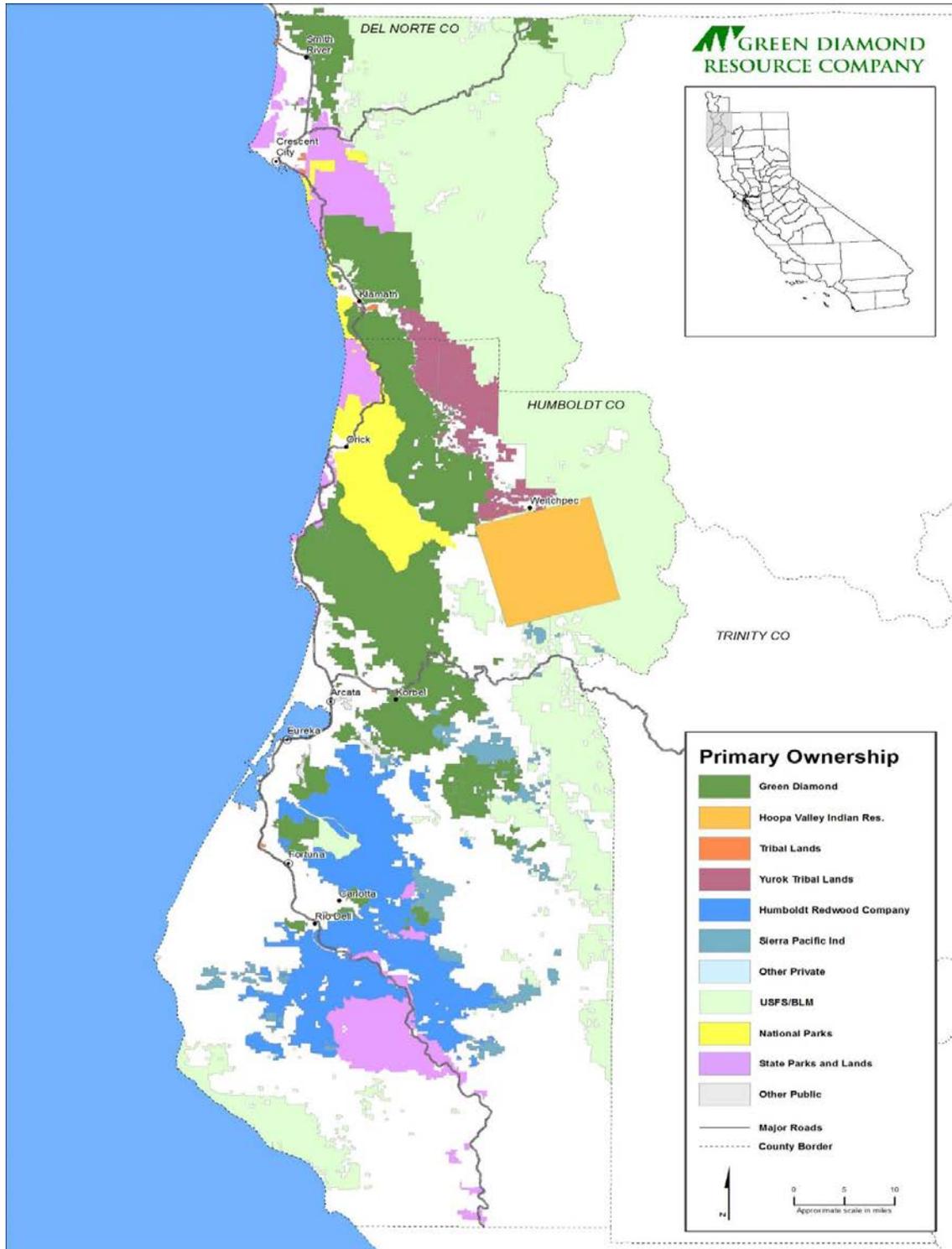


Figure 1. Primary Ownership within Marten Safe Harbor Agreement Area

1 46. Soon after Green Diamond requested immunity under the Safe Harbor Act, the
2 Department began to work with Green Diamond to draft a safe harbor agreement. The Department
3 did not provide any notice to the public that it was doing so, nor did it publicly post drafts of the
4 Agreement or request public input. Though the Centers authored two listing petitions for the
5 Humboldt marten and have substantial expertise on the marten, the Department did not receive input
6 on the Green Diamond Safe Harbor Agreement from the Centers or other members of the public.

