

*Nez Perce*

**TRIBAL EXECUTIVE COMMITTEE**  
**Office of Legal Counsel**

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May 16, 2024

**Sent via USPS and email: [davia.m.palmeri@odfw.oregon.gov](mailto:davia.m.palmeri@odfw.oregon.gov)**

Ms. Davia Palmeri, Interim Director  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Dr., S.E.  
Salem, OR 97303

**Re: ORS OAR 635-800-0300**

Dear Interim Director Palmeri:

On behalf of the Nez Perce Tribe ("Tribe"), I submit the enclosed Joinder In Petition To Repeal or, Alternatively, Amend OAR 635-800-0300 (Filed by the Confederated Tribes of the Warm Springs Reservation of Oregon). The Tribe is submitting this Joinder In Petition to the Oregon Department of Fish and Wildlife ("ODFW") pursuant to ORS 183.390 and OAR 137-001-0070 and is requesting that ODFW schedule an oral presentation in accordance with the rule.

Sincerely,

A handwritten signature in blue ink that reads "Julie S. Kane".

Julie S. Kane  
Managing Attorney

cc: Shana Radford, Tribal Affairs Director, Office of the Governor  
Geoff Huntington, Senior Natural Resources Advisor, 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

NEZ PERCE TRIBE’S JOINDER  
IN  
PETITION TO REPEAL OR,  
ALTERNATIVELY, AMEND  
OAR 635-800-0300  
(FILED BY THE CONFEDERATED TRIBES  
OF THE WARM SPRINGS RESERVATION  
OF OREGON)

The Nez Perce Tribe (Tribe) joins in supporting the petition filed by the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWSRO) filed on May 7, 2024 (Attachment A), and the relief requested therein.

The Tribe provides a brief description of its interests and its interest in the challenged rule, and otherwise adopts the Petition filed by the CTWSRO.

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

The Nez Perce Tribe and the United States are parties to the Treaty with the Nez Perce of June 11, 1855, 12 Stat. 957.

The Tribe’s address is Nez Perce Tribe, P.O. Box 305, Lapwai, Idaho 83540.

**II. Nez Perce Interests and Interest in the Challenged Rule**

The Nez Perce Tribe is a sovereign nation with Treaty-reserved rights at all its usual and accustomed fishing places. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957. The Tribe’s usual and accustomed fishing places include, but are not limited to, the Columbia and Snake rivers and their tributaries. The importance of salmon, steelhead, eels (Pacific lamprey) and other fish to the Nez Perce cannot be overstated. The United States has acknowledged the breadth of Nez Perce fishing. For example, the United States’ expert before the Indian Claims

Commission reported Nez Perce fisheries on the Clearwater, Snake, Salmon, and Columbia rivers, noting that Nez Perce “would journey to the Willamette River in Oregon, making their camps near Portland, and at Oregon City, near the falls on the Willamette.” United States Expert Stuart A. Chalfant, *Aboriginal Territory of the Nez Perce Indians*, U.S. Indian Claims Commission, Docket 175, Exhibit 24, pp. 77-80. The Nez Perce continue to exercise their Treaty-reserved rights at their usual and accustomed places including, for example, Willamette Falls, pursuant to Treaty and tribal regulation.

The Tribe’s letters to Congress (Attachment B) and Oregon (Attachment C) set forth the Tribe’s position that the state of Oregon has no authority to take action that could affect or modify the exercise of the Nez Perce Tribe’s Treaty-reserved rights at any location nor affect or modify the exercise of any other tribes with treaty-reserved rights at any location.

NEZ PERCE TRIBE  
OFFICE OF LEGAL COUNSEL

/s/ Julie S. Kane

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Attorneys for the Nez Perce Tribe

Dated: May 16, 2024.

