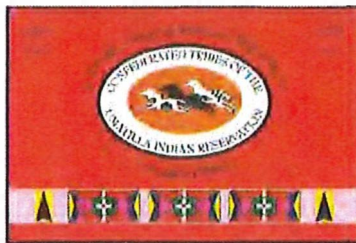


# **Exhibit B**

**Supplemental  
Public Correspondence Received  
December 7, 2022 to December 13, 2022**

Confederated Tribes *of the*  
Umatilla Indian Reservation

Board of Trustees



46411 Timine Way  
Pendleton, OR 97801

www.ctuir.org  
Phone: 541-429-7030

email: bot@ctuir.org  
Fax: 541-276-3095

December 12, 2022

Curtis E. Melcher, Director  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

Re: Proposed Memorandum of Agreement to Define Exercise of Hunting, Fishing, Trapping and Gathering by the Cow Creek Band of Umpqua Tribe of Indians and its Members and for Cooperative Management of Natural Resources

Director Melcher:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), I write in response to your October 18, 2022 letter regarding the Cow Creek Band of Umpqua Tribe of Indian's ("Cow Creek Tribe") proposed Hunting, Fishing, Trapping and Gathering Agreement ("HFT&G Agreement") which will be before the Fish and Wildlife Commission at its December 16, 2022 meeting. The Agreement between the Cow Creek Tribe and the Oregon Department of Fish and Wildlife ("ODFW") also includes provisions addressing cooperative management of natural resources in the defined geographical area. The CTUIR does not object to the Cow Creek Tribe's HFT&G Agreement as described below.

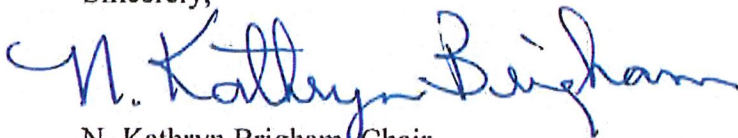
The CTUIR has Treaty-reserved federal rights in the waters, lands, fish, and wildlife of what is now the State of Oregon, and other places. In our Treaty of 1855 with the United States, 12 Stat. 945, the CTUIR reserved for our members the right to take fish at all usual and accustomed areas and to hunt on all open and unclaimed lands. Pursuant to the Treaty, our tribal members have fished and hunted waters and lands in what is now known as the State of Oregon, and beyond its borders, since time immemorial. The water, fish, game, roots and berries are our First Foods, and integral components of our longhouse ceremonies and feasts.

The proposed HFT&G Agreement follows the format of the recently approved Coquille HFT&G Agreement, including language added to the Coquille HFT&G Agreement at Cow Creek's request which clarifies that the agreement is non-exclusive, does not establish any new rights, and does not affect or implicate the hunting, fishing, trapping or gathering rights of any other tribe. With the clarifying language the CTUIR does not object to the HFT&G Agreement.

CTUIR BOT Letter to ODFW  
Re: Cow Creek HFT&G Agreement  
December 12, 2022  
Page 2 of 2

Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "N. Kathryn Brigham". The signature is fluid and cursive, with the first name "N." and the last name "Brigham" clearly legible.

N. Kathryn Brigham, Chair  
Board of Trustees

CC:

Coby Howell, Senior Trial Attorney, United States Department of Justice  
Jason Miner, Governor's Natural Resource Director  
Dustin Buchler, General Counsel, Office of the Governor  
Sarah Weston, Deputy General Counsel, Office of the Governor  
Erin Donald, Senior Assistant Attorney General, Department of Justice  
Davia Palmeri, Conservation Strategy Coordinator, ODFW



Confederated Tribes of Warm Springs, Oregon  
PO Box C  
Warm Springs, OR 97761  
Phone: 541-553-1161  
Fax: 541-553-1924

December 7, 2022

Curtis E. Melcher, Director  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

Re: Proposed Memorandum of Agreement to Define Exercise of Hunting, Fishing, Trapping and Gathering by the Cow Creek Band of Umpqua Tribe of Indians and its Members and for Cooperative Management of Natural Resources

Dear Director Melcher:

On behalf of The Confederated Tribes of the Warm Springs Reservation of Oregon ("CTWS"), we write regarding the Cow Creek Band of Umpqua Tribe of Indian's ("Cow Creek Tribe") proposed Hunting, Fishing, Trapping and Gathering Agreement ("HFTG Agreement") which will be before the Fish and Wildlife Commission at its December 16, 2022 meeting. CTWS is the legal successor-in-interest to the Indian signatories of the Treaty with the Tribes of Middle Oregon, dated June 25, 1855, 12 Stat. 963 ("1855 Treaty"), which reserves sovereign rights in the waters, lands, fish, and wildlife of what is now the State of Oregon, including the Willamette River. We do not object to the Cow Creek Tribe's HFTG Agreement as long as its geographic scope, including any future amendments, except Deschutes County and all of lands ceded in the 1855 Treaty. We also ask that clarifying language be added to the Agreement confirming that it will not be used to attempt to affect any rights reserved in our 1855 Treaty.

Pursuant to the 1855 Treaty, our members are guaranteed the right to take fish at all usual and accustomed areas as our people have done since time immemorial. We also have treaty-reserved rights to hunt and gather cultural foods throughout the State. The water, fish, game, roots and berries are our First Foods, and integral components of our longhouse ceremonies and feasts.

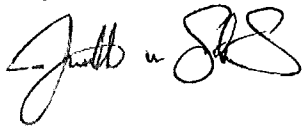
The proposed HFTG Agreement follows the format of the recently approved Coquille HFTG Agreement, including language added to the Coquille HFTG Agreement at Cow Creek's request which clarifies that the agreement is non-exclusive, does not establish any new rights, and does not affect or implicate the hunting, fishing, trapping or gathering rights of any other tribe. The HFTG Agreement also excludes Deschutes County from its geographic scope. With the exclusion of Deschutes County and all of CTWS's ceded lands in the 1855 Treaty from this HFTG Agreement, and from any subsequent modification, and with addition of the clarifying language that the Agreement will not be used to attempt to affect or implicate any rights reserved in the 1855 Treaty within the geographic scope of the HFTG Agreement (nor can the language legally affect those Treaty rights), the CTWS does not object to the HFTG Agreement.



Mr. Curtis E. Melcher  
Director  
Oregon Department of Fish and Wildlife  
Page 2 of 2

On behalf of the CTWS, we reserve the rights to protect our sovereign interests in the future. Please contact me or our fish and wildlife attorney, Brent Hall at (541) 215-0404, if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan W. Smith, Sr.", written in a cursive style.

Jonathan W. Smith, Sr., Chairman  
Confederated Tribes of the Warm Springs Reservation of Oregon

CC:

Coby Howell, Senior Trial Attorney, United States Department of Justice  
Jason Miner, Governor's Natural Resource Director  
Dustin Buehler, General Counsel, Office of the Governor  
Sarah Weston, Deputy General Counsel, Office of the Governor  
Erin Donald, Senior Assistant Attorney General, Department of Justice  
Davia Palmeri, Conservation Strategy Coordinator, ODFW

**BORISCH Roxann B \* ODFW**

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**Subject:** FW: Supplemental Comments re Siletz Tribe and Cow Creek Band MOAs  
**Attachments:** BAM 12.7.22 supp cmts Siletz Cow Creek MOAs.pdf

**From:** Brian McLachlan <[bamclachlan@hotmail.com](mailto:bamclachlan@hotmail.com)>

**Sent:** Wednesday, December 7, 2022 9:36 AM

**To:** COMMISSION ODFW \* ODFW <[ODFW.COMMISSION@odfw.oregon.gov](mailto:ODFW.COMMISSION@odfw.oregon.gov)>; MELCHER Curt \* ODFW <[Curt.MELCHER@odfw.oregon.gov](mailto:Curt.MELCHER@odfw.oregon.gov)>

**Subject:** Supplemental Comments re Siletz Tribe and Cow Creek Band MOAs

Commissioners and Director Melcher – Please find attached my supplemental comments concerning proposed MOAs with the Siletz Tribe and Cow Creek Band. Thank you for considering my comments.

Regards,

Brian McLachlan

Brian McLachlan  
Portland, Oregon  
December 7, 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 additional comments to supplement the comments I submitted on November 26, 2022, regarding the proposed Memorandum of Agreements (MOA) between the Confederated Tribes of Siletz Indians (Siletz Tribe) and the Cow Creek Band of Umpqua Tribe of Indians (Cow Creek Band) and the State of Oregon.

