

# **Exhibit B**

**Public Correspondence Received as of  
November 30, 2022**

Brian McLachlan  
Portland, Oregon  
November 26, 2022

Oregon Fish and Wildlife Commission  
ODFW Director Curt Melcher  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, Oregon 97302  
*Via electronic mail to [odfw.commission@odfw.oregon.gov](mailto:odfw.commission@odfw.oregon.gov)*

Dear Commissioners and Director Melcher:

I write to provide comments regarding the proposed Memorandum of Agreement between the Confederated Tribes of Siletz Indians (Siletz Tribe) and the State of Oregon (Siletz MOA), and the proposed Memorandum of Agreement between the Cow Creek Band of Umpqua Tribe of Indians (Cow Creek Band) and the State of Oregon (Cow Creek MOA), both concerning the exercise of hunting, fishing, trapping, and gathering activities and for cooperative management of natural and wildlife resources.<sup>1</sup>

I support in principle ODFW entering into agreements with the Siletz Tribe and the Cow Creek Band to cooperate on fish and wildlife management issues and to define the exercise of each Tribe's hunting, fishing, trapping, and gathering activities. I recognize and acknowledge the grave historical injustice and mistreatment occasioned upon the Tribes and the ancestors of current Tribal members through euro-American colonialism and settlement, and I respect the Tribes' dedication to preserving their cultures and identities. I am hopeful these agreements will assist the Tribes in doing so, while in addition make positive contributions to the conservation of Oregon's fish and wildlife, which will benefit all Oregonians.

I nonetheless have concerns about the proposed MOAs, including the vague and ill-defined allocation provisions, the authority of the Oregon Fish and Wildlife Commission to enter into these agreements, the impact these agreements could have on fishing and hunting opportunities for non-tribal Oregon citizens, and the ability of the State to exit the Siletz MOA should pending Federal legislation be enacted.

In order to protect the present and future interests of Oregon's citizens, I request the Commission take the following two actions before, and as a condition to, approving the MOAs.

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<sup>1</sup> These two proposed MOAs are similar to the Memorandum of Agreement between the Coquille Indian Tribe and the State of Oregon (Coquille MOA) entered into earlier this year. Accordingly, I hereby incorporate by reference my June 14, 2022, comments regarding the Coquille MOA (attached).

- (1) Request and obtain written assurance from the Oregon Department of Justice/Office of the Attorney General that introduced Federal legislation, if enacted, will not affect the State's ability to unilaterally terminate without cause the proposed Siletz MOA pursuant to its terms; and,
- (2) Amend both MOAs to clarify that the annual amounts, limits, areas, and methods of Tribal harvest (a) will be consistent with the State's Wildlife Policy ORS 496.012; and (b) will reflect the parties' intention that overall fishing and hunting activities by tribal members will not increase as a result of the MOA, and that no more than small reductions in opportunities for the general public to take a few species with limited population sizes may be created to accommodate tribal activities.

The first item concerns introduced Federal legislation that would provide a process for the Siletz Tribe and State of Oregon to modify or rescind the May 2, 1980 consent decree and amend or replace the associated agreement defining the Tribe's hunting, fishing, trapping and gathering rights under Federal law. *See* Senate Bill S. 3123; House Bill H.R. 6345. In pertinent part, the bills anticipate successor agreements between the Siletz Tribe and the State and provide that such agreements "shall remain in effect until and unless replaced, amended, or otherwise modified by 1 or more successor [ ] agreements" and "may be amended from time to time by mutual consent" of the Tribe and the State. *Id.* (emphasis added).

I am concerned that under Federal Indian law canons of construction, the U.S. Constitution's federal law supremacy clause, and Congress' plenary authority over tribal affairs, this legislation, if enacted, may be interpreted to preempt the State's ability to unilaterally terminate the Siletz MOA without cause as expressly provided for in the proposed MOA.

As you will recall, earlier this year the Commission required the Coquille MOA to be amended to expressly and unambiguously provide for either party to unilaterally terminate the MOA without cause. In my view, this is an absolutely critical component of the proposed MOAs which protects the interests of the State of Oregon and its citizens, and without which the Commission should not approve the proposed agreement.<sup>2</sup>

The second item concerns the State's and Tribes' understanding and expectation regarding the amount and extent of annual tribal hunting and fishing activities and the potential impact of those activities on the general public's hunting and fishing opportunities.