**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, petitioner the Confederated Tribes of the Warm Springs Reservation of Oregon (“Confederated Tribes of Warm Springs” or “Tribe”) petitions the Oregon Department of Fish and Wildlife (“ODFW”) to repeal OAR 635-800-0300. ODFW should repeal OAR 635-800-0300 in its entirety for at least two reasons. First, there is a legal error in the underlying Fish & Wildlife Commission’s vote: the terms of two Commission members who voted to approve had already expired at the time of the vote. Second, the rule, as currently drafted, creates conflict with the terms of the Tribe’s 1855 Treaty (defined below), which are incorporated into and have the force of federal law. In the alternative, the Tribe asks that ODFW initiate a rulemaking procedure to amend the rule. The Tribe 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 Confederated Tribes of Warm Springs is the legal successor-in-interest to the Indian signatories of the Treaty with the Tribes of Middle Oregon, dated June 25, 1855, 12 Stat. 963 (“CTWS Treaty”). The address for the Confederated Tribes of Warm Springs is P.O. Box C, Warm Springs, Oregon, 97761.

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

Pursuant to OAR 137-001-0070, the Tribe provides the names 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 and Bands of the Yakama Nation  
401 Fort Road  
Toppenish, WA 98948

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

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

Columbia River Inter-Tribal Fish Commission  
700 NE Multnomah Street, Suite 1200  
Portland, OR 97232

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.**

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

**IV. Background.**

The CTWS Treaty reserves for the Tribe legally-enforceable rights to take fish at its “usual and accustomed stations, in common with citizens of the United States.” CTWS Treaty, Art 1. The CTWS Treaty also secures the privilege of hunting outside the Warm Springs Reservation on “unclaimed lands.” *Id.* The geographic scope of the Confederated Tribes of Warm Springs’ treaty-reserved fishing and hunting rights are not limited to the lands ceded to the United States in the CTWS Treaty. With respect to treaty-reserved fishing rights, the United States Supreme Court has expressly rejected the notion that those rights are limited to the treaty-ceded area, and instead extend to areas where the Confederated Tribes of Warm Springs’ members, and their predecessors, have customarily fished before and since the 1855 Treaty. *See Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (recognizing right of Yakama Nation tribal members to fish at usual and accustomed locations in Oregon outside the Yakama ceded area). The Oregon Court of Appeals has also recently recognized that the treaty-reserved right to hunt extends to unclaimed lands beyond the treaty-ceded area. *See State v. Begay*, 312 Or App 647, 495 P.3d 732 (2021) (recognizing treaty-reserved right of Yakama Nation tribal member to hunt on unclaimed lands in Oregon).

Before and since the CTWS Treaty, the Confederated Tribes of Warm Springs’ members have customarily fished and hunted outside of the treaty-ceded area. In western Oregon, the Confederated Tribes of Warm Springs have usual and accustomed fishing locations in the lower Columbia River and its tributaries, including the Willamette River and the Sandy River. Willamette Falls is a particularly

important treaty-reserved fishery. The Confederated Tribes of Warm Springs also has treaty-protected rights to hunt unclaimed lands in western Oregon, particularly the western slope of the Cascades, as their ancestors have done since time immemorial. These treaty-protected fishing and hunting areas are within the geographic scope of OAR 635-800-0300.

**A. The Grand Ronde Tribe Does Not Possess Off-Reservation Treaty Rights for Fishing, Hunting, and Gathering.**

The Confederated Tribes of the Grand Ronde Community (“Grand Ronde Tribe” or “Grand Ronde”) does not have any federal treaty-reserved rights to fish or hunt outside of its reservation, nor does it even have a colorable claim to such treaty rights.<sup>1</sup> In 1954, Congress passed Public Law 588, 68 Stat. 724, which terminated the federal recognition of the Grand Ronde Tribe. Nearly thirty years later, in 1983, Congress restored the federal recognition of the Grand Ronde 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 had previously existed. 25 U.S.C. § 713b(d).

