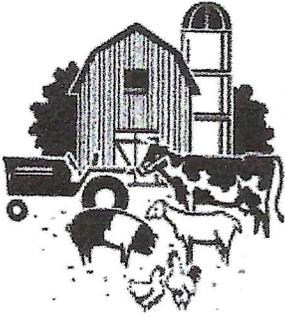


# **Exhibit C**

**Supplemental  
Public Correspondence Received as of  
June 15, 2022**



# Coos - Curry County Farm Bureau

87518 Davis Creek Lane, Bandon, Oregon 97411

June 14, 2022

Oregon Department of Fish and Wildlife Commission  
4034 Fairview Industrial Drive Se  
Salem, Oregon 97302

Re: Memorandum of Agreement to Define Exercise of Hunting, Fishing, Trapping and Gathering by the Coquille Indian Tribe and Its Members and for Cooperative Management of Natural Resources.

Chairman Wahl and members of the Commission:

Coos-Curry County Farm Bureau (CCFB) would like to thank you for the opportunity to provide comments on the **MEMORANDUM OF AGREEMENT TO DEFINE EXERCISE OF HUNTING, FISHING, TRAPPING AND GATHERING BY THE COQUILLE INDIAN TRIBE AND ITS MEMBERS AND FOR COOPERATIVE MANAGEMENT OF NATURAL RESOURCES** between The Coquille Indian Tribe and The State of Oregon, through the Oregon Department of Fish and Wildlife. CCFB members in Coos and Curry County own land and provide food and habitat for Oregon's wildlife. CCFB members own agriculture and timber land in the proposed **Geographic Scope of this Agreement**. Even as landowners, CCFB and other private landowners must abide by the hunting, fishing, and trapping regulations as set forth by the Oregon Department of Fish and Wildlife (ODFW). Many of these CCFB families have owned their property and managed the land for well over 100 years in part for the benefit of wildlife management.

The Coos-Curry County Farm Bureau Board is concerned with the impacts of this agreement. The following are concerns that need to be considered:

- All agriculture and timber landowners provide habitat to wildlife and everyone in Oregon has input into the wildlife management process through the Fish and Wildlife Commission including such entities as the Tribes. It is inappropriate for ODFW to negotiate with a single entity such as the Tribes to allow "cooperative management of fish and wildlife populations" within a specific geographic area which includes private property.
- As landowners, we have no authority to harvest fish and wildlife on our property outside the ODFW regulations. It is not appropriate for ODFW to authorize a procedure for the harvest of fish and wildlife within this specified geographic area by the Tribe's membership.
- If this agreement is approved, there will be other agreements proposed from other entities creating havoc and confusion within the realm of ODFW as an agency. The costs to manage these agreements will be extensive. There will also be conflict between those who are allowed to harvest under this agreement and the rest of Oregon hunters, fishermen, and trappers.
- Contrary to the Cost of Compliance, we feel there will be problems with OSP as there will be multiple licenses and hunting/fishing seasons. This will require additional training and the costs should be factored in.
- There will be a reduction of license sales especially as more Tribe's request an Agreement such