Tribal hunting and fishing activities in the Northwest have been subject to disputes and divisive litigation for well over a century. In order to avoid future conflict and disagreements concerning the MOAs, it is essential that the State's and Tribes' understandings and expectations concerning tribal hunting and fishing activities are clearly and accurately expressed and memorialized.

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<sup>2</sup> I withdrew my opposition to the Coquille MOA after it was amended to provide for unilateral termination without cause.

Unfortunately, the proposed MOAs contain ambiguous and ill-defined standards and terms governing the amounts and extent of tribal hunting and fishing activities.<sup>3</sup> Nonetheless, the State, through ODFW in its Notices of Proposed Rulemaking, has affirmatively represented to Oregon's citizens that under the MOAs (a) tribal hunting and fishing activities are not anticipated to increase, (b) public impacts will be minimal, (c) businesses which provide goods and services to hunters and anglers are not expected to be impacted, and (d) no more than possibly small reductions to the general public's fishing and hunting opportunities are expected to result. *See* Notices of Proposed Rulemaking (10.18.22) for Siletz MOA and Cow Creek MOA at 2.

Because the proposed MOAs currently contain no standards or terms that actually support or otherwise provide a basis for these public representations, I request the Commission require the proposed MOAs to be amended prior to approval to expressly reflect these expectations and understandings in order that the State and Tribes are aligned and united in their understanding and interpretation of the agreements.

If the Tribes' share these expectations, they should have no objection to making the requested amendments. If they do not share these expectations and object to the amendments, then the State's and Tribes' understandings are not aligned, and the MOAs should not be approved.

Thank you for considering my comments. If you have any questions or would like to discuss my concerns, please do not hesitate to contact me.

Best regards,

Brian McLachlan

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<sup>3</sup> The standards and terms used are nearly the same as in the Coquille MOA. *Cf.* Coquille MOA § 3.b *with* Siletz MOA § 5.b.iii *and* Cow Creek MOA § 3.b. My June 14, 2022, comments discuss the deficiencies and other problems with these standards and terms.

Brian McLachlan  
Portland, Oregon  
June 14, 2022

Oregon Fish and Wildlife Commission  
c/o Michelle Tate  
Director's Office  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, Oregon 97302

Dear Oregon Fish and Wildlife Commissioners:

Please accept my comments below regarding the proposed Memorandum of Agreement (MOA) Between the Coquille Indian Tribe and the State of Oregon, through the Oregon Department of Fish and Wildlife (Exhibit C to the Commission's June 17, 2022, Meeting Agenda).

I support in principle ODFW entering into an agreement with the Coquille Tribe for cooperative fish and wildlife management and to define the exercise of the Tribe's and its members' hunting, fishing, and gathering activities. I understand the Tribe has made, and will continue to make, positive contributions that are of benefit to Oregon's fish and wildlife and to all Oregonians. I also recognize and acknowledge the grave historical injustice and mistreatment occasioned upon the Tribe and the ancestors of current Tribal members through euro-American colonialism and settlement and respect the Tribe's dedication to preserving its culture and identity.

Based on my reading of the text of the MOA, I nonetheless have significant concerns about the proposed agreement and urge the Commission to not approve the MOA as drafted at this time.

The proposed MOA is styled as a legally binding, judicially enforceable contract. It is perpetual, with no end date, and appears to require both parties' consent to be terminated. The substantive standards applicable to tribal harvest levels and limits are vague, may significantly curtail ODFW's statutorily delegated conservation and management authority and discretion, and do not factor in potential impacts to non-tribal hunters and anglers. Based on the text, I am concerned the MOA could foreseeably be judicially interpreted in a way that results in substantial negative impacts to non-tribal Oregon citizens who participate in hunting, fishing, and gathering activities, and which significantly constrains the policy choices available to the State as a political body.

Due to inadequate time to provide more complete and thorough comments, I focus here on select concerns I have with the proposed MOA, and I urge the Commission to take more time to consider and evaluate this profoundly important agreement.

