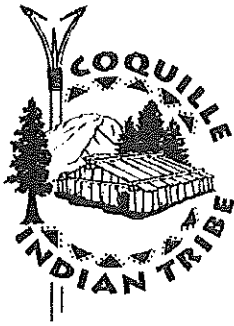


# **Exhibit H**

**Supplemental  
Public Correspondence Received as of  
June 14, 2023**





# COQUILLE INDIAN TRIBE

3050 Tremont Street North Bend, OR 97459  
Phone: (541) 756-0904 Fax: (541) 756-0847  
[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.

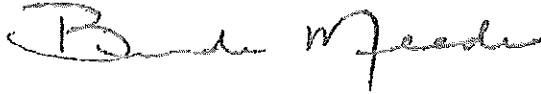
We can and should extend our partnership model so that all Oregonians and Oregon tribes can experience its benefits. Oregon tribes have a rich history of project collaboration, even when more than one tribal government expresses an interest in a project's geography. I believe in Oregon tribes' capacity 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!

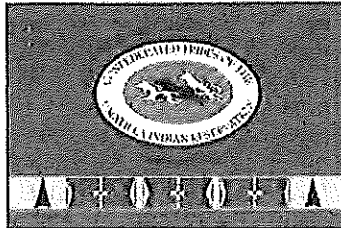
A handwritten signature in cursive script that reads "Brenda Meade". The signature is written in black ink on a white background.

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 the*  
Umatilla Indian Reservation

Board of Trustees



46411 Timline Way  
Pendleton, OR 97801

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

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

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 of the Siletz Tribe and its Members and Setting Out Principles of Cooperative Management of Wildlife Resources

Dear Director Melcher:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation of Oregon ("CTUIR"), I write to express support for the Siletz Tribe's 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 CTUIR has Treaty-reserved federal rights in the waters, lands, fish, and wildlife of the Columbia Basin, including the Willamette River. 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. Pursuant to the Treaty, our tribal members have fished and hunted the Columbia Basin for subsistence, ceremonial, and commercial purposes since time immemorial. Our culture reveres salmon, steelhead, lamprey cels and sturgeon as one of the First Foods, and an integral component of our longhouse ceremonies and feasts.

The Supreme Court of the United States has repeatedly recognized the significance of our treaty right to fish at off-reservation usual and accustomed places, holding that the right is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Washington v. Washington State Comm'l Pass. Fishing Vessel*, 443 U.S. 658, 680, 99 S. Ct. 3055, 3071-3072 (1978), quoting *United States v. Winans*, 198 U.S. 371, 380 (1905). This treaty right to fish is a property right, protected by the Fifth Amendment to the Constitution of the United States. See *Muckleshoot Indian Tribe v. United States Corps of Engineers*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988), citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-412, 88 S. Ct. 1705, 1710-1711 (1968). The right to take fish includes a right to cross private property to access those areas, "imposing a servitude" upon the land. *Winans*, 198 U.S. at 381. Since 1968, the CTUIR has protected the treaty fishing right as an intervenor-plaintiff in *United States v. Oregon*, CV 68-513-SI, in the United States District Court for the District of Oregon.

Not only have we protected our treaty right to fish in Court, but we are also leaders in implementing the work to restore our treaty resources: the fish and our protected fisheries. We actively protect and restore both anadromous and resident fish stocks in the Columbia River Basin and the ecosystems on which they depend. The fisheries restoration and ecosystem work our tribes pursue serves both the Tribe's interest and the public interest. We do this work in our ceded areas, in the mainstem and lower Columbia River, and on the Willamette River including at Willamette Falls.

How any agreement between the Siletz Tribe and the State of Oregon, or between any other tribe and the State of Oregon, addresses the Willamette Falls area is of great concern to the CTUIR. The Willamette River is a tributary of the Columbia River. The CTUIR, along with its sister Columbia Basin Treaty Tribes, have long claimed Willamette Falls as a usual and accustomed fishing area reserved in our Treaty of 1855 and we continue to use the Falls annually for subsistence and ceremonial harvest. We have not claimed exclusive fishing or gathering rights at Willamette Falls relative to other tribes.

Prior to development of the HFT&G Agreement, Siletz and ODFW were engaged in negotiations on a co-management agreement designed to replace its 1980 hunting, fishing, gathering and trapping agreement and the 1980 federal Consent Decree. In that process, Siletz was transparent with us in the development of the co-management Agreement and its related attempt to draft federal legislation, S. 3123, rescinding the federal Consent Decree that is currently in place with respect to its hunting, fishing, trapping and gathering trapping rights. Based on council-to-council and staff-level conversations with Siletz, we reached an intertribal agreement for protections of the CTUIR interests at Willamette Falls. We also were provided with the draft replacement agreement that Siletz would seek with the State of Oregon prior to the commencement of negotiations, along with an opportunity to provide comments that were incorporated by Siletz. Further, Siletz expressed its support for our history and continued use of Willamette Falls.

