



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

---

May 13, 2024

Sent via USPS and E-mail

Davia Palmeri – Interim Director  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Drive SE  
Salem, OR 97303  
E-mail: Davia.M.PALMERI@odfw.oregon.gov

Re: ORS OAR 635-800-0300

Dear Interim Director Palmeri:

On behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), I submit the enclosed Petition seeking Repeal, or Alternatively, Amendment of OAR 635-800-0300. This Petition is submitted pursuant to the authorities set forth in ORS 183.390 and OAR 137-001-0070. The Yakama Nation requests ODFW schedule on oral presentation in according with the rule.

Sincerely,

Marcus Shirzad, Senior Attorney  
Yakama Nation Office of Legal Counsel  
P.O. Box 150, 401 Fort Road  
Toppenish, WA 98948  
Telephone: (509) 865-7268  
marcus@yakamanation-olc.org

Cc: Shana Radford, Tribal Affairs Director, Office of the Governor  
Geoff Huntington, Senior Natural Resources Adviser, Office of the Governor  
Erin L. Donald, Oregon Department of Justice

**BEFORE THE OREGON DEPARTMENT OF FISH AND WILDLIFE**

In the Matter of Cooperative Management Agreement for Hunting, Fishing, Trapping, and Gathering By Confederated Tribes of Grand Ronde

PETITION TO REPEAL OR,  
ALTERNATIVELY, AMEND  
OAR 635-800-0300

(Oral Presentation Requested)

Pursuant to ORS 183.390 and OAR 137-001-0070, the Confederated Tribes and Bands of the Yakama Nation (“Petitioner” or “Yakama Nation”) petitions the Oregon Department of Fish and Wildlife (“ODFW”) to repeal OAR 635-800-0300. First, the Oregon Fish and Wildlife Commission’s adoption of the rule was unlawful. Two Commission members cast deciding votes on August 4, 2023 despite expiration of their term limits. Second, the adopted rule creates conflict with Petitioner’s sovereign interests, jurisdiction, and treaty-reserved rights. Repeal is the most straight-forward remedy. In the alternative, Petitioner asks that ODFW initiate a rulemaking procedure to amend the rule in a manner that removes the conflict with Petitioner’s sovereign interests, jurisdiction, and treaty-reserved rights. Petitioner also requests that ODFW schedule oral presentation on this Petition pursuant to OAR 137-001-0070(4)(b).

**I. Names, Addresses, and Brief Description of Petitioner.**

The Yakama Nation is a federally-recognized Indian tribe pursuant to the Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859) (“Yakama Treaty”). The mailing address for the Yakama Nation is P.O. Box 151, Toppenish, Washington, 98948. The Yakama Nation’s governmental headquarters are located on the Yakama Reservation, near the townsite of Toppenish, Washington. The Yakama Nation’s sovereign interests, jurisdiction, and treaty

rights extend across its Article II reservation boundaries, 12 Stat. at 952, its Article I cessation boundaries, 12 Stat. at 951-52, and its Article III traditional, cultural use, and usual and accustomed areas, 12 Stat. at 952-53. Where Article II of the Yakama Treaty establishes lands for the Yakama Nation's exclusive use and benefit, it is Article I and Article III of the Yakama Treaty that establish, at the very least, a reserved and perpetual right to access, use, and derive income and other benefit from over twelve million acres of *off*-reservation lands—the Yakama Nation's Treaty Territory. Accordingly, the Yakama Nation has an interest in any state law, agency action, or rulemaking within its Treaty Territory that might adversely impact its rights and interests secured and reserved by the Yakama Treaty.

**II. Other Persons Known to Petitioner to be Interested in Rule.**

Pursuant to OAR 137-001-0070, Petitioner provides the name and addresses of other person(s) known to them to be interested in the rule:

Confederated Tribes of the Grand Ronde Community of Oregon  
9615 Grand Ronde Rd.  
Grande Ronde, Oregon 97347

Confederated Tribes of the Warm Springs Reservation of Oregon  
P.O. Box C  
Warm Springs, Oregon, 97761

Confederated Tribes of the Umatilla Indian Reservation  
46411 Timine Way  
Pendleton, Oregon 97801

Nez Perce Tribe  
P.O. Box 305  
Lapwai, ID 83540

Burns Paiute Tribe  
100 Pasigo St.  
Burns, OR 97720

Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians  
1245 Fulton Ave.  
Coos Bay, OR 97420

Coquille Indian Tribe  
3050 Tremont St.  
North Bend, OR 97459

Cow Creek Band of Umpqua Tribe of Indians  
2371 NE Stephens St., Suite 100  
Roseburg, OR 97470

Klamath Tribes  
501 Chiloquin Blvd.  
PO Box 436  
Chiloquin, OR 97624

Confederated Tribes of Siletz Indians  
201 SE Swan Avenue  
PO Box 549  
Siletz, OR 97380

### **III. Rule Petitioner Requests to Repeal or, in the Alternative, Amend.**

Petitioner requests ODFW to repeal or, in the alternative, amend OAR 635-800-0300.