**1. As a Legally Binding and Judicially Enforceable Contract, the MOA Requires Very Careful Scrutiny**

The proposed MOA is styled as a contract.<sup>1</sup> It is thus a mutual exchange of promises that legally obligates the parties to perform according to its terms and standards. And the express terms of the MOA make the parties' obligations judicially enforceable.<sup>2</sup> They also make the MOA and its attendant obligations perpetual (i.e., with no end date)<sup>3</sup> and appear to condition termination of the agreement upon the mutual consent of both parties.<sup>4</sup>

While, as a practical matter, I assume ODFW and the Tribe will work together in good faith to implement the MOA, **because of the legally binding nature of the MOA, the Commission has a duty to the citizens of this State to evaluate the MOA assuming the Tribe will demand the full extent of the contractual rights provided to it under the terms and standards of the proposed MOA.**

But for the MOA (1) appearing to require mutual consent of the parties to terminate it, (2) waiving the State's sovereign immunity, and (3) making the MOA judicially enforceable through declaratory and injunctive relief, I would not be writing this letter to you today. Absent these terms, ODFW and the Coquille Tribe would have the opportunity to cooperatively implement the MOA and attempt to work out any issues that arose in a manner that is equitable to all citizens of the State as well as to the members of the Coquille Tribe, knowing that if the terms of the MOA proved to be unworkable or inequitable, that both parties would have adequate incentives to negotiate a mutually acceptable compromise. In that case, the MOA would truly be a perpetual "voluntary" co-operative management agreement, and the State

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<sup>1</sup> MOA at 12 ("The Parties agree that this Agreement is a contract . . .")

<sup>2</sup> Id. at 11.

<sup>3</sup> Id. at 14 ("The Parties intention upon entering this Agreement is that it is perpetual").

<sup>4</sup> Id.

would not be potentially “locked-in” to an agreement that may be interpreted in a way that is detrimental to the interests of its citizens.

But the MOA is instead drafted as a legally binding and judicially enforceable “perpetual” contract, and so I feel compelled to provide these comments and to urge the Commission to take more time to understand the ramifications of this proposed agreement.

## **2. May ODFW Unilaterally Terminate the MOA?**

The proposed MOA states: “Amendments/Termination. This Agreement can be amended or terminated in writing by mutual consent.”<sup>5</sup>

While this clause is somewhat ambiguous, it nonetheless suggests the parties may intend that termination of the MOA requires the written consent of both ODFW (on behalf of the State) and the Coquille Tribe.

**Commissioners – please ask your counsel directly the following question (and please do so in a public setting so that the public can understand the terms of the MOA): *may the Fish and Wildlife Commission unilaterally terminate the MOA at will?***

I suggest you also ask an official of the Coquille Tribe the same question to ensure that both parties have the same understanding of the termination clause.

If both ODFW and the Tribe understand the MOA to allow ODFW to unilaterally terminate it at will, then I strongly suggest the MOA be revised to clearly articulate this understanding (e.g., by revising the termination clause to read: “This Agreement may be terminated unilaterally by either party at will at any time”). If this revision is made to the MOA, my further concerns described below with other sections of the MOA are mitigated by knowing that ODFW may exit the MOA if it

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<sup>5</sup> *Id.* Under section 13 (Effective Date) the MOA indicates the agreement will remain in effect “only so long as both the implementing rules and resolutions remain effective.” *Id.* This suggests the agreement could become ineffective should a party repeal applicable implementing rules and resolutions. It is unclear to me how this provision works in connection with the Termination clause.

proves to be unworkable, inequitable, or otherwise unduly burdensome or problematic to the State's interests.<sup>6</sup>

If, however, the parties do not understand the MOA to allow ODFW to unilaterally terminate the agreement at will, then I request the Commission to not approve it as currently drafted.

**3. If Termination Requires the Consent of Both Parties, the MOA May Impair Core Governmental Powers and Functions of Future Commissions, Administrations, and potentially Legislatures, and Thereby Undermine the Democratic Process**

In our constitutional democratic system, the power to govern is derived from the collective consent of the governed. *See* OR Const. Art. 1, sec. 1; United States Declaration of Independence. Every two, four, and six years (sometimes more often) we have elections, where the People express their collective will and elect representatives and officials to carry out the business of governing. Often, as a result, the leadership, laws, and policies of the State change. At set intervals, the membership of the Fish and Wildlife Commission changes as well. The ability of the People – here the citizens of Oregon – to change their elected officials, and for elected officials to change law and policy (and Commission membership and policy), is a core element of our democratic process and a fundamental attribute of the State's sovereignty.