7 47. Staff at the Department disagreed that the conservation measures Green Diamond
8 proposed for its safe harbor agreement would be effective, and that the measures proposed were
9 sufficient to comply with the Safe Harbor Act. Department staff expressed concern that, among other
10 things, the management activities proposed by Green Diamond would not provide a net conservation
11 benefit to the Humboldt marten.

12 48. On April 27, 2018, while the Department was still conducting its status report for the
13 Humboldt marten CESA listing petition, the Department approved the Green Diamond Safe Harbor
14 Agreement, against the recommendations of its own experts.

15 49. The Agreement between Green Diamond and the Department covers all of Green
16 Diamond’s forestland subject to timber harvesting rights in Del Norte and Humboldt Counties.
17 Thirty-eight percent of the enrolled land is within nine miles of currently known extant marten
18 populations.

19 50. The Agreement authorizes take of Humboldt martens if that take is incidental to the
20 activities covered in the Agreement—namely, road construction, timber harvest operations, and
21 forest management practices. In return, Green Diamond promises to undertake management
22 activities that—according to the Agreement—are reasonably expected to provide a net conservation
23 benefit to Humboldt martens.

24 51. In fact, the conservation benefits promised by the Agreement are illusory. As a result,
25 the Agreement gives Green Diamond free reign to take an endangered species without requiring
26 sufficient corresponding benefit.

1 52. For example, the Agreement commits Green Diamond to two types of management
2 activities—assisted dispersal and habitat management—neither of which can be reasonably expected
3 to provide a net conservation benefit.

4 53. The benefits of the assisted dispersal activities are highly uncertain, as evidenced by
5 the fact that the Agreement’s first commitment is to fund a study regarding the feasibility of assisted
6 dispersal. Martens are highly vulnerable to stress, and may die from stress when trapped for study or
7 dispersal. Because assisted dispersal of martens is not feasible, the assisted dispersal management
8 activities set forth in the Agreement will have no conservation benefit whatsoever. Even if assisted
9 dispersal were feasible, dispersal could amount to a mere relocation of Humboldt marten from extant
10 population areas to areas outside of Green Diamond’s property, essentially removing the endangered
11 species from the areas that Green Diamond wants to clear-cut.

12 54. Likewise, the Agreement’s habitat management activities fail to provide a net
13 conservation benefit, because the activities identified are activities that Green Diamond is already
14 obligated to undertake by law or pursuant to other plans and agreements. For example, the
15 Agreement credits Green Diamond’s promise to comply with a pre-existing Aquatic Habitat
16 Conservation Plan—a plan that Green Diamond is already legally required to implement under the
17 federal Endangered Species Act. In essence, the Safe Harbor Agreement grants Green Diamond
18 CESA immunity, and in return, Green Diamond continues its business as usual.

19 55. The Green Diamond Safe Harbor Agreement also relies on inaccurate, unjustified, or
20 overly vague metrics to determine what impact the Agreement might have on the Humboldt marten.
21 For example, in establishing the baseline conditions against which the conservation benefit (or harm)
22 of the Agreement will be measured, the Agreement uses average forest age as an indicator of habitat
23 quality, without explaining why average age is the appropriate indicator, or identifying the average
24 age that provides suitable marten habitat. This baseline cannot provide a reliable measure of the
25 viability of the Humboldt marten population, and consequently the Department cannot reliably
26 evaluate whether Humboldt martens have been harmed or helped by the Agreement.

27 56. Similarly, the Agreement provides no detail on the number of martens that might be
28 harmed or killed, instead making a generic statement that the Department authorizes Green Diamond

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VERIFICATION

I, Tom Wheeler, hereby declare:

I am the Executive Director of the Environmental Protection Information Center, a non-profit organization with offices in Arcata, California. The facts alleged in the above petition and complaint are true to my personal knowledge and belief.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this verification is executed on this 29 day of January 2019 at Arcata, California.


TOM WHEELER