### **IV. Background.**

#### **A. The Yakama Nation Possesses Off-Reservation Treaty Rights for Fishing, Hunting, and Gathering that Extend into Oregon.**

In recognition of its People's way of life, the Yakama Treaty reserved to the Yakama Nation's constituent tribes and bands off-reservation fishing, hunting, and gathering rights throughout the Yakama Nation's Treaty Territory, which encompasses traditional, cultural, and usual and accustomed areas from the Pacific Ocean up the Columbia River system beyond the 49<sup>th</sup> parallel, and from the Puget Sound east into Buffalo Country. *See United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9<sup>th</sup> Cir. 1975) (finding that the Yakama Nation's usual and accustomed areas include the "Columbia River area"); *see also Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1238-1239 (E.D. Wash. 1997), *aff'd* sub nom. *Cree v. Flores*, 157 F.3d 762 (9<sup>th</sup> Cir. 1998); *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (holding *Yakima Indian Nation v. Flores*' factual findings regarding the vast size and scope of Yakama Nation's traditional and cultural use areas

to be unchallenged and binding); Pacific Salmon Treaty Act, 16 U.S.C. 3631(i) (defining “treaty Indian tribe” for purposes of implementing the Act to mean “any of the federally recognized Indian tribes of the Columbia River basin, Washington coast or Puget Sound areas having reserved fishing rights to salmon stocks subject to the Treaty under treaties with the United States Government”).

Adjudication of the Yakama Nation’s treaty-reserved rights establishes that their reach imposes an easement on lands throughout Oregon. In *United States v. Winans*, the United States Supreme Court held that the Yakama Nation’s treaty-reserved right to fish is enduring, not temporary; and further, that the right imposed a servitude upon lands and waters within the Yakama Nation’s Treaty Territory, which includes the Columbia River. 198 U.S. 371, 381-82 (1905). In *Seufert Brothers Co. v. United States*, the United States Supreme Court affirmed and expanded upon its *Winans* decision, holding that although the Yakama Nation’s Reservation and cessation boundaries may lie north of the Columbia River in what is now the State of Washington, the Yakama Nation nevertheless maintained usual and accustomed fishing areas in Oregon and its treaty-reserved right to fish there remained intact, “impos[ing] a servitude upon the Oregon soil.” 249 U.S. 194, 199 (1919). Applying this longstanding precedent, the Oregon Court of Appeals recently confirmed that the Yakama Nation’s traditional and cultural use areas include areas beyond those specifically called out in the Yakama Treaty. *See State v. Begay*, 312 Or App 647, 665, 495 P.3d 732 (2021) (holding that hunting rights reserved under Article III of the Yakama Treaty extend across all open and unclaimed lands in Oregon).

Today, the Yakama Nation’s enrolled membership exceeds 11,000 people who rely on the commercial, ceremonial, cultural, and subsistence resources found in the Columbia River Basin and surrounding areas. The Yakama Nation’s interests in this geographic area are not limited to rights of access, use, and harvest. The Yakama Nation exercises jurisdiction throughout its Treaty Territory—

areas over which the Yakama Nation manages resources, applies its laws, and enforces its police powers in common with the states.

Over 100 years of litigation—including *United States vs. Washington*, 384 F. Supp. at 382 and *United States v. Oregon*, 666 F. Supp. 1461 (D. Or. 1987)—has affirmed the Yakama Nation’s status as co-managers of the Columbia River Basin fishery. Consequently, the Yakama Nation has made considerable investments in protecting and restoring fish and wildlife populations and habitats throughout the Columbia River Basin, including in the lower Columbia River, the Willamette River, Willamette Falls, and the Sandy River. Any impact to these fisheries, such as the expansion of take opportunities that might diminish the Yakama Nation’s right to its “fair and equitable share of all fish from any given run,” must account for the Yakama Nation’s legally-protected interests. *See United States v. Oregon*, 699 F. Supp. 1456, 1463 (D. Or. 1988) (citing to *Washington v. Washington State Comm’l Pass. Fishing Vessel*, 443 U.S. 658, 687 (1978)). Similarly, any delegation of regulatory authority to parties outside existing multi-sovereign co-management arrangements must not disrupt the careful balance of mutual commitments adopted in the in service of protecting and enhancing the Yakama Nation’s treaty-reserved resources throughout the Columbia River Basin. *See United States v. Oregon*, Civ. No. 3:68-cv-00513, (D. Or. Feb. 26, 2018), ECF 2607-1 (accepting the Columbia River Fish Management Agreement, 2018-2027).