Contracts which operate to legally bind or impair the discretion of future administrations, legislatures, or commissions in their exercise of governmental powers and functions (as distinguished from proprietary activities) can undermine this democratic process as well as raise separation of powers concerns.<sup>7</sup> As a general

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<sup>6</sup> I would prefer the State's waiver of sovereign immunity and provisions allowing for judicial enforcement also be removed from the MOA. But if the State (through ODFW) has the power to unilaterally terminate the agreement at will at any time, this would allow the State to effectively avoid judicial enforcement by exercising its right to terminate the MOA if a lawsuit were to be filed. Obviously, you should ask your counsel about this.

<sup>7</sup> For example, if an agreement explicitly or implicitly binds, limits, or otherwise impairs the discretion committed to ODFW by statute (such as setting fishing and hunting bag limits and seasons), and is judicially enforceable, the exercise of that discretion, rather than residing in the agency, and ultimately in this Commission, becomes subject to court approval or disapproval, which may undermine the

principle, political bodies may not contractually bind their successors with respect to governmental or legislative powers (such as the rulemaking authority of this Commission).<sup>8,9</sup>

By statute, fish and wildlife are the “property of the State.” ORS 498.002. The State holds and manages these public resources (prior to their lawful capture) in its sovereign capacity for the benefit of all State citizens. *Monroe v. Withycombe*, 84 Or. 328, 165 P. 227 (Or. 1917). Management of fish and wildlife, including the allocation of harvest privileges through the establishment of seasons, bag limits, and

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Legislature’s intent in delegating this power and discretion to the agency and the Commission.

<sup>8</sup> I have not had sufficient time to research Oregon law regarding this issue. As always, I suggest the Commission seek advice from its counsel about this concern. *See Board of Klamath County Comm'rs v. Select County Employees*, 148 Or.App. 48, 939 P.2d 80 (1997) (“an outgoing elected governing body of finite tenure which enter[s] into a contract involving a 'governmental' function [can]not bind a subsequently elected body.'...”) *quoting Graves v. Arnado*, 307 Or. 358, 364, 768 P.2d 910 (1989); *see also Miles v. City of Baker*, 152 Or. 87, 92-93, 51 P.2d 1047 (1935) (“If the work provided for in plaintiff’s alleged contract is a governmental function, then the great weight of authority is to the effect that the outgoing council could not bind its successors in such a contract.”); *Johnson v. City of Pendleton*, 131 Or. 46, 55, 280 P. 873 (1929) (city possesses no power to enter contract binding city for all time to make annual levy for specific purpose, because “[u]pon matters which are purely governmental in their nature ... no legislative act will bind a subsequent legislature.”); *see also generally*, Washington State Office of the Attorney General, *Power Of County Legislative Authority To Enter Into Contract That Binds The County Legislative Authority In The Future*, AGO 2012 No. 4 – May 15, 2012, accessed 6/13/22 at <https://www.atg.wa.gov/ago-opinions/power-county-legislative-authority-enter-contract-binds-county-legislative-authority>; United States Department of Justice, *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, Memorandum Opinion for the Associate Attorney General, June 15, 1999, accessed 6/13/22 at <https://www.justice.gov/file/19516/download>; Memorandum for All Assistant Attorneys General and All United States Attorneys, from Edwin Meese III, United States Attorney General, *Re Department Policy regarding Consent decrees and Settlement Agreements* (Mar. 13, 1986), accessed 6/13/22 at <https://www.archives.gov/files/news/samuel-alito/accession-060-89-1/Acc060-89-1-box9-memoAyer-LSWG-1986.pdf>.

<sup>9</sup> *But see* Oregon Constitution, Art. 1, sec. 21 (“No [ ] law impairing the obligation of contracts shall ever be passed, . . .”); *Hughes v. State*, 838 P.2d 1018, 314 Or. 1 (Or. 1992).

associated regulations, is thus a quintessential governmental (i.e., legislative) function as an exercise of the State's police power. *See id.* The legislature has delegated and committed this authority and attendant discretion to the Fish and Wildlife Commission. *See* ORS 496.012; ORS 496.138; ORS 496.146.