The Siletz Tribe continued its transparent and cooperative approach with the CTUIR in its pivot to the HFT&G Agreement with Oregon. This HFT&G Agreement is not intended to be nor is it a replacement agreement for the co-management agreement under the Consent Decree, but rather is entered into under the State of Oregon's derivative authority. *See, e.g., Confederated Tribes of Siletz Indians v. Oregon*, 244 Or. App. 535 (Or. App. 2011). Because of the Siletz Tribe's transparent and cooperative approach and assurances with respect to Willamette Falls and the lower Columbia River, we support the HFT&G Agreement and the Siletz process for seeking improved hunting and fishing access for its tribal members in Oregon.

With respect to the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribe") October 19, 2022 letter objecting to the Siletz HFT&G Agreement, we believe the ODFW should be aware of the following information. The Grand Ronde Tribe has engaged in similar efforts as the Siletz Tribe to rescind the Grand Ronde's 1986 Consent Decree and replace the

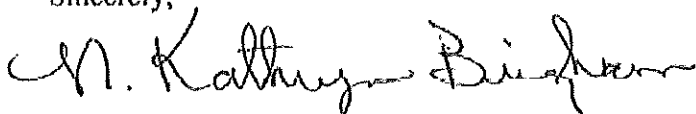
management agreement that is subject to that Consent Decree. The Grand Ronde Tribe has not been transparent nor cooperative with other tribes with interests at Willamette Falls.

The CTUIR had a government-to-government meeting with the Grand Ronde Tribe on this subject in which neither draft federal legislation nor a draft replacement agreement was shared. When Grande Ronde did share a very rough draft replacement agreement, we raised significant concerns about that agreement. The Grand Ronde Tribe refused to acknowledge the CTUIR's history and continued use of Willamette Falls as usual and accustomed fishing areas under our Treaty. Indeed, the Grand Ronde Tribe explicitly told the CTUIR that no assurances could be made with respect to Willamette Falls. Further, Grand Ronde suggested that CTUIR, a Treaty Tribe with reserved federal rights, should follow the process that Grand Ronde used for fishing at Willamette Falls and put itself under the jurisdiction of the State of Oregon. We also understand that no formal or substantive meetings have taken place between other concerned Columbia Basin Treaty Tribes and Grand Ronde on this matter.

Our conversations with the Siletz Tribe have given us confidence that it has not and will not attempt to use any HFT&G agreement with the State of Oregon to challenge or interfere in any way with our usual and accustomed areas or our annual harvest activities at Willamette Falls. Unfortunately, the CTGR has failed to provide similar assurances. Instead, the CTGR promotes a false narrative of historic control of tribal fisheries at Willamette Falls, along with a claim of primacy or exclusive rights for fishing at Willamette Falls.

Please contact me if you have any questions or if I can provide any further information.

Sincerely,



N. Kathryn Brigham, Chair  
Board of Trustees

CC:

Jason Miner  
Dustin Buehler  
Sarah Weston  
Erin Donald  
Davia Palmeri



Brian McLachlan  
Portland, Oregon  
June 11, 2023

Oregon Fish and Wildlife Commission  
ODFW Director Curt Melcher  
Oregon Department of Fish and Wildlife (ODFW)  
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 and express concerns regarding the proposed Memorandums of Agreement (MOA) between the State of Oregon and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI), the Confederated Tribes of Siletz Indians (Siletz Tribe), and the Confederated Tribes of the Grand Ronde Community of Oregon (Grand Ronde Tribe), each concerning the exercise of hunting, fishing, trapping, and gathering activities and for cooperative management of natural and wildlife resources.

The three proposed MOAs are similarly structured and contain many identical or substantially similar terms and conditions to each other, and to the previously approved MOAs between the State of Oregon and the Coquille Indian Tribe and the Cow Creek Band of Umpqua Tribe of Indians. I submitted lengthy comments to the Commission concerning these two previously approved agreements. Because the proposed MOAs involve similar concerns, I hereby incorporate by reference my prior comments and focus below on a few key issues.<sup>1</sup>

I support in principle ODFW entering into agreements with the CTCLUSI, Siletz Tribe, and Grand Ronde Tribe 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 enhancing their abilities to make positive contributions to the conservation of Oregon's fish and wildlife to the benefit of all Oregonians.

I nonetheless have significant concerns about the proposed MOAs, including, but not limited to, the vague, ill-defined, and onerous harvest allocation terms and standards, the authority of the ODFW on behalf of the State of Oregon to enter into these agreements, the impact these

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<sup>1</sup> Incorporated by reference and attached are my comments to the Commission dated (1) June 14, 2022, (2) November 26, 2022, and (3) December 7, 2022.

agreements could potentially have on fishing and hunting opportunities for non-tribal Oregon citizens, the effect pending federal legislation may have on these agreements, and the reaction to these agreements by Columbia River treaty Tribes which assert claims concerning fishing in the lower Columbia and Willamette Rivers.