After speaking with the ODFW's Conservation Strategy Coordinator and lead staff person on these MOAs, further reviewing the proposed MOAs, and finding a recent Oregon Court of Appeals decision addressing "conservation necessity" legal principles, I am concerned about the legality of the MOAs as currently drafted.

I address these concerns below and provide suggested solutions. I also offer some proposed revisions to the MOAs that address the two issues raised in my original comment letter and present a few additional concerns (and solutions) that warrant attention from ODFW and the Commission.

### **1. ODFW Must Retain Authority Over Method of Harvest**

The proposed MOAs provide that the "method" of tribal harvest shall be subject "exclusively to tribal decision." *See* Siletz MOA § 5.d; Cow Creek MOA § 3.c. This appears inconsistent with Oregon Revised Statute (ORS) 496.162, which provides that "the State Fish and Wildlife Commission, at appropriate times each year, shall by rule: (a) [p]rescribe 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." (Emphasis added).

While the Legislature has authorized the Commission to delegate this responsibility to the Director, *see* ORS 496.112(3), I am not aware of any statutory provision authorizing the Commission or Director to delegate or transfer this management authority and responsibility to a

Tribal government, nor to contractually bind itself through the MOAs to not exercise this authority committed to it by the Legislature.<sup>1</sup>

Moreover, from a practical standpoint, ODFW managers and biologists need to discuss and agree on the method of Tribal harvest because harvest methods can have significant conservation and management implications that managers must take into consideration when developing seasons and regulations. For example, mark-selective fisheries – where only hatchery-origin fish may be retained and all natural-origin (i.e., “wild”) fish must be released (such as most recreational steelhead and spring Chinook fisheries) – typically result in substantially less impacts on wild stocks per fish harvested than fisheries conducted using non-mark-selective methods (such as gill-net fisheries).<sup>2</sup> Thus, agreement only on harvest numbers but not methods is insufficient to allow ODFW managers to ensure that conservation and allocation sharing objectives are met.

Based on ORS 496.112(3) and practical management considerations, the MOAs should be revised to delete sections indicating harvest method will be exclusively a tribal decision, and to integrate Tribal harvest methods into the annual or seasonal agreement negotiations between ODFW and the Tribes.

To address what I perceive as the Tribes’ desire to exercise their sovereignty (i.e., self-government) regarding method of harvest, I suggest the MOAs also include the following language:

In a manner consistent with the agency’s statutory mandates, ODFW intends for the Tribes to decide for themselves what hunting, fishing, trapping, and gathering methods to employ while nonetheless taking into account these methods in negotiating and agreeing to overall harvest activities.

## **2. “Conservation Necessity” Terms May Substantially and Improperly Diminish the State’s Fish and Wildlife Management, Regulatory, and Enforcement Authorities**

The term “conservation necessity” is employed three times in both the proposed Siletz Tribe and Cow Creek Band MOAs. I strongly recommend it be removed from both.

“Conservation necessity” is a legal term of art that encompasses a set of legal principles governing when and how a state may regulate treaty hunting and fishing activities by tribal members. ODFW’s lead staff person confirmed to me that the meaning of “conservation

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<sup>1</sup> See *State ex rel State Office for Services to Children and Families v. Klamath Tribe*, 170 Or App 106 (2000) (citing rule that “[a]n administrative body possesses only those powers that the legislature grants and cannot exercise authority that it does not possess”).

<sup>2</sup> See e.g., February 3, 2022 ODFW-WDFW Columbia River Joint Staff Report: Stock Status and Fisheries For Spring Chinook, Summer Chinook, Sockeye, Steelhead, and Other Species at 22 (harvest rate schedule for upriver Columbia River spring Chinook showing substantially higher natural impact rate per same catch for Tribal gill net fishery as compared to non-tribal fishery, which is primarily mark-selective).

necessity” as used in the MOAs is intended to be the same as employed in cases involving treaty fishing and hunting rights (personal communication, Nov. 30, 2022).

The Oregon Court of Appeals recently issued a decision discussing at length and applying the principles comprising the “conservation necessity” doctrine. In *State v. McCormack/Senter*, 21 Or App 551 (2022), two members of the Nez Perce Tribe were convicted under OAR 635-041-0025(3) for fishing with illegal gill nets on the Columbia River. The Court of Appeals overturned these convictions because the State failed to establish, as was required, that applying this regulation to the tribal fishers constituted a “conservation necessity.”