While I understand and respect that the Coquille Tribe asserts fishing and hunting rights arising under federal law (e.g., treaties, aboriginal title, inherent sovereignty), I am not aware of any settled and controlling judicial determination or legal precedent concerning the Tribe's assertions. Absent this, it seems problematic for ODFW, on behalf of the State, to agree to terms that potentially perpetually contractually bind and curtail its statutorily delegated governmental authority and discretion in the management of the State's fish and wildlife. As discussed below, my concern is that the terms of the MOA could be interpreted to do precisely this.

#### **4. The MOA's Legally Binding Standards Are Ambiguous and Vague; Constrain ODFW's Management Authority and Discretion; and Do Not Adequately Protect the Interests of Oregon's Citizens**

The proposed MOA states that it "provides agreed-upon standards for the Tribe to exercise such harvest rights and to determine tribal harvest levels in cooperation with ODFW." MOA at 4-5 (emphasis added). As discussed above, the MOA makes these "standards" legally binding and judicially enforceable through waiver of the State's sovereign immunity.

While I trust the parties are entering into this agreement in good faith and with the best intentions to amicably work out any differences that may arise, fish and wildlife management in general, and especially tribal fishing and hunting rights and activities in the Northwest have a long history of controversy and litigation. Indeed, the parties here recognize that disputes are foreseeable by including a dispute resolution section in the MOA and by making the MOA judicially enforceable. Accordingly, **as Commissioners, you are duty bound to protect the interests of the State of Oregon and its citizens by very carefully evaluating the sufficiency of the terms, standards, and obligations set forth in the MOA in an effort to anticipate how these terms may be interpreted and enforced by a court of law should a dispute escalate to that level.**

The only substantive (as distinguished from procedural) tribal harvest standards I can find in the MOA are set forth in one brief sentence:

“The limits and areas of the Tribe’s ceremonial and subsistence harvest will be set annually or seasonally by mutual agreement of the Parties based on the [1] best available scientific data of [2] estimated availability, [3] escapement goals, [4] tribal needs, and [5] conservation necessity.”

MOA at 5 (emphasis and numbering added).

In my view, these “standards” are vague, ambiguous, ill-defined, impair ODFW’s statutorily delegated management authority and discretion, do not adequately protect the interests of the State or its citizens, and set up potential conflicts with ODFW’s statutory mandate.

#### **A. “Estimated Availability”**

This “standard” is inherently ambiguous. I have found nothing in the proposed MOA that defines “availability,” nor any criteria to be used to determine whether fish or game are indeed “available” for tribal harvest. Does it refer to mere presence, i.e., whether a target species is present (i.e., “available”) in a certain location? Does it require a target population’s abundance to exceed some conservation or other threshold? For instance, steelhead might be “available,” i.e., present, in a specific river, but their abundance may be lower than the State’s conservation objectives. Would these steelhead nonetheless be “available” for tribal harvest? And how is ODFW staff in administering the agreement supposed to determine “estimated availability”? Does harvest by non-tribal hunters and anglers (e.g., traditional seasons and bag limits) factor into this determination? If there is a dispute and a subsequent lawsuit, what criteria will ODFW tell the court it should employ to determine whether the “estimated availability” standard is met?

It is axiomatic that contractually binding standards should be well-defined. Ask yourself, and then ask your staff, by the terms of the MOA, what does “estimated availability” mean, how is “availability” defined, and what criteria is to be used by the parties to determine “availability”? Then ask Coquille Tribal officials the same questions. And then revise the agreement to ensure the mutual understanding of the parties is clearly articulated in the MOA.

#### **B. “Escapement Goals”**

Escapement goals are biological reference points generally employed in fisheries management that refer to the number of fish that “escape” harvest (and other sources of mortality) to complete spawning activities. Fishery management plans apply the concept of escapement goals in different ways. For instance, an

escapement goal may be based on the spawning abundance that, on average, is thought to produce the maximum sustainable yield (MSY) for a population or management unit. Alternately, an escapement goal may be set at a critical biological threshold below which there is increased risk to the viability of a population. Escapement goals may also be expressed based on recovery objectives, such as employed in ODFW's Coastal Multispecies Management Plan. Escapement goals sometimes include only natural-origin fish (i.e., "wild fish"), and other times include hatchery-origin fish spawning naturally. Hatchery operations also have escapement goals in the form of broodstock collection objectives. Moreover, some fisheries are managed without set escapement goals, such as by using exploitation rates or other metrics. For many populations, the State simply does not collect enough data to manage fisheries by escapement goals.