- as this one. 37% of ODFW's income comes from Hunting and Fishing License fees. There will also be a need for additional ODFW staff and costs just to comply with each Agreement.
- “Agreement does not define the specific extent of such rights possessed by the Coquille Tribe nor the specific amount or number of fish and wildlife resources that may be harvested by the Tribe's members at any particular time.” The concern is the agreed upon standards for the Tribe to exercise harvest rights may impact the populations and species take for Oregon fishermen and hunters.
  - Private Lands: Harvest activities on privately owned lands within the geographic scope should only be permitted only with “written” permission of the owner of the private lands. Tribal members shall present the landowner with Tribal identification as well as the tribal license at the time of requesting permission. As private landowners, we feel this will help reduce the trespass issues especially if hunting, fishing, trapping and gathering is done at times outside the regular hunting season.
  - Prosecution Referral Agreement: It is concerning that this section allows for an enforcement coordination mechanism whereby tribal members violating state or tribal wildlife laws of the State or Coquille Indian Tribe are summoned initially to Coquille Tribal Court. As landowners, if someone trespasses on private property and takes an animal without written permission from the landowner, they should be summoned to the Circuit Court of the County as well as other violators of hunting and fishing laws on state owned lands in the proposed geographic area.
  - The cooperative management of fish and wildlife developed by the Tribe and ODFW shall not pertain to privately owned lands in the geographic area nor impact private landowners.
  - This proposed Agreement is directly counter to the citizens of Oregon being provided due process and citizen involvement in these decisions that impact all fish and wildlife species that belong to all citizens of the State. To allow ODFW to work behind the scenes with a single entity to which the citizens do not have any due process opportunities with and absolutely do not have standing with as non-tribal members is unconstitutional under Oregon law.
  - The land area proposed under the Agreement has not been federally recognized by only the Coquille Tribe and therefore the Coquille Tribe cannot be allowed a special agreement with ODFW that encompasses land areas that have been claimed by at least two additional Tribes: the Tollowa and the Siletz.

Thank you for the opportunity to provide comments on this proposed agreement. Coos-Curry County Farm Bureau sees many problems with the proposed Agreement in terms of potential over reach and requests the Fish and Wildlife Commission reject this proposed Agreement. It is important that all Oregonians should be under the same regulations for hunting, fishing, trapping and gathering and wildlife management should be a full public process with no one entity having greater authority especially on lands that they do not own.

Respectfully,



Sharon Waterman, Secretary



COW CREEK BAND OF UMPQUA TRIBE OF INDIANS  
GOVERNMENT OFFICES

2371 NE STEPHENS STREET, SUITE 100  
ROSEBURG, OR 97470-1399

Phone: 541-672-9405

Fax: 541-673-0432

June 15, 2022

*Sent Via Electronic Mail to [odfw.commission@odfw.oregon.gov](mailto:odfw.commission@odfw.oregon.gov)*

ODFW Commission  
Attn: Mary Wahl, Chair  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97302

Re: OAR 635-800-0100 and Coquille Tribe Hunting and Fishing Agreement

Dear Commission Members and Director Melcher,

I write on behalf of the Cow Creek Band of Umpqua Tribe of Indians ("Cow Creek"). Cow Creek withdraws its opposition to the proposed agreement, as amended, for hunting, fishing, and trapping by the Coquille Tribe ("Coquille Agreement") and OAR 635-800-0100, as reflected in the attached changes. The amendments to the Coquille Agreement and OAR 635-800-0100, based on discussions between the two tribes, provide Cow Creek comfort that nothing in the Coquille Agreement asserts any rights of Coquille within Cow Creek's ancestral territory, as recognized expressly in 25 U.S.C. § 712e. We look forward to continuing to work with ODFW, Coquille, and other tribes on these critical matters of mutual concern.

Sincerely,

Daniel Courtney  
Chairman, Cow Creek Band of Umpqua Tribe of Indians

Cc: [curt.melcher@odfw.oregon.gov](mailto:curt.melcher@odfw.oregon.gov)  
[dustin.e.buehler@oregon.gov](mailto:dustin.e.buehler@oregon.gov)

[roxann.b.borisch@odfw.oregon.gov](mailto:roxann.b.borisch@odfw.oregon.gov)

[brendameade@coquilletribe.org](mailto:brendameade@coquilletribe.org)

June 15, 2022

Dear ODFW Commissioners,

I am an attorney at Dole Coalwell in Roseburg. I have been practicing contract law and business law for almost 30 years. If the ODFW Commission was my client, I would strongly advise the Commission not to sign the Coquille/ODFW Agreement as written.