The court’s decision is instructive as to the substantial burden placed on the State where the “conservation necessity” doctrine applies. To overcome this burden, the state must prove, by clear and convincing evidence,<sup>3</sup> that (1) a regulation is a reasonable and necessary conservation measure (i.e., necessary for the perpetuation of a species); (2) application of the regulation to tribal fishing or hunting activities is necessary in the interest of conservation; and (3) the regulation does not discriminate against tribal fishing or hunting. *State v. McCormack/Senter*, 21 Or App 551, 561-64 (2022). To establish the first element above, the state must show a regulation is the least restrictive which can be imposed consistent with achieving the state’s conservation goal, and the tribe’s own conservation measures are insufficient to meet the needs of conservation. To satisfy the second element, the state must show that restriction of non-treaty anglers and hunters is insufficient to accomplish conservation of the resource. For example, the State must prove it is unable to preserve a run salmon by forbidding non-treaty anglers from harvesting those salmon. *See id.*

Applying these principles through the MOAs could have significant legal and practical ramifications, including to limit, burden, or otherwise diminish ODFW’s management, regulatory, and enforcement authorities.

For example, if the Siletz Tribe or Cow Creek Band and ODFW cannot agree on a tribal harvest limit and the issue is subsequently disputed and litigated (which is provided for in the MOAs), the “conservation necessity” standard could and likely would result in a significant burden being placed on ODFW to show by clear and convincing evidence that (1) regulation of non-tribal hunting and fishing is insufficient to meet conservation needs; (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, faced with this burden, it seems likely ODFW staff may be more likely to concede to tribal requests during negotiations, which in turn may potentially compromise ODFW’s management objectives and statutory mandate to optimize recreational benefits such as through hunting and fishing.

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<sup>3</sup> The “clear and convincing” evidentiary standard requires a substantially higher level of proof than the “preponderance of the evidence” standard. *See id.* at 564 n.10.

Moreover, in evaluating whether it is in the State's interest to include "conservation necessity" principles in the MOAs, the Commission should also keep in mind that in *McCormack* the Court of Appeals rejected as insufficient the testimony of an ODFW manager that the regulation in question was necessary for conservation. *See id.* at 555, 565-66 (rejecting as insufficient ODFW manager testimony that regulating use of gill net near dam where fish congregate at fish ladder was necessary for conservation). And the court also rejected the Oregon Attorney General's argument that the regulation was permissible because it was consistent with the governing management agreement between the State and Nez Perce Tribe. *Id.* at 567 (the "test for determining the permissibility of a state restriction on treaty-reserved fishing rights is whether that restriction is necessary for conservation (i.e., necessary for the perpetuation of a species), not whether it is "consistent with" a co-management agreement.").

*McCormack* thus stands for the rule that, where "conservation necessity" principles apply, even where a law or regulation is consistent with a State-Tribal co-management agreement, and ODFW managers testify that application of the regulation is necessary for conservation, this by itself is still insufficient to satisfy the State's burden to establish a "conservation necessity" and enforce its regulation in connection with tribal fishing.

Given all this, I question whether ODFW has the statutory authority to contractually burden State fish and wildlife management, regulatory, and enforcement authority with "conservation necessity" principles, and I request that "conservation necessity" terms be removed entirely from the MOAs.

If the term is left in, at the public hearing, I request the Commission ask the following questions of staff and agency counsel prior to public comment so that the public can respond accordingly.

1. What is the purpose of including "conservation necessity" terms and incorporating associated principles in the MOAs? Does incorporation of these principles into MOAs – which are legally binding contracts – not necessarily burden and limit the State's management, regulatory, and enforcement authorities?
2. How specifically are "conservation necessity" principles suppose to be applied by ODFW managers (including the principle that prior to regulating tribal activities, the state must show by clear and convincing evidence that prohibiting non-tribal fishing and hunting is insufficient to meet conservation needs) in negotiating annual and seasonal tribal hunting and fishing amounts, methods, areas, and limits?
3. How may including "conservation necessity" principles in the MOAs impact the ability of the State's law enforcement authorities (including the Oregon State Police) to enforce the State's laws and regulations with respect to hunting and fishing activities by members of the Siletz Tribe and Cow Creek Band? Could the inclusion of "conservation necessity" terms in the MOAs provide a viable defense for tribal members charged with violating

State hunting and fishing laws? Has ODFW consulted with the Oregon State Police or prosecutors about this specific issue?<sup>4</sup>

4. What statute or other authority provides ODFW with the authority to contractually burden, limit, or otherwise diminish the State's broad authority to manage fish and wildlife by including "conservation necessity" terms in the MOAs?