My point here is that this "standard," and how it will be employed in practice, is exceedingly vague and potentially subject to disagreement. What if the Tribe contends that the escapement goal for wild steelhead on a certain river ought to be set at the MSY reference point (in order for the Tribe to maximize its interest in harvest), but that conflicts with ODFW's traditional management approach and/or the Commission's policy as set forth in the Coastal Multispecies Management Plan? This of course begs the question – if there is a disagreement, who decides what approach to employ? And if this disagreement escalates into the courts, what criteria is a judge supposed to use to determine if this escapement goal standard is satisfied if the parties have not even agreed on what the escapement goal is, or by what method it will be set?

### **C. "Tribal Needs"**

Like the standards above, the term "Tribal Needs" is not defined in any concrete way and is thus impractically vague and ambiguous. If the Tribe tells ODFW it plans to harvest 250 elk, or 4000 Chinook salmon (or whatever, just pick a number), in a given year in order to satisfy Tribal ceremonial and subsistence "needs", how is ODFW supposed to assess whether this number is in excess of "tribal needs." Is ODFW supposed to tell tribal officials that tribal members don't need so much elk meat or salmon this year, or that the tribe doesn't need to hold certain ceremonies? Would any such suggestion not rightly be viewed as offensive by Tribe? And isn't "tribal need" inherently only determinable by the Tribe itself?

While I assume good intentions and that the Tribe will determine its harvest needs in good faith, the MOA is nonetheless a legally binding and judicially enforceable contract. Clear, well-defined contract terms are essential to set the parties

expectations, define discernible practical limits, and facilitate successful implementation.

#### **D. “Conservation Necessity”**

The term “conservation necessity” is a legal term of art used in the context of federal tribal treaty fishing and hunting rights. In the Northwest, it describes principles established under judicial decisions in *U.S. v. Oregon* and *U.S. v. Washington* that outline under what conditions a state may regulate treaty fishing activities. It is also incorporated into Federal policy.<sup>10</sup>

In general, where a Tribe has fishing rights guaranteed under a federal treaty, a “state may only regulate treaty fishing when reasonable and necessary for conservation, provided: reasonable regulation of non-Indian activities is insufficient to meet the conservation purpose, the regulations are the least restrictive possible, the regulations do not discriminate against Indians, and voluntary tribal measures are not adequate.”<sup>11</sup>

**Commissioners – please ask ODFW staff and your counsel if the term “conservation necessity” as used in the MOA is intended to have the same meaning as I have described in the above paragraph.**

If not, then to avoid confusion and misinterpretation, it should be removed, and another term or phrase should be used in its place.

On the other hand, if the meaning of “conservation necessity” as used in the MOA is intended by the parties to have the same meaning as used in the context described above, then I strongly urge the Commission to thoroughly discuss with counsel the ramifications of using this term (there is a considerable body of case law discussing

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<sup>10</sup> See Final Environmental Impact Statement to Analyze Impacts of NOAA’s National Marine Fisheries Service (NMFS) joining as a signatory to the new *U.S. v. Oregon* Management Agreement for the Years 2018-2027 at 1 (*U.S. v. Or.* FEIS); see also June 1997 Secretarial Order No. 3206 entitled “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, issued jointly by the Secretary of the Interior and the Secretary of Commerce.

<sup>11</sup> *U.S. v. Or* FEIS at 1.

the term and associated principles<sup>12</sup>), including how use of this standard may limit and curtail ODFW management and conservation authority, what burdens it may place on ODFW, and whether it may impermissibly impair the authority and discretion committed to ODFW by statute.

I am concerned that by using the term “conservation necessity” the parties may be importing a significant body of federal case law into interpretation of the MOA’s “standards.” Moreover, by using this term, ODFW may be in effect agreeing to limit and constrain the State’s sovereign authority and discretion in the management and conservation of fish and wildlife in a way analogous to the limitations and constraints imposed on the State by federal treaties with Indian Tribes in the Columbia Basin.

Does the Fish and Wildlife Commission intend to do this?

Does the Fish and Wildlife Commission have authority (delegated from the Legislature) to do this?