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 settled the dispute by entering into a written settlement agreement titled “Agreement Among The State of Oregon, The United

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<sup>1</sup> The Grand Ronde Tribe claims an interest in several treaties, including: Treaty with the Umpqua-Cow Creek Band, 1853; Treaty with the Rogue River, 1853; Treaty with the Rogue River 1854; Treaty with the Chasta, 1854; Treaty with the Umpqua and Kalapuya, 1854; Treaty with the Kalapuya, 1855; and Treaty with the Molalla, 1855. The Confederated Tribes of Warm Springs does not concede, and reserves its rights to dispute, that the Grand Ronde Tribe is the legal successor-in-interest to the Indian signatories of any of those treaties or that the treaties reserve any off-reservation fishing, hunting, gathering, or trapping rights.

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 (“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 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 additional 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).

**B. The Oregon Fish and Wildlife Commission's Ostensible Action to Adopt OAR 635-800-0300.**

On August 4, 2023, the 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 the Tribe’s substantial objections and despite the fact that the terms of two of the commissioners had already expired before the vote: 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 Apr. 23, 2024).

The Tribe’s objections were presented both in writing before the August 4, 2023 hearing, and also through testimony provided at the hearing. The objections were well-developed and clearly articulated strong concern about both the expansive geographic scope of OAR 635-800-0300, and the corresponding memorandum of agreement (“MOA”). The Tribe asserted that the MOA would, among other problems, create unnecessary inter-tribal conflict between the Grand Ronde Tribe and the Tribe’s treaty-reserved fishing and hunting rights along with the treaty-reserved rights of the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe (collectively, the “Columbia River Treaty Tribes”). Without meaningfully consulting with the Tribe or the other Columbia River Treaty Tribes, and without addressing their clearly-stated concerns, deliberation amongst 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). 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](#) (last accessed Apr. 24, 2024). Both Chair Wahl and Commissioner Labhart voted for the adoption of the rule, despite the fact that their terms had expired. The Tribe is not aware of any legal basis for Chair Wahl and Commissioner Labhart's authority to participate in the Commission vote on August 4, 2024.<sup>2</sup>

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

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

“[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; Cow Creek Band of Umpqua Tribe of Indians; and the Coquille Indian Tribe. In addition, the MOA is an unprecedented affront to the

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<sup>2</sup> In a letter dated December 8, 2023, the Tribe requested the 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 9, 2024, the Deputy Attorney General sent a letter advising that the Attorney General and Oregon Department of Justice were not able to respond to the Tribe's inquiry regarding the Commissioner's authority to act. See Exhibit B.

sovereignty of other 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 tribes.

The Tribe objects to the geographic scope of the MOA because it includes areas where the Tribe retains treaty-reserved rights to fish and hunt. 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) any property held in fee by another federally-recognized Indian tribe. MOA at § 5.a. Neither ODFW nor the Grand Ronde Tribe have provided the Tribe with sufficient explanation as to why they believe that the scope of the MOA is appropriate in light of the Tribe'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 CTGR MOA: the terms of two Commission members who voted to approve had already expired at the time of the vote. Second, the rule, as currently drafted, creates conflict with the terms of the CTWS Treaty, which are incorporated into and have the force of federal law.

**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, 669 P2d 314 (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, 619 P2d 1307 (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, 157 P3d 275 (2007) (characterizing statutes contemplating appointees serving at the pleasure of appointing authority as "hiring and firing"). Interpretations do not include, however, extension of expired term limits. 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 contrary to the framework for interpreting statute laid down in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). 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.

Chair Wahl's term began on May 15, 2019. *See ODFW Commission Members* webpage (*see supra*). Commissioner Labhart's term began on July 1, 2019. *Id.* Chair Wahl's and Commissioner Labhart's terms both expired precisely four years later: May 14, 2023 and June 30, 2023, respectively. *Id.* The Commission's vote to approve the MOA occurred on August 4, 2023. Commission Minutes (Aug. 4, 2023). Because their terms had expired, neither Chair Wahl nor Commissioner Labhart had authority to participate in Commission business on the date of the vote.

Nevertheless, both Chair Wahl and Commissioner Labhart voted in support of the MOA. Commission Minutes (Aug. 4, 2023). The result of the vote was 4-3 in favor. *Id.* If Chair Wahl's and Commissioner Labhart's votes are not counted, then the majority of the Commission votes would have been against the MOA.