1. No Right to Terminate. Once signed, the Agreement is effective forever. There are no termination or escape clauses in the Agreement. Although I anticipate a cooperative partnership between the state of Oregon and the Coquille Indian Tribe, there are no guarantees. We all know that political boards change over time, and government entities have the ability to amend their constitutions. If the Tribe becomes uncooperative, exceeds its hunting and fishing authority, or fails to properly fulfill its obligations under the Agreement, then there is no way for the State of Oregon to cancel the Agreement.
  - a. The Agreement boasts of a “partnership” arrangement between the Tribe and ODFW. A partnership requires both parties to work together for the common good. If one partner exceeds its authority or becomes uncooperative, then the other partner must have the ability to terminate the partnership; this helps ensure good faith dealings. Without such termination rights, the other party can feel emboldened and become even more obstinate and unreasonable. A contract that prevents a termination of the agreement in this situation does not represent a partnership.
2. No Meaningful Dispute Resolution Provisions. The Agreement states that disagreements shall “be resolved pursuant to the dispute resolution provisions of [the] Agreement.” This sounds encouraging, but please read the hollow provisions of section 6 of the Agreement. “Dispute resolution” is nothing more than mediation (which requires the mutual agreement of the parties) and thereafter full-on litigation in Marion County Circuit Court. This is even more problematic when the Agreement does not have a termination clause in the event one party acts in bad faith.
3. Ambiguities.
  - a. Paragraph 3e provides that Coquille tribal members may exchange, trade, or barter “wildlife or wildlife parts” with other Indian tribes. But this paragraph fails to clarify that the items they trade for must also be limited to “wildlife or wildlife parts.” Without this clarification, Coquille tribal members could trade wildlife for vehicles, fuel, firearms, real estate, and more. Certainly, this is not the intent of the Agreement, which needs clarification.

- b. Paragraph 3c states “Method of harvest shall be subject *exclusively* to tribal decision. Yet paragraph 3d states “The Tribe agrees to adopt harvest regulations consistent with Oregon Revised Statutes . . . .”
  - c. Paragraph 3b states that limits and areas of Tribal harvest shall be set “annually” or “seasonally.” But paragraph 3c states “After 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.” This paragraph fails to clarify that such exclusive discretion is only for that calendar year or season in compliance with paragraph 3b.
4. Lack of Notice and Lack of Confidence. Notice of the Agreement was not made public until April 21 and was not disseminated by ODFW to interested stakeholders such as the Oregon Hunters Association and other tribes. An agreement with such far reaching implications should be vetted by all stakeholders and discussed over a series of Commission meetings. Frankly, ODFW staff should be ashamed for suggesting to the Commission that it should adopt this Agreement without being properly vetted by all the stakeholders and for clearly trying to slip this Agreement in “under the radar.” This type of behavior leads to distrust and lack of respect for the agency.

In closing, I remind the Commissioners that you have a fiduciary duty to the State of Oregon and its citizens to properly manage our wildlife and fish resources. Adopting the Agreement as written would amount to a breach of your fiduciary duty.

Jeff Mornarich  
Attorney  
810 SE Douglas Ave.  
Roseburg, OR 97470  
541-673-5541

-----Original Message-----

From: t <tbar280@gmail.com>

Sent: Thursday, June 16, 2022 7:29 AM

To: odfw.commission@state.or.us; Curt Melcher <curt.melcher@state.or.us>

Subject: Comments for Commission meeting on June 17, 2022

June 15, 2022

Chair Wahl, Commissioners, and Director Melcher

Regarding the Coquille Tribe Memorandum of Agreement

My name is Tim Barbouletos. I am a retired OSP Game Officer, and a supporter of ODFW. Through the decades I witnessed ODFW go to great extremes to solicit public input in wildlife management decisions ..... both through meetings and written comment. Throughout my career I went to dozens, perhaps hundreds of meetings. There were many times when the only people at local meetings were ODFW and OSP staff. Despite low turnout, the effort was always made. That practice continues to this day.

That is why I write this letter. Late last week I learned the Coquille Indian Tribe was negotiating with the Oregon Governor's Office to obtain tribal hunting and fishing rights for its members. It seems reasonable to conclude the Governor's office had ODFW staff complete the process. I also learned a Memorandum of Agreement (MOA) was compiled and might be signed at the June 17th Commission meeting.