There is no question that the Yakama Nation’s Treaty Territory includes the areas within the geographic scope of OAR 635-800-0300.

**B. The Grand Ronde Tribe Does Not Possess Off-Reservation Treaty Rights for Fishing, Hunting, or Trapping Wildlife.**

The Confederated Tribes of the Grand Ronde Community (“Grand Ronde Tribe”) does not have any federal treaty-reserved rights to fish, hunt, or trap wildlife outside of its existing reservation

boundaries. In 1954, Congress passed Public Law 588, 68 Stat. 724, which terminated the Grand Ronde Tribe's federal recognition. Nearly thirty years later, in 1983, Congress passed legislation that resulted in the Grand Ronde Tribe's restoration as a federally-recognized Indian tribe. Pub. L. 98-165, Nov. 22, 1983, 97 Stat. 1064, 25 U.S.C. §§ 713 *et seq.* Congress, however, did not restore any fishing, hunting, or trapping rights to the Grand Ronde Tribe to the extent that any has ever existed. 25 U.S.C. § 713b(d).<sup>1</sup>

In 1986, the Grand Ronde Tribe commenced legal action against the State of Oregon in United States District Court for the District of Oregon. *See The Confederated Tribes of the Grand Ronde Community of Oregon v. State of Oregon*, Case No. 86-1620-BU. The parties ultimately settled the dispute by entering into a written settlement agreement titled "Agreement Among The State of Oregon, The United States of America, and The Confederated Tribes of the Grande Ronde Community of Oregon To Permanently Define Tribal Hunting, Fishing, Trapping and Animal Gathering Rights of the Tribe and its Members" ("Settlement Agreement"). *See* Joint Memorandum in Support of Consent Decree at Attachment A. On December 18, 1986, the District Court entered a Final Decree and Order approving the Settlement Agreement ("Consent Decree"). In 1987, the Oregon Fish and Wildlife Commission adopted the Settlement Agreement as a rule. *See* OAR 635-041-0600.

The Consent Decree and Settlement Agreement "fully and completely" define the "tribal hunting, fishing, trapping and animal gathering rights" of the Grand Ronde Tribe. Joint Memorandum in Support of Consent Decree at Attachment A, p. 5. The Settlement Agreement also expressly provides that no "additional tribal rights shall hereafter exist except those which are specifically set forth in this agreement." *Id.* The Consent Decree permanently enjoins the Grand Ronde Tribe "from asserting or

---

<sup>1</sup> " (d) No hunting, fishing or trapping rights restored -- No hunting, fishing, or trapping rights of any nature of the tribe or of any member, including any indirect or procedural right or advantage over individuals who are not members, are granted or restored under this subchapter."

prosecuting any claim for tribal hunting, fishing, trapping, or animal gathering rights \* \* \* other than as such rights are specified and limited by the terms and provisions” of the Settlement Agreement. Final Decree and Order, ¶ 3.

Notwithstanding the Settlement Agreement, the State of Oregon has allowed the Grand Ronde Tribe and its members to engage in certain state-regulated hunting, fishing, trapping, or animal gathering activities under a special license granted to the Grand Ronde Tribe. *See* OAR 635-041-0610; *see also* *Confederated Tribes of Siletz Indians of Oregon v. Fish and Wildlife Comm’n*, 244 Or App 535, 260 P3d 705 (2011) (holding that the Settlement Agreement does not prohibit the State from allowing for additional hunting for Grand Ronde Tribe).

**C. The Oregon Fish and Wildlife Commission’s Vote to Adopt OAR 635-800-0300.**

During an August 4, 2023 meeting, the Oregon Fish and Wildlife Commission (“Commission”) purported to adopt OAR 635-800-0300, which is titled “Memorandum of Agreement for Off-Reservation and Non-Trust Land Hunting, Fishing, Trapping, and Gathering with the Confederated Tribes of the Grand Ronde Community of Oregon.” The Commission took such ostensible action despite substantial objections raised by Petitioner and many others, and despite the fact that the term limits of two Commission members had already expired before the vote: Commission Chair Mary Wahl’s term began on May 15, 2019 and expired on May 14, 2023, and Commissioner Mark Labhart’s term began on July 1, 2019 and expired on June 30, 2023. *See ODFW Commission Members* webpage, <https://www.dfw.state.or.us/agency/commission/members.asp> (last visited May 8, 2024).