Moreover, this “standard” is especially concerning when used as a basis to determine the Tribe’s harvest limits and areas. It suggests that in negotiating tribal harvest limits and areas, prior to a limit being imposed on the Tribe’s fishing and hunting activities, ODFW has the burden to show that it cannot address conservation concerns by restricting non-tribal fishing and hunting activities. This appears to implicitly preference tribal fishing and hunting over non-tribal fishing and hunting when it comes to meeting conservation requirements.

If the Tribe and ODFW cannot agree on a tribal harvest limit and the issue is subsequently litigated, this “conservation necessity” standard could result in a legal burden being placed on ODFW to show (1) reasonable regulation of non-Indian activities is insufficient to meet the applicable conservation objective; (2) the agency’s proposed tribal harvest limits are the least restrictive possible, (3) the agency’s proposed tribal harvest limits do not discriminate against Tribal members, and (4) voluntary tribal measures are not adequate. If so, this would be a significant legal burden to overcome. Faced with this burden, ODFW staff may be more likely to concede to tribal demands during negotiations and in this way potentially compromise the interests of non-tribal hunters and anglers.

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<sup>12</sup> See e.g., *Minnesota et al. v. Mille Lacs Band of Chippewa Indians et al.*, 526 U.S. 172, 205 (1999); *U.S. v. State of Washington*, 143 F.Supp.2d 1218 (W.D. Wash. 2001).

## **E. The Missing Standard – Non-Tribal Harvest and Use**

Fish and wildlife resources are finite. And, unfortunately, the abundance of many species is declining. Demand is inevitably greater than supply, and allocation is often a zero-sum game. Greater allocation of harvest opportunity to one group commonly results in less for another group. This is the reality of modern fish and wildlife management.

Conspicuously absent from the standards upon which tribal harvest limits and areas are based is any mention of non-tribal harvest or recreational use of fish or wildlife resources.

Was this omission intentional?

Given ODFW's legislative mandate to provide optimum recreational and aesthetic benefits for present and future generations of Oregon's citizens, *see* ORS 496.012, non-tribal use and harvest must be considered in determining Tribal harvest limits, areas, and seasons.

When there is a dispute involving a contract, courts look first and primarily to the express written terms of the contract to evaluate the obligations of the parties. Factors that are not included in the express terms will often be disregarded.

Here, the contractual standards governing tribal harvest limits and areas do not factor in non-tribal harvest and use needs. This appears to conflict with the agency's statutory mandate. I strongly suggest the MOA "standards" be revised to expressly include the agency's complete statutory mandate – including in particular the mandate to optimize recreational and aesthetic use for all Oregonians.

### **5. ODFW Staff's Agenda Item Summary Fails to Describe Potential Impacts to Recreational Hunting and Fishing**

ODFW staff's agenda item summary indicates the department expects the MOA to "result in a negligible reduction in revenue and a negligible change in the impact of hunting and fishing to existing fish and wildlife populations." Exhibit C, Attachment 1, at 3. While this passage describes expected impacts to ODFW's revenue and to fish and wildlife populations, a close reading reveals it does not describe the expected impacts to non-tribal recreational fishing and hunting opportunities.

ODFW is legislatively mandated to optimize recreational and aesthetic benefits for the present and future citizens of the state. ORS 496.012. As Commissioners charged with this legislative mandate, you have an obligation to ask the following question of ODFW staff, and demand that staff provide as clear, direct, and detailed an answer as possible: *what impacts to non-tribal recreational hunting and fishing opportunities are expected if the MOA is approved?*

## 6. The MOA Should be Revised to Protect State Interests Through Exclusion Section Language

The MOA states that “Nothing in this Agreement shall be construed to diminish, waive, limit or otherwise affect ancestral, aboriginal, treaty, statutory, equitable or other rights of the Tribe.” MOA sec. 6.f at 12. In order to protect the interests of the State, I suggest the sentence be revised to include the following additions and revisions (in bold): “Nothing in this Agreement shall be construed to diminish, waive, limit, **expand, acknowledge, recognize** or otherwise affect ancestral, aboriginal, treaty, statutory, equitable or other rights of, **or asserted by**, the Tribe.”

As I understand it, the Coquille Tribe’s asserted rights to fish and hunt have not been legally determined by a court of law. ODFW, acting on behalf of the State, should therefore include precautionary language in the MOA to ensure that nothing in the MOA may be used against the State’s interests should a legal action concerning the Tribe’s asserted rights be commenced.