### **3. Rulemaking is Required to Implement Annual or Seasonal Tribal Harvest Agreements**

Neither the proposed rule now before the Commission, nor the proposed MOAs, define the specific amounts or numbers of fish and wildlife resources that may be harvested by the Tribes, nor the season, timing, area, or methods of such harvest. *See* Siletz MOA § 3.b; Cow Creek MOA § 2. Rather, the MOAs outline a process whereby the Tribes and ODFW will negotiate annual or seasonal agreements as to the limits and areas of tribal harvest. Upon reaching such agreements, the MOAs provide that ODFW will issue the respective Tribe an annual implementing permit consistent with the parties' agreement. *See* Siletz MOA §5.b.v; Cow Creek MOA § 3.b. The MOAs are silent as to whether ODFW will go through formal rulemaking in connection with issuing these tribal implementing permits.

ORS 496.162(a) provides that the Commission "shall by rule (a) [p]rescribe 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." (Emphasis added). It thus appears ODFW must engage in rulemaking in connection with issuing a tribal implementing permit. Accordingly, the MOAs should be revised to reflect that, upon reaching a tentative agreement with a Tribe, ODFW will commence a rulemaking process (which should include public notice and hearing) prior to and in connection with issuing a tribal implementing permit.

This should not be a significant burden to either ODFW or the Tribes as the agency engages in similar rulemaking processes, such as by adopting annual fishing regulations in State marine waters that are consistent with those negotiated, agreed to, and adopted by, the Pacific Fishery Management Council (via the Secretary of Commerce), and by ratifying and approving regulations adopted through the Columbia River Compact process.

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<sup>4</sup> For example, proposed Cow Creek Band MOA § 3.c provides that "[a]fter mutual agreement on harvest numbers and Wildlife Management Units of harvest, the method and time of such ceremonial or subsistence harvest shall be subject to the exclusive decision and regulation of the Tribe, subject to any documented conservation necessity concerns." (Emphasis added). Does this mean enforcement of State laws and regulations by the Oregon State Police concerning hunting and fishing activities by Cow Creek Band members is subject to the "conservation necessity" principles as articulated in *State v. McCormack*?

#### 4. Is ODFW Being Honest When Its Representations to the Public Do Not Match the Tribal Harvest Standards in the Proposed MOAs?

ODFW has a duty to be honest. Both to the citizens of Oregon, which it serves, and to the Tribes, with which it is entering into these MOAs. In my view, this duty of honesty requires the agency to have an objectively sound and reasonable basis for its public representations.

ODFW's Notices of Proposed Rulemaking affirmatively represent to Oregon's citizens that, as a result of the rule implementing the MOAs, (a) tribal hunting and fishing activities are not anticipated to increase, (b) the public is likely to be minimally affected; (c) businesses which provide goods and services to hunters and anglers are not expected to be impacted, and (d) possibly small reductions to the general public's opportunity to take a few species may be created to accommodate tribal activities. *See* Notices of Proposed Rulemaking (10.18.22) for Siletz MOA and Cow Creek MOA at 2.<sup>5</sup>

I find no terms in the MOAs to directly support these representations.

I asked ODFW's lead staff person about this. Based on our conversation, it is my understanding that ODFW intends to negotiate the annual or seasonal harvest agreements with the Tribes to be consistent with the agency's representations to the public in the Notices of Proposed Rulemaking (personal communication, Nov. 30, 2022).

Here's the problem – that's not what the MOAs say. The terms and standards applicable to tribal hunting and fishing activities are set forth in one sentence in each of the MOAs and are not defined elsewhere. The applicable provision in the Cow Creek Band MOA states:

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 estimated availability, [2] escapement goals,<sup>6</sup> [3] tribal needs, and [4] conservation necessity.