Petitioner’s objections were presented in writing prior to the August 4, 2023 meeting, and also in-person through testimony at the meeting. Petitioner’s objections expressed strong concern about the expansive geographic scope of OAR 635-800-0300 and the corresponding memorandum of agreement (“MOA”). Petitioner asserted that the MOA, among other problems, would create unnecessary inter-

tribal conflict between the Grand Ronde Tribe and Petitioner’s treaty-reserved fishing rights along with the treaty-reserved rights of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe (all four collectively, the “Columbia River Treaty Tribes”). Without meaningfully consulting with Petitioner or the other Columbia River Treaty Tribes, or addressing their well-developed and clearly-stated concerns, deliberation amongst the Commissioners was followed by a motion and rushed vote to adopt the new rule and corresponding MOA. The motion was carried with four in favor (Labhart, Khalil, Zarnowitz, Wahl); three opposed (King, Spelbrink, Hatfield-Hyde). *See* Oregon Fish and Wildlife Commission Minutes (Aug. 4, 2023), available at [https://www.dfw.state.or.us/agency/commission/minutes/23/08\\_Aug/Aug%202023%20Minutes%20Final%20.pdf](https://www.dfw.state.or.us/agency/commission/minutes/23/08_Aug/Aug%202023%20Minutes%20Final%20.pdf) (last accessed May 8, 2024). Commission Chair Wahl and Commissioner Labhart both cast votes despite the fact that their term limits had expired. Petitioner is not aware of any legal basis for Commission Chair Wahl and Commissioner Labhart’s authority to participate in the Commission vote on August 4, 2024.<sup>2</sup>

**D. The Geographic Scope of OAR 635-800-0300 is Overbroad.**

On August 24, 2023, the Director of ODFW and the Tribal Council Chair of the Grande Ronde Tribe signed the MOA. On September 28, 2023, the Secretary of State entered a permanent administrative order filing OAR 635-800-0300. The order summarizes the rule as follows:

---

<sup>2</sup> In a letter dated December 8, 2023, Petitioner requested the Oregon State Attorney General’s assistance in determining whether the Commission’s August 4, 2023 vote purporting to adopt OAR 635-800-0300 was lawful. *See* Exhibit A. On January 2, 2024, the Deputy Attorney General sent a letter advising that the Attorney General and Oregon Department of Justice were not able to respond to Petitioner’s inquiry regarding the authority of the Commissioners to act because taking a position on the question would be deemed “legal advice”. *See* Exhibit B.

“[The MOA] modifies the cooperative management of fish and wildlife populations between the Oregon Department of Fish and Wildlife and the Confederated Tribes of the Grand Ronde Community of Oregon. It updates procedures for ceremonial and subsistence harvest of fish and wildlife within the specified geographic area by the Grande Ronde’s members and establishes in an annual process with ODFW and based upon scientifically established and projected numbers for each resource.”

The MOA is expressly incorporated into the rule by reference. OAR 635-800-0300(a).

The geographic scope of the MOA is broader than any other tribal cooperative management agreement in western Oregon, including, notably, that of the Confederated Tribes of Siletz Indians; the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians; the Cow Creek Band of Umpqua Tribe of Indians; and the Coquille Indian Tribe. In addition, the MOA is an unprecedented affront to the sovereignty of other federally-recognized Indian tribes; it is the first time that the Commission has ever approved a tribal cooperative management agreement over the direct and sustained objections of other Indian tribes.

Petitioner objects to the geographic scope of the MOA because it includes areas where Petitioner retains treaty-reserved rights to fish and hunt, and exercises its jurisdiction. The MOA, therefore, carries significant risk of inter-tribal conflict in those overlapping areas. The objectionable areas include, for example only and without limitation: (a) ODFW Wildlife Management Units 15 (Willamette) and 16 (Santiam), including but not limited to, the mainstem of the Columbia River, the Willamette River from the mouth to the top of Willamette Falls, and the Sandy River; and (b) all lands in Oregon held in fee by the Grand Ronde Tribe regardless of location. MOA at § 5.a. Neither ODFW nor the Grand Ronde Tribe have provided Petitioner with sufficient explanation as to why they believe that the geographic scope of the MOA is appropriate in light of Petitioner’s objections and those similar objections raised by the other Columbia River Treaty Tribes.

**V. Request for Repeal of OAR 635-800-0300.**

ODFW should repeal OAR 635-800-0300 in its entirety for at least two reasons. First, there is a serious, fundamental flaw in the Commission’s vote on the MOA: the term limits of two Commissioners who voted to approve had already expired at the time of the vote. Second, the adopted rule creates conflict with Petitioner’s sovereign interests, jurisdiction, and treaty-reserved rights established pursuant to the Yakama Treaty.