Chair Wahl and Commissioner Labhart had no authority to vote following the expiration of their terms. Their votes should not have been counted, and the vote should have failed 2-3. For this reason, ODFW should repeal OAR 635-800-0300 in its entirety.

**B. OAR 635-800-0300 Conflicts With the CTWS 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. US*, 410 F3d 506, 512 (9th Cir. 2005); *see also Sohappy v. Smith*, 302 F. Supp. 899, 905 (D. Or. 1969) (citing *Worcester v. Georgia*, 31 US 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 SCt 1000, 1015-16 (state law, as applied to tribal members or interests, is generally subject to Indian treaty rights). Interpretation of Indian treaties is a matter of federal, rather than state, law. *State v. Begay*, 312 Or App 647, 652, 495 P.3d 732 (2021). The CTWS Treaty is incorporated into federal law. *See* 12 Stat. 963.

The Tribe’s treaty rights extend throughout its ceded lands as well as the areas that the Tribe’s members and their ancestors traditionally used. As noted by the United States Supreme Court as far back as 1919, usual and accustomed fishing areas are not circumscribed or limited in any way by ceded area boundaries. *See Seufert Bros. v. United States*, 249 U.S. 194 (1919); *see also, e.g., United States v. Winans*, 198 US 371, 381-82 (1905). As the Court in *United States v. Washington* explained:

[E]very fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.

384 F Supp at 329. The geographic scope of the MOA and OAR 635-800-0300 encompass usual and accustomed treaty fishing areas of the Tribe, as well as its treaty hunting and gathering areas. The most

problematic overlap occurs with respect to Willamette Falls and the lower Columbia River in ODFW Wildlife Management Units 15 (Willamette) and 16 (Santiam).

The Tribe's members harvest lamprey and salmon at Willamette Falls, conduct salmon fisheries below Bonneville Dam, and harvest smelt in the Sandy River. Under the MOA, the Grande Ronde Tribe regulates fishing, hunting, and gathering activities of its members in all of these locations. It is foreseeable that conflicts will arise between the Tribe's members and the Grande Ronde Tribe's members when multiple parties are conducting fisheries or other activities in these areas, 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, the Tribe's treaty rights.

ODFW is bound to observe the Tribe's treaties and, accordingly, must avoid any conflicts between its regulations and the CTWS Treaty. OAR 635-800-0300 violates this obligation because it creates potential conflict, 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 alleged adoption of OAR 635-800-0300. While not perfect, this paradigm presents considerably less conflict with the Tribe'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 Grand Ronde Tribe members, ODFW should initiate a new rule-making process and more meaningfully consult with the Tribe, and the other Columbia River Treaty Tribes, to adequately hear, understand, and consider their concerns in the interest of recognizing and avoiding conflicts with the Tribe's sovereign and federally-protected rights and interests.

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

If ODFW denies this request to repeal OAR 635-800-0300, the Tribe 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 deletions and additions to the adopted language that the Tribe deems to reflect an acceptable remedy to its concerns. The proposed amendments align with those previously proposed by the Tribe and are intended to minimize the risk of future conflict between the Grand Ronde Tribe, the State of Oregon, and the Tribe 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 many other tribal cooperative agreements, rather than an isolated outlier. This amendment to the geographic scope will remain significant, and will continue to demonstrate its relevance, as ODFW enters into future tribal cooperative agreements of similar natures.

## **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 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). Accordingly, the Tribe 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 the Tribe. *See* OAR 137-PETITION TO REPEAL OR, ALTERNATIVELY, AMEND OAR 635-800-0300 PAGE 12

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” the Grand Ronde Tribe. Office of the Secretary of State, Notice of Proposed Rulemaking – Chapter 635 Dep’t of Fish And Wildlife, 1 (June 15, 2023). The Tribe assumes that the substantive goal of the rule is to advance the relationship between the State and the Grand Ronde Tribe by increasing fishing and hunting harvest opportunities for members of the Grand Ronde Tribe. The primary basis for the Tribe’s opposition to the rule is both cultural and economic. The Tribe’s members exercising treaty-reserved fishing rights often sell salmon and steelhead commercially. The rule, by introducing a vague and uncertain management scheme, 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 the Tribe’s proposed amendments to the rule or promulgating a new rule that does not conflict with the Tribe’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). The Tribe does not object to or seek to undermine this need. Advancing a government-to-government relationship with one tribe, however, should not be done in a way that is an affront to the sovereignty of another. 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 the State of Oregon in areas where the Tribe has treaty-reserved rights to fish, hunt, and gather.