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<sup>5</sup> The Notices of Proposed Rulemaking state: "The public is likely to be minimally affected by the proposed rule [which implements the MOA]. Members of the Cow Creek Tribe will benefit by not purchasing a license for hunting, fishing, and trapping activities conducted within the specified area. The Tribe will benefit by being able to authorize hunting, fishing, and trapping consistent with tribal values within annual harvest limits and areas set by mutual consent between the tribe and ODFW staff. It is not anticipated that overall fishing and hunting activities by tribal members will increase as a result of this rule, but it is possible that small reductions in opportunities for the general public to take a few species with limited population sizes may be created to accommodate tribal activities. Businesses that provide goods and services to hunters and anglers in the specified area are not expected to be impacted by the rule." (Emphasis added).

<sup>6</sup> I suggest the term "escapement goals" be replaced with "conservation objectives" as the latter term is more inclusive and will cover various management goals and objectives designed to conserve various fish and wildlife resources.

Proposed Cow Creek Band MOA § 3.b at 5. The terms of the Siletz Tribe MOA are nearly identical, except to include an additional standard: “ODFW management goals such as those related to research, disease management or population enhancement.” Proposed Siletz Tribe MOA § 5.b.iii at 7.

None of these standards speak directly or adequately to the representations stated in the agency’s Notice of Proposed Rulemaking. In addition, conspicuously absent in the standards is any reference to ODFW’s statutory mandate, including to “provide optimum recreational benefits.” *See* ORS 496.112.

These MOAs are intended to be in place for a long time – well after ODFW’s current Commission members, Director, and staff have moved on. But the Tribes will undoubtedly be here. As will recreational hunters and anglers. And, unless revised, the ill-defined, ambiguous, and inherently inadequate terms in the MOAs will likely be here as well – leaving a mess for the future.

Imagine a decade or two from now, when, as they often do, fish runs or game numbers cycle down, and a Tribe requests – as is its prerogative – an amount of fish or game that may materially impact the general public’s fishing or hunting opportunity. What will ODFW say to the public and the Tribe? Will the agency decline the Tribe’s request due to its representations to Oregon’s citizens in the 2022 Notice of Proposed Rulemaking? Would not the Tribes rightly consider this a breach of the express terms in the MOAs?<sup>7</sup> Or, will ODFW forget or ignore what it told Oregon’s citizens about the expected impacts of the MOAs? And if a dispute should arise, would not the express terms of the MOAs surely govern over representations made in the Notice?

Although I assume good faith intentions all around, is it really being honest with Oregon’s citizens and the Tribes to make public representations that are not directly and adequately supported by the express terms of the proposed MOAs?<sup>8</sup>

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<sup>7</sup> *See* Siletz Tribe MOA § 3.b at 4 (“[T]his Agreement sets out standards and the process for the Tribe to determine tribal harvest limits and areas in cooperation with ODFW . . .”); Cow Creek Band MOA § 2 at 5 (“[T]his Agreement provides agreed-upon standards for the Tribe to exercise such harvest rights and to determine tribal harvest levels in cooperation with ODFW.”).

<sup>8</sup> In its 2014 and 2015 Sport Fishing Regulations Pamphlets, ODFW represented that Columbia River Endorsement fees would be used to help eliminate non-tribal commercial gill nets from the lower mainstem Columbia River. A few years later the agency changed course. As of 2022, non-tribal gill nets are still used on the lower mainstem, and ODFW is still collecting this additional fee from recreational anglers. A significant number of recreational anglers lost trust and confidence in the agency over this. Will ODFW do something similar with respect to the MOAs?

## **5. Cumulative Impacts**

ODFW has already entered into an MOA with the Coquille Tribe. Now before the Commission are proposed MOAs with the Siletz Tribe and Cow Creek Band. And additional MOAs are anticipated.

The geographic scope of some of the MOAs overlap. Accordingly, fish and wildlife populations, as well as the general public's fishing and hunting opportunities, may be cumulatively impacted by implementation of multiple MOAs and the resulting aggregate tribal fishing and hunting activities.

While ODFW has represented that impacts from individual MOAs will be small and minimal, it has failed to address the cumulative impacts of multiple MOAs. Because cumulative impacts could foreseeably impact conservation objectives and the public's fishing and hunting opportunities in different ways than individual MOAs, it is incumbent on ODFW to fully inform this Commission and the public about potential cumulative impacts.