**A. The Commission’s Purported Adoption of OAR 635-800-0300 was Unlawful.**

The Commission’s basis of authority is ORS 496.090. Under ORS 496.090(2), the “term of office of each [Commission] member is four years, but a member serves at the pleasure of the Governor.” The phrase “serves at the pleasure” is typically construed to mean that an employee or official may be removed by and at the convenience of the appointing authority. *See Circuit Court of Oregon, Fifteenth Judicial District v. AFSCME Local 502-A*, 295 Or 542, 546 (1983) (noting that a statute allowing juvenile court judges to appoint counselors who serve at the judge’s pleasure and designated salary confers “the authority to hire, fire and set salaries”); *Schmidt v. Jackson County Juvenile Dept.*, 49 Or App 349 (1980) (holding that an employee who serves at the pleasure of an appointing authority cannot assert a violation of due process property rights); *Daniel v. Board of County Com’rs for Josephine County*, 212 Or App 76, 84 (2007) (characterizing statutes contemplating appointees serving at the pleasure of appointing authority as “hiring and firing”). A reading of ORS 496.090(2) that allows Commission members to lawfully serve beyond their term limits would obviate the need for term limits and is unworkable. The only reasonable interpretation of this statute is that the Governor appoints Commission members who serve for four-year terms unless the Governor removes the member prior to the end of four years.

As detailed above in Section IV.C. of this Petition, Commission Chair Wahl's term began on May 15, 2019. Commissioner Labhart's term began on July 1, 2019. Commission Chair Wahl's and Commissioner Labhart's terms both expired precisely four years later: May 14, 2023 and June 30, 2023, respectively. The Commission's vote to approve the MOA took place at the August 4, 2023 meeting. Because their term limits had expired, neither Commission Chair Wahl nor Commissioner Labhart had authority to participate in Commission business on the date of the vote. Nevertheless, both Commissioner Wahl and Commissioner Labhart cast votes in support of the MOA. The result of the vote was 4-3 in favor.

Commission Chair Wahl and Commissioner Labhart had no authority to vote following the expiration of their terms. Their votes should not have been counted. If Commission Chair Wahl's and Commissioner Labhart's supporting votes are not counted, then the tally of the remaining Commissioner votes would see the MOA fail 2-3. For this reason, ODFW should repeal OAR 635-800-0300 in its entirety.

**B. OAR 635-800-0300 Conflicts With the Yakama Treaty.**

Treaties, including those between the federal government and Indian tribes, are the "supreme law of the land." U.S. Const. art. VI, cl 2; *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005); *see also Sohappy v. Smith*, 302 F. Supp. 899, 905 (D. Or. 1969) (citing *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) (recognizing Indian treaties as "supreme law of the land"). States and their officials are bound to observe Indian treaties. *Sohappy*, 302 F. Supp. at 905; *see also Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1015-16 (state laws, as applied to Yakama tribal members and their interests, are generally subject to and preempted by the Yakama Treaty). Interpretation of Indian treaties is a matter of federal law, not state law. *State v. Begay*, 312 Or App at 652. The Yakama Treaty is incorporated into federal law. *See* 12 Stat. 951.

Section IV.A. of this Petition details the geographic scope of the Yakama Nation's Treaty Territory. It includes the areas within the geographic scope of the MOA and OAR 635-800-0300. From a conflict standpoint, the most problematic overlap occurs in and around the lower Columbia River and the Willamette River in ODFW Wildlife Management Units 16 (Santiam) and 15 (Willamette). Petitioner's members conduct salmon fisheries below Bonneville Dam, harvest smelt in the Sandy River, and harvest lamprey and salmon at Willamette Falls. Under the MOA and the authority ostensibly delegated by ODFW, the Grand Ronde Tribe is authorized to regulate fishing, hunting, and gathering activities of its members in all of these locations. It is foreseeable that conflicts will arise between Petitioner and the Grand Ronde Tribe members when multiple parties are conducting fisheries or other activities in these locations, or any other area under the MOA. Finite fish and game resources in these areas are already at critically low levels. Introducing new harvests, with undefined and uncertain take limits, has the potential to significantly affect fish and wildlife management and, by extension, Petitioner's treaty-reserved rights.

ODFW is bound to observe Petitioner's sovereign interests, jurisdiction, and treaty-reserved rights and, accordingly, must avoid any conflicts between its regulations and the Yakama Treaty. OAR 635-800-0300 violates these obligations and, for that reason, too, ODFW should repeal the rule in its entirety.

The effect of a repeal would be to return fish and game management in western Oregon to the status quo ante—that is, to the management regime immediately before the unlawful adoption of OAR 635-800-0300. While not perfect, this paradigm presents considerably less conflict with Petitioner's treaty-reserved rights. To the extent that ODFW is interested in adopting a rule which authorizes off-reservation hunting, fishing, gathering, and trapping by the Grand Ronde Tribe, ODFW should initiate a new rule-making process that includes *actual* consultation with Petitioner to adequately hear,

understand, and consider their concerns in the interest of recognizing and avoiding conflicts with Petitioner’s sovereign and federally-protected rights and interests.<sup>3</sup>

**VI. Request for Amendment of Rule.**

If ODFW denies Petitioner’s request to repeal OAR 635-800-0300, then Petitioner respectfully requests that the Commission amend the rule. In accordance with OAR 137-001-0070(1)(a), Petitioner attaches as Exhibit C to this Petition a copy of the rule showing proposed modification to the adopted language that Petitioner deems to reflect an acceptable remedy to its concerns. The proposed amendments align with those previously proposed by Petitioner and are intended to minimize the risk of future conflict between the Grand Ronde Tribe, the State of Oregon, and Petitioner with respect to the management and harvest of fish and wildlife in western Oregon. This proposed geographic scope results in the MOA being consistent with ODFW’s other tribal cooperative agreements, rather than an isolated outlier.