In order to protect the State of Oregon and its citizens' interests in fish and wildlife, which the Commission has a fiduciary duty to do, I respectfully request, at minimum, the Commission take the following three actions before, and as a condition to, approving the MOAs.

- (1) Request and obtain written assurance from the Oregon Department of Justice/Office of the Attorney General that introduced Federal legislation pertaining to the fishing and hunting rights of the Siletz Tribe and Grand Ronde Tribe,<sup>2</sup> if enacted, (a) will not affect the State's ability to unilaterally terminate without cause the proposed MOAs,<sup>3</sup> and (b) that any such termination would not then leave potential Tribal claims of hunting and fishing rights under federal law legally unresolved and thus pose litigation risk to the State of Oregon.<sup>4</sup>

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<sup>2</sup> See S. 1287, H.R. 2850, S. 1286, H.R. 2839.

<sup>3</sup> The proposed Siletz MOA indicates the MOA does not replace, amend, or otherwise modify the 1980 settlement agreement between the State of Oregon and Siletz Tribe. §10 at 16. I do not find a similar provision in the proposed Grand Ronde MOA. Moreover, recent Congressional testimony by Vice-Chairman Lane of the Siletz Tribe appears to indicate the MOA is intended to replace the 1980 settlement agreement and consent decree. See House Committee on Natural Resources, Subcommittee on Indian and Insular Affairs hearing held Wednesday, June 7, 2023. The Commission should clarify whether the proposed MOAs are indeed intended to replace, amend, or otherwise modify the Siletz and Grand Ronde settlement agreements.

<sup>4</sup> The Siletz Tribe's and Grand Ronde Tribe's hunting, fishing, trapping, and gathering rights under Federal law are currently settled and determined through settlement agreements and consent decrees entered in final judgments of the United States District Court for the District of Oregon. Pending federal legislation would allow those agreements, consent decrees, and final judgments to be modified and potentially undone. I am concerned that sometime in the future there may be a dispute between the State and a Tribe regarding harvest allocations under the MOAs, which is quite foreseeable given declining fish and wildlife populations, competing claims and interests, poorly drafted terms, and over a century of allocation disputes in the Northwest regarding Tribal hunting and fishing rights. If, due to such dispute, the State were to exercise its right to terminate a MOA, this may leave Tribal claims to fishing and hunting rights unresolved under federal law (based on ratified or unratified treaties, or theories of unextinguished aboriginal title or rights, or inherent sovereignty) and thus pose a significant litigation risk to the State given the pending legislation's apparent override of the State's potential affirmative defenses of *res judicata* and collateral estoppel. See e.g., S. 1286 ("In any action brought in the United States District Court for the District of Oregon to rescind, overturn, modify, or provide relief under Federal law from the Consent Decree, the United States District Court for the District of Oregon shall review the application of the parties on the merits without regard to the defense of res judicata or collateral estoppel.") (emphasis added).

- (2) Amend each MOA 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' expectations (as expressly represented to Oregon's citizens by ODFW in the Notices of Proposed Rulemaking) that overall fishing and hunting activities by Tribal members will not materially increase as a result of the MOAs, and that no more than small reductions in the public's opportunity to harvest a few species may result to accommodate tribal fishing, hunting and gathering activities.<sup>5</sup>
- (3) Receive assurance on the public record from Director Melcher (or another appropriate State of Oregon official) that the State has (a) consulted with officials of each of the four Columbia River treaty Tribes<sup>6</sup> regarding the proposed MOAs (and associated introduced federal legislation) and has (b) obtained reasonable assurance from each of the four Tribes that approval of the MOAs will not prompt actions by those Tribes, legal or otherwise, to materially expand their current fishing activities or harvest levels in the lower Columbia or Willamette Rivers.

The first issue concerns introduced Federal legislation that would provide a process for the Siletz Tribe and Grand Ronde Tribe, respectfully, with the State of Oregon, to modify, rescind, or amend the consent decrees and/or associated settlement agreements currently in place defining Tribal hunting, fishing, trapping and gathering rights under Federal law. *See e.g.*, Senate Bills S. 1286 & 1287. In pertinent part, the bills anticipate successor agreements between the Tribes 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" that "may be amended from time to time by mutual consent" of the Tribes 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 and/or Grand Ronde MOA's without cause as expressly provided for in the proposed MOAs.

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<sup>5</sup> *See e.g.*, Exhibit H, Attachment 2 (Notice of Proposed Rulemaking) at 3 ("The public is likely to be minimally affected by the proposed rule. . . 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 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.").