The geographic scope amendment advanced by the Tribe allows the stated need for the rule—advancing the government-to-government relationship—to proceed without trampling on the rights, interests, and concerns of the Tribe and its own sovereign interests. For the reasons explained in this

Petition, the Commission has other options for achieving its goal *and* avoiding significant conflicts with the CTWS 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, the Tribe, the federal government, and other tribal nations. The rule and the MOA are silent as to the Tribe'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 the Tribe's current co-management arrangements. Moreover, despite the potentially significant effect that the MOA would have on co-management, ODFW failed to engage in timely and substantive consultation with the Tribe prior to approving the MOA or the rule. As a result, the Tribe has no sense of how ODFW plans to approach co-management moving forward. The potential complexity created by the rule could be avoided by ODFW either repealing the rule or adopting the Tribe'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 V.B., above, the Tribe has treaty-reserved fishing, hunting, and gathering rights in western Oregon, including in the lower Columbia River and in the Willamette Basin. The broad geographic scope of the MOA creates conflict with the exercise of those federally-protected rights by the Tribe.

**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 the Tribe'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, the Confederated Tribes of Warm Springs requests that ODFW accept and act upon this Petition to repeal OAR 635-800-0300. In the alternative, the Tribe requests that ODFW amend OAR 635-800-0300 consistent with the Tribe's proposed changes set forth in Exhibit C.

THE CONFEDERATED TRIBES OF THE WARM  
SPRINGS RESERVATION OF OREGON

DocuSigned by:

*Josh Newton*

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By: Josh Newton

DocuSigned by:

*Brent H. Hall*

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By: Brent H. Hall

Of Attorneys for The Confederated Tribes of the  
Warm Springs Reservation of Oregon

Date: May 7, 2024

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**Exhibit - A**

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

December 8, 2023

**VIA E-MAIL**

Honorable Ellen F. Rosenblum  
Attorney General  
Office of Attorney General  
Oregon Department of Justice  
1162 Court St. NE  
Salem, OR 97301-4096

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

Dear Attorney General Rosenblum:

I am writing on behalf of The Confederated Tribes of the Warm Springs Reservation of Oregon (“Confederated Tribes of Warm Springs”). I seek to apprise you of what appears to be a serious irregularity associated with the purported adoption of OAR 635-800-0300 by the Oregon Fish and Wildlife Commission (“OFWC” or “Commission”).

On August 4, 2023, the OFWC purported to adopt the 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 by each of the four Columbia River Treaty Tribes<sup>1</sup> about the expansive geographic scope of the memorandum of agreement (“CTGR MOA”). Each of the Columbia River Treaty Tribes expressed significant concern that the CTGR MOA would create unnecessary inter-tribal conflict between the Confederated Tribes of the Grand Ronde Community of Oregon (“CTGR”) and them. Without meaningfully consulting with the Columbia River Treaty Tribes, the Commission rushed a vote to adopt the rule. The Commission ultimately voted 4-3 in favor of adopting the rule.

The terms of two of the commissioners, however, appear to have expired before the vote. According to the ODFW website, Commission Chair Mary Wahl’s term expired on May 14, 2023, and Commissioner Mart 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. 5, 2023). Both Chair Wahl and Commissioner Labhart voted for the adoption of the rule. Commission, Oregon Fish and Wildlife Commission Minutes, 11 (Aug. 4, 2023). If Chair Wahl’s

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<sup>1</sup> The Columbia River Treaty Tribes include the Confederated Tribes of Warm Springs, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe.