**VII. OAR 137-001-0070(2) Comments.**

A petition that requests the repeal or amendment of an existing rule must also provide comments relating to certain criteria, including: “(a) options for achieving the existing rule's substantive goals while reducing the negative economic impact on businesses; (b) the continued need for the existing rule; (c) the complexity of the existing rule; (d) the extent to which the existing rule overlaps, duplicates, or conflicts

---

<sup>3</sup> ODFW failed to engage in any consultation with Petitioner regarding the MOA or the rule. As a fundamental matter, Petitioner should have received direct notice of the proposed rulemaking from ODFW. This expectation is not unreasonable; nor is the belief that ODFW should have first engaged in consultation with Petitioner before advocating for adoption of the rule and MOA. *U.S. v. Oregon* mandates that multiple jurisdictions, including Petitioner and Oregon, work together as equal co-managers of Columbia River Basin fishery. Rightfully then, when ODFW proposes rulemaking that will have an effect on fisheries that are co-managed *together*, it is reasonable to expect that ODFW would consult with Petitioner *before* drafting rules and holding hearings that impact management of the Columbia River Basin fisheries.

with other state or federal rules and with local government regulations; and (e) the degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule.” OAR 137-001-0070(2). Petitioner, accordingly, provides the following comments.

**A. OAR 137-001-0070(2)(a) - Options for Achieving the Existing Rule’s Substantive Goals While Reducing the Negative Economic Impact on Businesses.**

To achieve the substantive goals of OAR 635-800-0300 while reducing negative impact on businesses, the Commission should repeal or amend the rule as requested by Petitioner. *See* OAR 137-001-0070(2)(a). Per the Notice of Proposed Rulemaking, the rule was needed “to advance the government-to-government relationship between the state of Oregon and” Grand Ronde. Office of the Secretary of State, Notice of Proposed Rulemaking – Chapter 635 Dep’t of Fish And Wildlife, 1 (June 15, 2023). Petitioner assumes that the substantive goal of the rule is to advance the relationship between Oregon and the Grand Ronde Tribe by increasing fishing and hunting harvest opportunities for members of the Grand Ronde Tribe. The primary basis for Petitioner’s opposition to the rule is not solely an economic one. The rule, by establishing an unreasonably expansive and overbroad geographic scope, has the potential to negatively impact Petitioner’s members treaty subsistence and commercial fishing operations. The Commission can avoid these negative impacts, while still achieving its goal of increasing harvest opportunities for members of the Grand Ronde Tribe, by either adopting Petitioner’s proposed amendments to the rule or promulgating a new rule that does not conflict with Petitioner’s treaty rights.

**B. OAR 137-001-0070(2)(b) - The Continued Need for the Existing Rule.**

ODFW’s stated need for OAR 635-800-0300 is to advance the State of Oregon’s government-to-government relationship with the Grand Ronde Tribe. *See* OAR 137-001-0070(2)(b). Petitioner does not object to or seek to undermine this need. Advancing a government-to-government relationship with

one Indian tribe, however, should not be done in a way that is an affront the sovereignty of another Indian tribe. There is simply no need for a rule that was not lawfully adopted by the Commission or one that purports to authorize the Grand Ronde Tribe to engage in certain cooperative management activities with ODFW in areas where Petitioner possesses sovereign interests, including its treaty-reserved rights to fish, hunt, and gather.

The geographic scope amendment advanced by Petitioner allows the stated need for the rule—advancing the government-to-government relationship—to proceed without trampling on Petitioner’s sovereign interests. For the reasons explained in this Petition, the Commission has other options for achieving its goal *and* avoiding significant conflicts with the Yakama Treaty.

**C. OAR 137-001-0070(2)(c) - The Complexity of the Existing Rule.**

Implementation of OAR 600-800-0300 has the potential to significantly complicate the existing framework for co-management of fish and wildlife resources in western Oregon. The rule ignores the MOA’s potential impact on this legally and technically complex management regime, which involves ODFW, Petitioner, the other Columbia River Treaty Tribes, the federal government, and other Indian tribes. The OAR 600-800-0300 and the MOA are silent as to Petitioner’s fishing, hunting, trapping, and gathering practices in the areas included in the MOA’s geographic scope. Neither the rule nor the MOA acknowledge ODFW and Petitioner’s current Columbia River Basin fishery co-management arrangements. Moreover, despite the potentially significant effect that the MOA would have on co-management of the Columbia River Basin fishery, ODFW failed to engage in any consultation with Petitioner prior to approving the MOA or the rule. As a result, Petitioner has little sense of how ODFW plans to approach co-management of the Columbia River Basin fishery moving forward. The potential complexity created by the rule is avoided by ODFW either repealing the rule or adopting Petitioner’s proposed amendments.