I have absolutely no issue with the tribe negotiating with Oregon to gain rights for its members. What I find concerning is the process used by Oregon's Government ..... specifically the lack of public inclusion.

ODFW typically bends over backwards to be as transparent as possible. I searched online and was unable to locate even one public meeting anywhere on the topic. The first ODFW notice I found was in the monthly Commission Meeting Agenda emails that I subscribe to. That email dated June 3, 2022 lists the Coquille MOA as an agenda item for the June 17th Commission Meeting. In that email Exhibit C, Attachment 1, Agenda Item Summary pdf, the PUBLIC INVOLVEMENT section reads as follows:

This agreement has been developed through direct, government-to-government negotiations between the Tribe and the state of Oregon through the department. The public received notice of the draft MOA and proposed administrative rules by notice in the Secretary of State's Bulletin (Attachment 2). The Tribe, in coordination with the Oregon Governor's Office, has engaged all of the federally recognized tribes in Oregon

in multiple forums to share details of the terms of the MOA. Members of the public may provide written and oral comment for the Commission's consideration.

Of Note:

- \* Only direct government-to-government negotiations occurred. Why was there no public input?
- \* The first public notice was 04-21-22 via Secretary of State's "Oregon Bulletin". That online report is likely unknown to most Oregonians. Calling that "public notice" is a huge stretch of reality.
- \* The tribe and the Governor's office engaged other tribes. Again, no public involvement?
- \* Finally, public comment was solicited via the last sentence. But making thoughtful comment is impossible without knowledge that the negotiations even existed.

At this point negotiations have occurred, an MOA is drafted, and the Commission may sign it in a few days. The MOA grants hunting and fishing privileges to the Coquille Tribe in five southwest Oregon Counties. Agenda Exhibit C, Attachment 5 shows there has been ZERO public correspondence to ODFW as of June 1, 2022. Lack of a public involvement component is totally contrary to decades of meeting history compiled by ODFW.

Without a detailed public record to review, one is left wonder about the political forces involved. I'd really like to know the impetus behind this project. And I would ask the Commission to seriously consider all potential negative consequences prior to moving forward.

There is one thing I am sure of:

Lack of public oversight fuels distrust and illustrates the worst in a representative form of government.



KATE BROWN  
Governor

June 15, 2022

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

*Re: Proposed OAR 635-800-0100 and Coquille Tribe cooperative management agreement*

Dear Commissioners,

I write in support of the proposed cooperative management agreement between the Oregon Department of Fish and Wildlife and the Coquille Indian Tribe. This agreement presents an important opportunity for the State of Oregon to collaborate with the Tribe on fish and wildlife management, leveraging tribal expertise, knowledge, experience and resources. It also represents a significant step toward enhancing and affirming tribal sovereignty.

I want to extend my thanks to Chair Brenda Meade, and other leaders and staff at the Coquille Tribe, who have worked closely with my staff and ODFW on this agreement, and have also engaged in extensive conversations with other Tribes regarding this agreement during recent months. I have also been pleased to see the productive consultations that have occurred in recent weeks between the State and Tribes that have requested government-to-government consultation. These Tribe-to-Tribe and State-to-Tribe conversations have resulted in positive suggestions to clarify the meaning and intent of the agreement, and I understand ODFW and the Coquille Tribe will be recommending that those suggestions be incorporated.

As we engage in the difficult work of dismantling systems of racism and colonialism, we must work together to find innovative ways to create a just and equitable Oregon. This agreement is an important step in that direction, and provides a model for enhanced state-tribal cooperation in the natural resources space. I applaud ODFW's willingness to lean into this important work, together with our Tribal partners. I welcome similar conversations between the State and other tribal governments. I urge the Commission to approve the agreement.