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and Commissioner Labhart's votes are not counted, the vote would have failed, and OAR 635-800-0300 would not have been adopted by the Commission.

We respectfully request your immediate assistance in determining whether the Commission's vote on August 4, 2023 purporting to adopt OAR 635-800-0300 was lawful. We specifically want to know whether Chair Wahl and Commissioner Labhart had the authority to cast votes given that their terms had expired, and if so, what action established that authority. If Chair Wahl and Commissioner Labhart did not have voting authority, we intend to file a petition, pursuant to ORS 183.390, to repeal the rule in its entirety.

It is our understanding that ODFW and CTGR are currently taking actions pursuant to the CTGR MOA. Time is, therefore, of essence to confirm whether the CTGR MOA was lawfully approved. We respectfully request that you provide us with a response on or before December 29, 2023. Thank you in advance for your attention to this important matter. If you have any questions, you may follow up directly with our legal counsel.

Sincerely,

DocuSigned by:  
  
CC:103847D37D425...  
Robert A. Brunoe  
Secretary-Treasurer / CEO  
for The Confederated Tribes of the Warm  
Springs Reservation of Oregon

cc: Tribal Council  
Austin Smith, Jr.  
Confederated Tribes and Bands of the Yakama Nation  
Confederated Tribes of the Umatilla Indian Reservation  
Nez Perce Tribe  
Columbia River Inter-Tribal Fish Commission  
Howie Arnett  
Josh Newton  
Brent Hall



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**Exhibit - B**

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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 9, 2024

Robert Brunoe, Secretary-Treasurer / CEO  
Confederated Tribes of the Warm Springs Reservation of Oregon  
PO Box C  
Warm Springs, OR 97761

Dear Secretary-Treasurer / CEO Brunoe:

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 Confederated Tribes of the Warm Springs Reservation 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,

A handwritten signature in blue ink that reads "Lisa M. Udland". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

LISA UDLAND  
Deputy Attorney General

Robert Brunoe, Secretary-Treasurer / CEO

January 9, 2024

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cc: Johnathan Smith, Jr., Tribal Chairman, CTWS  
Austin Smith, Jr., Natural Resources General Manager, CTWS  
Gerald Lewis, Chairman, Yakama Nation Tribal Council  
Gary Burke, Chairman, Umatilla Indian Reservation  
Shannon F. Wheeler, Chaiman, Nez Perce Tribal Executive Committee  
Columbia River Inter-Tribal Fish Commission  
Howard Arnett  
Josh Newton  
Brent Hall

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**Exhibit - C**

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**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 off-reservation treaty fishing and hunting 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 another federally-recognized Indian tribe.



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

April 5, 2022

Honorable Brian Schatz, Chairman  
Senate Committee on Indian Affairs  
SH-838 Hart Senate Office Building  
Washington, DC 20510

Honorable Lisa Murkowski, Vice-Chairman  
Senate Committee on Indian Affairs  
SH-838 Hart Senate Office Building  
Washington, DC 20510

**Re: Senate Bill 3123 and Senate Bill 3126, acts to address the hunting, fishing, trapping, and animal gathering rights of the Confederated Tribes of Siletz Indians and Confederated Tribes of the Grand Ronde Community of Oregon**

Dear Chairman Schatz and Vice-Chair Murkowski:

The Nez Perce Tribe writes to express its concerns regarding the current iterations of S. 3123 and S. 3126 that address the hunting, fishing, trapping, and animal gathering rights of the Confederated Tribes of Siletz Indians ("Siletz") and the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"). The Nez Perce Tribe's concerns mirror those raised by the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes of the Umatilla Indian Reservation in testimony and written correspondence.

Since time immemorial, the Nez Perce people, the Nimiipuu, have occupied and used for subsistence, cultural, ceremonial, and commercial purposes over 13 million acres in what is today the states of Idaho, Oregon, Washington, and Montana. On June 11, 1855, the Tribe reserved by treaty, and the United States secured to the Tribe, rights that the Nimiipuu have exercised since time immemorial, including the right to take fish at all usual and accustomed places, and the rights to hunt, gather, pasture, and travel.<sup>1</sup> These were not merely "rights" that impose responsibilities on the United States. For the Nez Perce they were and are a guarantee of our ability to preserve our culture and identity that is inextricably linked to the reserved rights.