**D. OAR 137-001-0070(2)(d) - The Extent to Which the Existing Rule Overlaps, Duplicates, or Conflicts With Other State or Federal Rules and With Local Government Regulations.**

As explained in Section IV.A., above, Petitioner has treaty-reserved fishing, hunting, and gathering rights in Columbia River Basin and surrounding areas, including in the lower Columbia River, the Willamette River, Willamette Falls, and the Sandy River. The broad geographic scope of the MOU creates conflict with the Yakama Treaty and Petitioner's exercise of its federally-protected treaty rights.

**E. OAR 137-001-0070(2)(e) - The Degree to Which Technology, Economic Conditions, or Other Factors Have Changed in the Subject Area Affected by the Existing Rule, Since the Agency Adopted the Rule.**

To Petitioner's knowledge, technology, economic conditions, and other related factors in the area affected by the rule have not changed since ODFW adopted the rule. *See* OAR 137-001-0070(2)(e).

**VIII. Conclusion.**

For the foregoing reasons, Petitioner requests that ODFW accept and act upon this Petition to repeal OAR 635-800-0300. In the alternative, Petitioner requests that ODFW amend OAR 635-800-0300 consistent with Petitioner's proposed changes set forth in Exhibit C.

THE CONFEDERATED TRIBES AND BANDS  
OF THE YAKAMA NATION

By: 

Marcus Shirzad, OSB No. 071725  
Yakama Nation Office of Legal Counsel  
P.O. Box 150, Toppenish, WA 98948  
Phone: (509) 865-7268  
E-mail: [marcus@yakamanation-olc.org](mailto:marcus@yakamanation-olc.org)

Attorney for the Confederated Tribes and Bands  
of the Yakama Nation

*Dated this 13th day of May, 2024.*

# EXHIBIT A



Confederated Tribes and Bands  
of the Yakama Nation

Established by the  
Treaty of June 9, 1855

---

December 8, 2023

**VIA USPS AND ELECTRONIC MAIL**

Honorable Ellen F. Rosenblum  
Attorney General  
Office of Attorney General  
Oregon Department of Justice  
1162 Court St. NE  
Salem, OR 97301-4096  
ellen.f.rosenblum@doj.state.or.us

Re: Oregon Fish and Wildlife Commission - OAR 635-800-0300

Dear Attorney General Rosenblum:

On behalf of Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), I write to bring attention to, and request your opinion regarding the validity of decisions made by the Oregon Department of Fish and Wildlife Commission (“Commission”) if any of its members’ terms have expired.

Public records show that Commission Chair Mary Wahl’s term expired on May 14, 2023, and Commissioner Mark Labhart’s term expired on June 30, 2023. *See* ODFW Commission Members, ODFW, <https://www.dfw.state.or.us/agency/commission/members.asp> (last visited Dec. 7, 2023). The Commission’s website provides the agenda and minutes for June, August, and September 2023 and show that Chair Wahl and Commissioner Labhart cast votes on a number of items. All but one item passed with unanimous vote.

On August 4, 2023, Chair Wahl and Commissioner Labhart voted to adopt OAR 635-800-0300, which is titled “Memorandum of Agreement for Off-Reservation and Non-Trust Land Hunting, Fishing, Trapping, and Gathering with the Confederated Tribes of the Grand Ronde Community of Oregon.” *See* Oregon Fish and Wildlife Commission Minutes, 11 (Aug. 4, 2023). Testimony during the August 4, 2023 meeting raised significant concerns with the substance of the proposed rule. Deliberation amongst Commissioners was followed by a rushed vote initiated by Commissioner Labhart motioning to adopt OAR 635-800-0300 as proposed. The motion was carried four in favor (Labhart, Khalil, Zarnowitz, Wahl); three opposed (King, Spelbrink, Hatfield-Hyde). Without Chair Wahl’s and Commissioner Labhart’s votes, OAR 635-800-0300 would not have been adopted by the Commission.

The Yakama Nation respectfully requests your immediate assistance in determining whether the Commission’s vote on August 4, 2023 purporting to adopt OAR 635-800-0300 was valid.