## 7. Equal Privileges and Immunities

I suggest the Commission, if it has not done so already, request the Attorney General’s office for advice and counsel concerning the risk of the MOA running afoul of the Oregon Constitution’s equal privileges and immunities provision. *See Oregon Constitution Art. 1, sec. 20* (“No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”)

While the Coquille Tribe is a sovereign political entity, my understanding is that membership in the Tribe is based on ancestry. Disparate governmental treatment of classes of people based on immutable characteristics such as ancestry, race, gender, ethnic background, alienage, nationality, and sexual orientation can be subject to rigorous judicial scrutiny, and an adequate evidentiary basis justifying disparate treatment may be required. Because American Indians and Tribes have a unique status under federal and state laws, however, whether and how the Oregon

Constitution's equal privileges and immunities provision applies here (if at all) may present a novel question (and one that is beyond the scope of my comments).

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Thank you for considering my comments.



# COQUILLE INDIAN TRIBE

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[www.coquilletribe.org](http://www.coquilletribe.org)

November 22, 2022

Sent VIA First Class Mail

Oregon Fish and Wildlife Commission  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

RE: Cooperative Management Agreements with Other Tribes

Dai s'la Commissioners! I hope this letter finds you well! Thank you once again for approving an historic cooperative management agreement with the Coquille Indian Tribe! In recent months we have been pleased to see our collaborative efforts with ODFW create real results to save Coquille River fall chinook, and we look forward to updating you on this progress again in the near future.

In the meantime, some tribal governments have requested Coquille to provide written support for their own cooperative management agreements. This letter provides my response to those requests.

The Coquille Tribe generally supports cooperative management agreements delegating ODFW management authority to every one of Oregon's nine federally recognized tribes on substantially similar terms to our cooperative management agreement.

We can and should extend our partnership model so that all Oregonians and Oregon tribes can experience its benefits. Oregon tribes have a rich history of project collaboration, even when more than one tribal government expresses an interest in a project's geography. I believe in Oregon tribes' capacity to discuss and resolve differences while performing these agreements. Even with our occasional differences, we excel at partnerships and serve the needs of our shared species and habitats.

What matters today is the impact we have when we cooperate, and the restoration of tribal practices to share traditional ecological knowledge. We will all benefit from leveraging the knowledge and resources of Oregon tribes to restore and maintain balanced species populations

and healthy habitats, and so I look forward to seeing our model expand to include more tribes and benefit an expanded geographic area.

Thank you for the opportunity to provide these comments. I look forward to our future cooperative efforts!

Masi!



Brenda Meade, Chairperson  
Coquille Indian Tribe

Cc: Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians  
Confederated Tribes of Grand Ronde  
Confederated Tribes of Siletz  
Cow Creek Band of the Umpqua Tribe of Indians  
Curt Melcher, ODFW



**CONFEDERATED TRIBES OF  
COOS, LOWER UMPQUA AND SIUSLAW INDIANS  
TRIBAL GOVERNMENT**

1245 Fulton Avenue - Coos Bay, OR 97420  
Telephone: (541)888-9577 Toll Free 1-888-280-0726 Fax: (541)888-2853

October 19, 2022

ODFW Commission  
Director Curt Melcher  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

**SENT VIA EMAIL**

**RE: Cow Creek Band of Umpqua Tribe of Indians Hunting and Fishing Agreement**

Dear Commission Members and Director Melcher:

This letter is submitted on behalf of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians ("CTCLUSI") on the proposed agreement for hunting, fishing, and trapping by the Cow Creek Band of Umpqua Tribe of Indians ("CCBUTI").

CTCLUSI strongly supports efforts of the State to recognize the hunting and fishing rights of Tribes and to develop co-management agreements for cooperative management of natural resources that are interest to both Tribal and State governments. It is critical that both Tribal and State agencies work on a government-to-government basis to manage fish and wildlife to ensure that there are healthy and harvestable levels of resources across the State. This agreement is a good example of how these efforts can be implemented.

Accordingly, CTCLUSI supports without reservation the proposed CCBUTI agreement.

We appreciate your consideration of this letter.

Sincerely,

Brad Kneaper, Chair  
The Confederated Tribes of Coos,  
Lower Umpqua, and Siuslaw Indians

cc: Dustin Buehler, Governor's Office  
Sarah Weston, Governor's Office  
Roxann Borisch, ODFW