<sup>6</sup> Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakima Nation, and the Nez Perce Tribe.

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,<sup>7</sup> and without which the Commission should not approve the proposed agreements.<sup>8</sup>

Moreover, even if the State were able to terminate one or both of the MOAs, introduced federal legislation, if enacted, appears to then allow the Tribes to assert claims of hunting and fishing rights under federal law and to bar the State from asserting certain important affirmative defenses to such claims.<sup>9</sup> This may present the State with a dilemma – either leave the MOA in place and live with substantially unfavorable terms, or terminate the MOA and face the litigation risk and uncertainty posed by potentially unextinguished and/or unsettled Tribal claims to hunting and fishing rights under federal law.

The second issue 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 rights and activities in the Northwest have been subject to disputes and divisive litigation for well over a century. To avoid future disagreements, 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 in the MOAs.

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<sup>7</sup> My concern with the State's ability to unilaterally exit the MOAs is, in large measure, driven by the ill-defined, vague, and onerous (to the State) standards set forth in the proposed MOAs regarding harvest allocation amounts and methods. If a dispute between the parties should arise, and the State is locked into the MOAs with such unfavorable terms (including the "conservation necessity" term), I am concerned the interests of the citizens of the State could be substantially compromised.

<sup>8</sup> As noted by the Commission at the time, I withdrew my opposition to the Coquille MOA after it was amended to provide for unilateral termination without cause. In my view, the ability for either party to exit the agreement incentivizes each party to work cooperatively with the other, and to seek reasonable compromises rather than resorting to litigation should differences arise. In other words, it keeps the agreement voluntary and consensual, in the political arena (i.e., government to government), and out of the courts. The Tribes are now politically powerful and influential in Oregon and more than capable of effectively navigating the State's political process and landscape.

<sup>9</sup> *See e.g.*, S. 1286 ("In any action brought in the United States District Court for the District of Oregon to rescind, overturn, modify, or provide relief under Federal law from the Consent Decree, the United States District Court for the District of Oregon shall review the application of the parties on the merits without regard to the defense of res judicata or collateral estoppel.") (emphasis added).

Unfortunately, the proposed MOAs contain ambiguous, ill-defined, and onerous standards and terms governing the amounts and extent of tribal hunting and fishing activities.<sup>10</sup> Nonetheless, ODFW, in the 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 note 4 supra.*

In addition, ODFW's Agenda Item Summaries for the proposed MOAs similarly explain that:

Even if there is an increase in tribal member participation and tribal harvest as a result of this MOA, it would be a very small fraction of the hunting and fishing in this geography. The department expects this 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. (emphasis added).<sup>11</sup>

Remarkably, the proposed MOAs currently contain no standards or terms governing harvest allocations that support or otherwise provide a basis for these public representations.

Accordingly, I request the Commission require the proposed MOAs to be amended prior to approval to expressly reflect these expectations and representations in order that the State and Tribes are aligned and united in their understanding and interpretation of the agreements.

The third issue involves reported disagreements between various Tribes regarding fishing rights in the lower Columbia and Willamette Rivers, most particularly at Willamette Falls. I am concerned that approval of the MOAs (with or without enactment of pending federal legislation) may trigger an escalation of these disagreements (including assertion of usual and accustomed treaty rights), which, in turn, may collaterally impact non-Tribal fishing opportunities. Accordingly, I urge the Commission to make sure that all Tribes claiming interests in the geographic areas covered by these MOAs have been consulted and that the proposed MOAs are acceptable to them.<sup>12</sup>

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<sup>10</sup> *See* discussion in incorporated comments dated June 14, 2022, and December 7, 2022.

<sup>11</sup> Exhibit G, Attachment 1 (Agenda Item Summary – MOA with the Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians June 16, 2023) at 3; *see also* Exhibit H, Attachment 1 (Agenda Item Summary – MOA with the Confederated Tribes of Siletz Indians – June 16, 2023) at 4; Exhibit I, Attachment 1 (Agenda Item Summary – MOA with the Confederated Tribes of Grand Ronde – June 16, 2023) at 4.

<sup>12</sup> In raising this issue, I take no position regarding the validity of any Tribe's claims to fishing rights on the lower Columbia or Willamette Rivers. I simply do not want to see an inter-Tribal disagreement escalate to a point where current non-tribal fisheries are negatively impacted.

Thank you for considering my comments. I would welcome the opportunity to speak at length with any of you about them. Please do not hesitate to contact me.

Best regards,

Brian McLachlan

cc: Geoffrey Huntington, Senior Natural Resources Advisor, Oregon Governor Tina Kotek,  
[geoff.huntington@oregon.gov](mailto:geoff.huntington@oregon.gov)

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  
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 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.

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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



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.