Moreover, I recommend the agency expressly address cumulative impacts in the MOAs as set forth in section 6 below so that the Tribes, Commission, and public can be assured of ODFW's intended approach.

## **6. Suggested Revisions to Address Concerns and Memorialize Representations**

To address my concerns above, I recommend the MOAs (Siletz Tribe MOA §5.b.iii; Cow Creek Bank MOA §3.b) be revised (in red) as follows:

The amounts, limits, times, methods, and areas of tribal ceremonial and subsistence harvest will be set annually or seasonally by mutual agreement of the Parties based on the best available scientific data of estimated availability, conservation objectives, tribal needs, and ODFW's statutory mandates (including ORS 496.012) and management goals, including but not limited to those related to research, disease management, population enhancement, and public fishing, hunting, trapping, and gathering opportunities. Taking into consideration Tribal harvest activities cumulatively under this and similar MOAs, the annual or seasonal agreements will reflect the Parties' expectations that (1) the public is expected to be minimally affected; (2) overall fishing and hunting activities by tribal members are not anticipated to increase; (3) small reductions in opportunities for the general public to take species with limited population sizes are possible and may be created to accommodate tribal activities; and (4) businesses that provide goods and services to hunters and anglers in the specified area are not expected to be impacted.

In addition, in a manner consistent with the agency's statutory mandates, ODFW intends the Tribes to decide for themselves what hunting, fishing, trapping, and gathering methods to employ while nonetheless taking these methods into account in negotiating and agreeing to overall harvest activities.

\* \* \*

Upon reaching a tentative agreement on the amounts, limits, times, methods, and areas of the Tribe's ceremonial and subsistence harvest pursuant to this section, ODFW will commence a rulemaking process in order to issue the Tribe an annual implementing permit consistent with a finalized Agreement, which shall then be incorporated into the tribally-issued licenses and tags that authorize tribal harvest of fish and wildlife.

## **7. Suggested Language to Address Pending Federal Legislation**

In my initial comments, I raised a concern about the ability of the State to exit the Siletz MOA pursuant to the agreement's terms should pending Federal legislation be enacted. I requested that the Commission obtain written assurance from its counsel that the State's rights to do so would not be preempted. I renew this request, and in addition recommend the MOA include additional clarifying language in §15 as follow:

The Parties intend and acknowledge that this Memorandum of Agreement is not intended to, and does not in any way, replace, amend, or otherwise modify the Agreement Among the State of Oregon, the United States of America and the Confederated Tribes of the Siletz Indians of Oregon to Permanently Define Tribal Hunting, Fishing, Trapping, and Gathering Rights of the Siletz Tribe and its Members and entered into by the United States on April 22, 1980.

## **8. Revision to Recital Regarding Adjudication of Siletz Tribe's Rights**

The proposed Siletz Tribe MOA includes the below recital.

**Whereas**, the Siletz Tribe's wildlife resource hunting, fishing, trapping and gathering rights ("HFT&G rights") have never been directly litigated, adjudicated or determined by any court in which the Siletz Tribe has been a party;

Proposed Siletz MOA at 2.

My understanding is the Tribe's hunting, fishing, trapping, and gathering rights under Federal law were, in fact, subject to litigation in which the Tribe was a party, and that their rights were determined through a settlement agreement and consent decree entered as a final judgment of the United States District Court for the District of Oregon in 1980.<sup>9</sup>

Accordingly, I recommend the recital be revised as follows:

**Whereas**, the Siletz Tribe's hunting, fishing, trapping, and gathering rights were not resolved through a trial on the merits but instead defined through a settlement agreement and consent decree entered as a final judgment of the United States District Court for the District of Oregon in 1980;

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<sup>9</sup> See OAR 635.041.0500; Section 4 of Public Law 96-340 (commonly known as the "Siletz Reservation Act") (96 Stat. 1074).

If desired, the Tribe can include additional language to address its view of the settlement and consent decree. I caution the State about joining in any recital or statement that may potentially prejudice its legal interests.<sup>10</sup>

## 9. Applicability of State Statutes

The MOAs contain language that could be construed to suggest ODFW agrees that only certain State statutes apply to Tribal hunting, fishing, trapping, and gathering activities authorized under the MOAs. *See* Cow Creek Band MOA §3.d at 6 (“Tribal Regulation of Harvest Consistent with Certain Oregon Revised Statutes. The Tribe agrees to adopt harvest regulations consistent with the Oregon Revised Statutes identified in Attachment A.”) (emphasis added); *id.* § 3.e. (“all other commercial activities must be consistent with Oregon Revised Statute . . .”) (emphasis added); *see* Siletz Tribe MOA §5.b.ii.c & h at 10.