Sincerely,

Governor Kate Brown

KB:smg

**From:** Craig Herman <cjherman@gmail.com>  
**Sent:** Wednesday, June 15, 2022 12:05 PM  
**To:** BORISCH Roxann B \* ODFW <Roxann.B.BORISCH@odfw.oregon.gov>  
**Subject:** Memorandum of Agreement with the Coquille Indian Tribe and Cooperative Management

Chair Wahl and Members of the Oregon Department of Fish and Wildlife Commission:

Thank you for allowing me to comment on the Memorandum of Agreement with the Coquille Indian Tribe and Cooperative Management.

I urge the Commission not to adopt the Memorandum of Agreement to Define Exercise of Hunting, Fishing, Trapping, and Gathering by the Coquille Indian Tribe and its Members and for Cooperative Management of Natural Resources between The Coquille Indian Tribe and the State of Oregon, through the Oregon Department of Fish and Wildlife (ODFW).

Adopting this agreement is not in the best interest of the people of Oregon and it creates confusion about management of fish and wildlife and dilutes the authority of ODFW to manage fish and wildlife.

Private landowners provide habitat to wildlife and everyone in Oregon has input into the wildlife management process through the Fish and Wildlife Commission including such entities as the Tribes. It is not appropriate for a single entity to be allowed "cooperative management of fish and wildlife populations within a specific geographic area" which includes our private property.

If the Commission approves this agreement, there will be other agreements proposed from other entities creating havoc and confusion within the realm of ODFW as an agency. The costs to manage these agreements will be extensive. There will also be conflict between those who are allowed to harvest under this agreement and the rest of Oregon hunters, fishermen, and trappers.

I believe it is inappropriate for ODFW to allow the Coquille Tribe to issue its own hunting, fishing, and trapping licenses. Fish and wildlife cannot be effectively managed when the Tribe will determine when and how much will be harvested.

It is a major concern that the "Prosecution Referral Agreement" section allows for an enforcement coordination mechanism whereby tribal members violating state or tribal wildlife laws of the State or Coquille Indian Tribe are summoned initially to Coquille Tribal Court.

As landowners, if someone trespasses on private property and takes an animal without written permission from the landowner, they should be summoned to the Circuit Court of the County as well as other violators of hunting and fishing laws on state owned lands in the proposed geographic area.

I am a landowner with some lands along the Coquille River. I am very concerned with how this Memorandum of Agreement will adversely affect me. I urge the Commission not to adopt the Memorandum of Agreement with the Coquille Indian Tribe.

Respectfully submitted  
Craig J. Herman  
56941 Parkersburg Rd.  
Bandon, OR 97411

**From:** Rick Eichstaedt <rick@eichstaedtlaw.net>

**Sent:** Tuesday, June 14, 2022 8:22 AM

**To:** BORISCH Roxann B \* ODFW <Roxann.B.BORISCH@odfw.oregon.gov>; MELCHER Curt \* ODFW <Curt.MELCHER@odfw.oregon.gov>

**Cc:** Brett Kenney <brett@plank.house>; All Tribal Council <AllTC@ctclusi.org>; WESTON Sarah K \* GOV <Sarah.K.WESTON@oregon.gov>; BUEHLER Dustin E \* GOV <Dustin.E.BUEHLER@oregon.gov>

**Subject:** OAR 635-800-0100 and Coquille Tribe Hunting and Fishing Agreement

Hello –

Find attached comments with an attachment of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians on OAR 635-800-0100 and Coquille Tribe Hunting and Fishing Agreement. As indicated by the comments of the Chair, CTCLUSI has no objection and supports ODFW in moving forward toward developing cooperative agreements with Tribe.

Thanks for considering these comments.

Rick Eichstaedt  
Attorney for CTCLUSI



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

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

June 12, 2022

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

**SENT VIA EMAIL**

**RE: OAR 635-800-0100 and Coquille Tribe Hunting and Fishing Agreement**

Dear Commission Members and Director Melcher:

This letter is submitted on behalf of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians ("CTCLUSI") on OAR 635-800-0100 and the proposed agreement for hunting, fishing, and trapping by the Coquille Indian Tribe.