OREGON FISH AND WILDLIFE COMMISSION - OAR 635-800-0300  
DECEMBER 8, 2023

The Yakama Nation is not alone in raising this concern. The Confederated Tribes of the Warm Springs Reservation of Oregon (“Confederated Tribes of Warm Springs”), the Confederated Tribes of the Umatilla Indian Reservation (“Confederated Tribes of Umatilla”), and the Nez Perce Tribe are all mindful of the Commission’s actions. Items of consequence to our collective interests are routinely part of the Commission’s monthly agenda. Accordingly, there is broad interest in your determination of whether Chair Wahl and Commissioner Labhart have the authority to cast a vote given that their terms appear to have expired.

It is our understanding that the Oregon Department of Fish and Wildlife is currently taking actions to carry out and implement OAR 635-800-0300. Therefore, time is of essence with respect to whether OAR 635-800-0300 was lawfully adopted. The Yakama Nation respectfully requests that you provide us with a response to our inquiry on or before December 28, 2023. If Chair Wahl and Commissioner Labhart did not have authority to vote on adopting OAR 635-800-0300, then the Yakama Nation intends to file a petition, pursuant to ORS 183.390, to repeal the rule in its entirety.

Thank you in advance for your attention to this important matter. If you have any questions, please communicate with our legal counsel, Mr. Marcus Shirzad, Senior Attorney for the Yakama Nation Office of Legal Counsel, at P.O. Box 150, Toppenish, WA 98948 and electronically at [marcus@yakamanation-olc.org](mailto:marcus@yakamanation-olc.org).

Respectfully,



Gerald Lewis, Chairman  
Yakama Nation Tribal Council

cc: Jonathan W. Smith, Sr., Chairman  
The Confederated Tribes of the Warm Springs Reservation of Oregon, Tribal Council  
Gary Burke, Chairman  
The Confederated Tribes of the Umatilla Indian Reservation, Board of Trustees  
Shannon Wheeler, Chairman  
Nez Perce Tribe, Executive Committee  
Aja K. DeCoteau, Executive Director  
Columbia River Inter-Tribal Fish Commission

# EXHIBIT B

ELLEN F. ROSENBLUM  
ATTORNEY GENERAL



LISA M. UDLAND  
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building  
1162 Court Street NE  
Salem, Oregon 97301-4096  
Telephone: (503) 378-6002

January 2, 2024

Gerald Lewis, Chairman  
Yakama Nation Tribal Council  
P.O. Box 151  
Toppenish, WA 98948

Dear Chairman Lewis:

Thank you for your letter inquiring about the process used to adopt Oregon Fish and Wildlife Commission OAR 635-800-0300. We acknowledge that natural resources are also cultural resources for the Yakama Nation and recognize the significance of natural resource management decisions.

Under Oregon Revised Statutes Chapter 180, the Attorney General and the Oregon Department of Justice serve as lawyers for the state of Oregon. As such, and under the restrictions of Chapter 180, we are not able to provide legal advice or answer legal questions for those outside of state government. We are thus not able to respond to your legal inquiry regarding the authority of the Commissioners to act in this instance.

Thank you for reaching out to the Attorney General. We regret we are unable to provide further assistance in this matter.

Sincerely,

LISA UDLAND  
Deputy Attorney General

cc: Jonathan W. Smith, Sr.  
Gary Burke  
Shannon Wheeler  
Aja K. DeCoteau

# EXHIBIT C

635-800-0300

**Memorandum of Agreement for Off-Reservation and Non-Trust Land Hunting, Fishing, Trapping, and Gathering with the Confederated Tribes of the Grand Ronde Community of Oregon**

(1) Members of the Confederated Tribes of the Grand Ronde Community of Oregon (Grand Ronde) are authorized to take species over which the Oregon Fish and Wildlife Commission has management authority on off-reservation and non-trust lands under the terms and conditions of the Memorandum of Agreement between the Grand Ronde and the State of Oregon, by and through the Department of Fish and Wildlife (Department), and within the geographic scope of that Agreement **and as limited by subsection (5) of this rule**, entered into by both parties in 2023, incorporated herein by reference.

(2) The Grand Ronde 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 habitat under the terms and conditions of the above referenced Memorandum of Agreement and within the geographic scope of that Agreement **and as limited by subsection (5) of this rule**.

(3) No additional tribal legal or treaty entitlement is created, conveyed, implied or diminished, nor is any existing agreement, treaty or court decree modified by the adoption of these rules or the above referenced Memorandum of Agreement.

(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.

**(5) Notwithstanding any provision in the Memorandum of Agreement and to avoid conflicts with the treaty fishing, hunting, and gathering rights of other federally-recognized Indian tribes, the geographic scope of this rule does not include:**

**(a) ODFW Wildlife Management Units 15 (Willamette) and 16 (Santiam), including but not limited to, the mainstem of the Columbia River, the Willamette River from the mouth to the top of Willamette Falls, and the Sandy River; and**

**(b) Any property held in fee by the Grand Ronde located within another federally-recognized Indian tribe's treaty-defined reservation boundaries, cessation boundaries, or traditional, cultural use, and usual and accustomed areas.**