ODFW has no authority to exempt Tribal activity under the MOAs from compliance with State statutes. While the Tribes may take a different position as to the applicability of State statutes, I suggest the MOA be revised to clarify the agency’s position.

In addition, both MOAs allow for the Tribes to trade or barter fish and wildlife harvested for ceremonial and subsistence purposes with enrolled members of federally recognized Tribes. Cow Creek MOA § 3.e at 7; Siletz MOA § 5.b.ii at 6. Generally, in Oregon, “commercial fishing” is defined with reference to the definition of fishing with a “commercial purpose.” ORS 506.006(4) defines “commercial purpose” to include, *inter alia*, “barter” and “trade”.<sup>11</sup> This suggests that barter and trade of fish or fish parts under the MOAs would be considered a “commercial purpose” under applicable Oregon statutes. There are a great number of statutory provisions governing commercial fishing (i.e., fishing with a commercial purpose), including a number that prohibit taking of fish for commercial purposes in certain waters. *See* ORS 511.206 et. seq. This suggests that bartering or trading fish taken from these waters, or not otherwise in compliance with other statutory provisions applicable to commercial fishing, would be prohibited under Oregon statutory law, which the Commission is not authorized to waive in the MOAs. I suggest agency counsel take a close look at this issue.<sup>12</sup>

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<sup>10</sup> I would also recommend ODFW’s counsel carefully review each recital in both MOAs to ensure they are appropriately attributed to ensure no prejudice to the State’s interests.

<sup>11</sup> “‘Commercial purposes’ means taking food fish with any gear unlawful for angling, or taking or possessing food fish in excess of the limits permitted for personal use, or taking, fishing for, handling, processing, or otherwise disposing of or dealing in food fish with the intent of disposing of such food fish or parts thereof for profit, or by sale, barter or trade, in commercial channels.”

<sup>12</sup> Unless specifically provided for in statute, ODFW cannot interpret the commercial fishing laws one way for purposes of tribal fishing under the MOAs and another way for the general public.

**10. Applicability of Agency Regulations**

Some agency regulations (such as seasons and bag limits applicable to the general public) will necessarily be superseded by the rules implementing the MOAs with regard to tribal activities. Other agency rules and regulations, however, may still remain effective with regard to the MOAs (e.g., rules implementing the Coastal Multi-species Management Plan and other fish and game management plans). ODFW should clarify which administrative rules and regulations will be superseded, and which will remain effective.

**11. Clarify Use of Term “Rights”**

The proposed Cow Creek Band MOA § 2 at 5 states:

This Agreement does not define the specific extent of such rights possessed by the Cow Creek Band of Umpqua Tribe of Indians, nor the specific amount or number of fish and wildlife resources that may be harvested by the Tribe’s members at any particular time. Instead, this Agreement provides agreed-upon standards for the Tribe to exercise such harvest rights and to determine tribal harvest levels in cooperation with ODFW.

It appears the term “rights” as used above refers to rights under federal law asserted by the Cow Creek Band (which are also referenced in the recitals), instead of contractual rights established by the MOAs themselves. I caution the State about language suggesting that tribal harvest activities under the MOAs involve the exercise of any rights asserted under federal law. Accordingly, I recommend the above section be revised as follows (in red):

This Agreement does not define the specific extent of any rights possessed by the Cow Creek Band of Umpqua Tribe of Indians, nor the specific amount or number of fish and wildlife resources that may be harvested by the Tribe’s members at any particular time pursuant to this Agreement. Instead, this Agreement provides agreed-upon standards for the Tribe to engage in harvest activities and to determine tribal harvest levels in cooperation with ODFW.

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Thank you for considering my comments. While I have outlined several concerns, I have also tried to provide viable solutions so that ODFW and the Tribes can move forward with the MOAs. If you have any questions or would like to discuss my concerns, please do not hesitate to contact me.

Best regards,  
Brian McLachlan