The Tribe appreciates the time Director Melcher, his staff, and representatives from the Governor's office took to consult with CTCLUSI on the proposed agreement with the Coquille Tribe. The consultation assisted the Tribe to better understand the agreement, opportunities for CTCLUSI to enter into a similar agreement, and potential solutions to address CTCLUSI's concerns.

After the consultation, CTCLUSI reached out to the Coquille Tribe and reached an agreement on the attached additions to the ODWF rule and the agreement, itself. Provided this additional language is added to both documents, CTCLUSI has no concerns with the adoption of the agreement and the related rule.

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

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'BK', with a long horizontal flourish extending to the right.

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

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

OAR

New Section:

(4) Nothing in the above referenced Memorandum of Agreement shall be construed as (a) affirming, recognizing or limiting the rights or claims of any other tribe within the geographic scope of that Agreement (b) limiting the Department from entering into separate agreements with other tribes addressing the authority to take species within the geographic scope of that Agreement or (c) establishing, expanding, adjudicating, waiving, limiting or otherwise affecting the ancestral, aboriginal, treaty, statutory, equitable, or other rights of the Tribe.

MOU

New Section 3(h):

**Coordination with Other Tribes.** In the event that ODFW enters into a comparable Co-Management Agreement with another tribe regarding the taking of fish and wildlife within all or part of the geographic scope of this Agreement, and such agreement includes obligations substantially identical to this subsection 3(h), the Coquille Tribe will meet annually with that tribe to discuss issues of mutual concern, including harvest areas and limits and cooperative management of natural resources.

Revise 6f to read

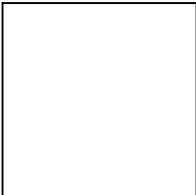
Nothing in this Agreement shall be construed to establish, expand, adjudicate, diminish, waive, limit or otherwise affect ancestral, aboriginal, treaty, statutory, equitable or other rights of the Tribe. Nothing in this Agreement shall prohibit the Coquille Indian Tribe from litigating or determining its legal rights under any treaty, Executive Order, federal statute or any other source of legal authority in any appropriate independent legal action, in an appropriate forum, at any time. If such litigation or determination takes place, the final results of any such litigation or determination shall be incorporated into this Agreement.

**From:** Jennifer Fairbrother <jennifer@nativefishsociety.org>  
**Sent:** Tuesday, June 14, 2022 8:16 PM  
**To:** COMMISSION ODFW \* ODFW <ODFW.COMMISSION@odfw.oregon.gov>  
**Cc:** PALMERI Davia M \* ODFW <Davia.M.PALMERI@odfw.oregon.gov>; Mark Sherwood <mark@nativefishsociety.org>  
**Subject:** Native Fish Society Comments on Exhibit C (Coquille Management Agreement)

Hi Michelle,

Attached are comments pertaining to Exhibit C pertaining to tribal management agreements for the Commission's June 17 meeting. Thank you as always for coordinating and executing these meetings!

Cheers,



**JENNIFER FAIRBROTHER**

Conservation Director | Native Fish Society

PO Box 1536, Oregon City, OR 97045

Cell: (541) 602-0696 | Office: (503) 344-4218

[nativefishsociety.org](http://nativefishsociety.org) • [Facebook](#) • [Twitter](#) • [Instagram](#)



June 13, 2022

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

RE: Exhibit C: Memorandum of Agreement Between ODFW and the Coquille Indian Tribe

Dear Chair Wahl and Members of the Commission,

Native Fish Society believes that the conservation and recovery of abundant wild fish is the shared endeavor of all people in the Northwest—be they tribal members, indigenous people, and residents of the region—and that working together to manage populations and protect habitats will give our wild fish and communities the best shot at ensuring we sustain the cultural, economic, and social values that wild fish support. Tribal fisheries co-management is not mutually exclusive with having abundant wild fish that support sustainable harvest for tribal, recreational, and commercial fisheries in the future.

Like all natural resource management, it is critical that the best available science, cultural knowledge, and conservation management philosophies be applied to any fishery that will be co-managed by the state and tribal nations. It is also important that there remain opportunities for the general public to provide comments and input on management decisions and actions affecting fish populations within the state of Oregon. With these considerations in mind, we provide the following comments and questions that Native Fish Society sees as applying to any future management agreement between the state and tribal nations.

**1. Successful partnerships require the parties to share a vision and agree upon the goals and objectives that will be pursued to attain that vision.**

ODFW is obligated to protect and recover the state's wild, native fish and wildlife and their habitats. This should be articulated as a shared obligation in any memorandum of agreement between the department and outside entities including federal agencies and tribal nations.

The draft Oregon Revised Statute (Exhibit C attachment 4) section 2 only extends the obligation to the protection and restoration of habitats, but not of species and populations. This should be amended as follows:

(2) The Coquille Indian Tribe and the Department will coordinate the use of their respective authorities, expertise and influence as regulatory or voluntary opportunities are presented to protect, enhance and restore fish and wildlife **and**

their habitats under the terms and conditions of the above referenced Memorandum of Agreement and within the geographic scope of that Agreement.

Similarly, existing statutory and regulatory management frameworks that will overlay any agreement should be explicitly enumerated. For instance, the Native Fish Conservation Policy, Coastal Multispecies Management Plan, and the Rogue South Coast Management Plan should be incorporated into any agreement pertaining to fisheries management in the southwest Oregon region.

## **2. ODFW should articulate how the new fisheries management model that incorporates tribal fisheries will operate within existing management plans.**

One of the basic principles of conservation management is to ensure that enough individuals in a population survive and reproduce to maintain a sustainable population over time. In the case of inland fisheries on anadromous populations, this requires an understanding of how many fish are needed to escape the fisheries in order to spawn the next generation (this concept is referred to as escapement). It then follows that fisheries be managed to ensure that sustainable escapement goals are being achieved regardless of how the allocation is divided between entities (i.e. tribal fisheries, recreational fisheries, and commercial fisheries).

ODFW does not have a consistent process for defining how much impact individual runs can sustain from inland fisheries nor for allocating that impact between tribal and recreational fisheries. To adequately manage multiple fisheries sustainably, it's key that managers set escapement goals, quantify the impacts of different fishery types (for example, catch and release vs. harvest), monitor adult fish returns, establish triggers to proactively manage fisheries before and in season, and collect and share population and fisheries data transparently with state, federal, and tribal managers and the public.

At present, ODFW has inconsistently applied these management frameworks for the various populations across the southern Oregon and central coast regions. For example, ODFW has recently implemented a sliding scale for the harvest of Fall Chinook Salmon under the CMP. Steelhead in rivers covered by the RSP have harvest caps, but these do not apply to populations outside the plan. Many populations and runs lack established escapement goals and preseason forecasting or in-season adaptive management triggers and plans.

Further complicating the management landscape is federal oversight of management and recovery for Endangered Species Act (ESA) listed populations like Oregon Coast Coho. Management agreements with tribal nations that seek to incorporate ESA-listed populations require that the federal management agencies be included in any such agreement and the resulting management. For instance, in the Lower Columbia River salmon and steelhead tributary fisheries, state and tribal fishery plans are evaluated and permitted by NOAA Fisheries. Will the state and tribes be engaging in this way for Oregon Coast Coho? How will new fisheries be incorporated into Oregon Coast Coho management and recovery plans? How will NOAA Fisheries be included as the managing authority? How will any populations listed under the ESA in the future be handled, and how would management under an agreement like this change in such an event?

### **3. Public input and transparent management are necessary for success.**

The process for establishing or refining management frameworks and allocating fisheries impacts between tribal and recreational fisheries must be transparent to the public and include the opportunity for public input. We suggest that the department include this as part of their annual process to set and adopt angling seasons and regulations as it provides for an existing process that includes public engagement and comment. The department and co-managers should share how they are quantifying fisheries impacts based on gear, methods, and seasons used so that the public understands how impacts are allocated and to ensure that new fisheries frameworks are sustainable.

Further, in implementing fisheries management frameworks, both ODFW and tribal managers need to collect and share population and run monitoring and fisheries impact data in a consistent and transparent way with each other and the public. A lack of trust regarding what impacts are actually occurring on a given run will quickly undermine co-management coordination, public trust and buy-in, and, ultimately, the conservation of populations. Management agreements should specify the need and methods for ensuring this transparency.

### **4. ODFW is struggling to meet its existing management obligations and goals. How will the state ensure that management agreements do not further erode the department's ability to conserve and recover wild fish populations?**

The department has failed to make adequate investments in key areas of wild fish management including population and fisheries monitoring, fisheries enforcement, and implementation of management plan directives that seek to reduce the negative impacts of hatchery programs on wild populations. The southwest and mid-coast regions in particular have long suffered from inadequate departmental capacity to engage in important and fundamental aspects of fisheries management. When it comes to fisheries, the department continues to be reactive rather than proactive, often responding to poor returns late in the season or not at all. In many of the region's rivers, there are no articulated escapement goals, run forecasting, or annual harvest limits defined. Operating any fisheries—tribal, recreational, or commercial—without these conservation management tools in place endangers the department's core obligation to protect and recover wild fish populations.

Before executing new fisheries, the department should obtain and/or allocate the financial and staff resources necessary to meet their management obligations and ensure that existing and new fisheries do not impede the conservation and recovery of wild populations. Management agreements should articulate how tribal nations, stakeholders, and NGOs will contribute and secure the resources necessary to achieve key management objectives for population and fisheries monitoring and enforcement.

### **5. Management agreements should be coordinated and not one-off to ensure they work in tandem with conservation goals and management objectives.**

The state of Oregon contains numerous federally recognized and unrecognized tribal nations and communities. Some tribes have retained rights to their usual and accustomed hunting and fishing places while others are actively seeking to reestablish these rights. How is ODFW ensuring that the process of establishing a new framework via management agreements equitably engages this diversity of nations and communities? How will the state engage where tribal interests overlap geographically? How will the state engage where tribal goals and objectives are divergent from one another or the state? We encourage the Commission to establish a universal framework that will guide the creation and implementation of individual management agreements as the first step in initiating any new co-management framework.

Thank you for the opportunity to comment on potential new management agreements for the state's fish and wildlife. We know that what we've been doing for the past century has not worked for our wild fish. New management agreements provide an opportunity to move in a new direction, but one which should be diligently outlined up front, grounded in the principles of conservation management, and adequately resourced to ensure the overarching goals can be accomplished. Without these three aspects, we will likely see the continued decline and extinction of many of the region's wild fish populations. If done purposefully and thoughtfully, we believe that a future of harvestable abundant wild fish is possible.

Sincerely,



Jennifer Fairbrother  
Conservation Director

**From:** Brian McLachlan <bamclachlan@hotmail.com>  
**Sent:** Tuesday, June 14, 2022 3:58 PM  
**To:** COMMISSION ODFW \* ODFW <ODFW.COMMISSION@odfw.oregon.gov>  
**Subject:** Comments re proposed Coquille MOA

Please find attached my comments re the proposed Coquille MOA. Thank you,

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).

\* \* \* \*

Thank you for considering my comments.

-----Original Message-----

From: Mike Yost <Mikeyost400@outlook.com>

Sent: Monday, June 13, 2022 4:56 PM

To: BORISCH Roxann B \* ODFW <Roxann.B.BORISCH@odfw.oregon.gov>

Subject: Coquille tribe and odfw.

I'm a Coos county local have lived here all but a year and a half. I do believe 100% that the Coquille Indian tribe should not get preferential treatment. I'd be interested to hear one good reason as to why odfw would let them have tags and or Licenses for free. Just the fact someone would think about giving away something to one group and not another is in itself favoritism and under the law we should all be treated equal.

Feel free to call or email me back with an explanation I'd love to hear it.

Thank you for your time.

Michael Yost

Concerned citizen.

541-297-1483