The Nez Perce Tribe exercises its treaty reserved rights throughout the Columbia Basin and beyond, including Willamette Falls. The Nez Perce Tribe's understanding is that nothing in this

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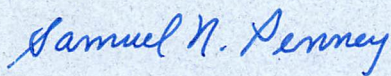
<sup>1</sup> Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

Honorable Brian Schatz  
Honorable Lisa Murkowski  
April 5, 2022  
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proposed legislation—and nothing in any successor agreement developed between the state of Oregon and a tribe that this legislation would narrowly authorize—is intended to affect or modify,<sup>2</sup> nor could it affect or modify, the exercise of the Nez Perce Tribe’s treaty-reserved rights at any location nor affect or modify the exercise of the treaty-reserved rights of any other tribe with treaty-reserved rights at any location. However, there have been indications that this understanding could be incorrect. Due to the importance of this issue, we urge the Senate Committee on Indian Affairs to ensure that this legislation does not contain or create any misunderstandings on this point.

Thank you for consideration of the Nez Perce Tribe’s concerns.

Sincerely,



Samuel N. Penney  
Chairman

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<sup>2</sup> Suzanne Bonamici, *Schrader, Bonamici Lead Push to Modernize Grand Ronde and Siletz Tribes’ Hunting and Fishing Agreements*, (Dec. 23, 2021), <https://bonamici.house.gov/media/press-releases/schrader-bonamici-lead-push-modernize-grand-ronde-and-siletz-tribes-hunting-and> (“While provisions in the bills facilitate a process to amend the Siletz and Grand Ronde Reservation Acts, the proposed legislation states that these Reservation Act amendments do not alter or change the treaty rights of any other Indian Tribe.”)



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

August 3, 2023

**Sent Via Email Only To: [curt.melcher@odfw.oregon.gov](mailto:curt.melcher@odfw.oregon.gov)**

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

***Re: Government-to-Government Consultation on Proposed Management Agreement  
Between the Confederated Tribes of the Grand Ronde Community of Oregon and  
the Oregon Department of Fish and Wildlife***

Dear Director Melcher:

The Nez Perce Tribal Executive Committee, the governing body of the Nez Perce Tribe, officially opposes any agreement between the Oregon Department of Fish and Wildlife (“ODFW”) and the Confederated Tribes of the Grand Ronde Community of Oregon (“CTGR”) with regard to fishing interests at Willamette Falls, on the Willamette River in Oregon City.

Since time immemorial the Nez Perce Tribe has exercised fishing, hunting, gathering and grazing rights throughout the northwest, including places along the Columbia and Willamette Rivers. The Willamette Falls was a seasonal stop for Nez Perce fishers to harvest lamprey, as well as salmon and other fish species. There is ethnographic evidence supporting Nez Perce use of these areas, as well as an acknowledgement by the federal government during the treaty process of the inherent right to “fish at all usual and accustomed places in common with citizens of the Territory.”<sup>1</sup>

The United States Supreme Court has repeatedly upheld the Nez Perce Tribe’s treaty right to fish at usual and accustomed fishing places off-reservation, including the right to access private property in order to fish.<sup>2</sup> The treaty right to fish is an inherent right that the Nez Perce continues to nurture as a co-manager of the fisheries resource in many areas of the pacific northwest,

<sup>1</sup> Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957.

<sup>2</sup> *United States v. Winans*, 198 U.S. 371 (1905). See also *United States v. Oregon*, 529 F.2d 570 (9<sup>th</sup> Cir. 1976); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979).

Curt Melcher, Director  
August 3, 2023  
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including the Columbia, Willamette, and Snake River basins. As a co-manager, any impact on this historical fishery is of great significance to the Nez Perce Tribe, especially if another entity is proposing new and/or exclusive rights to the Willamette Falls area.

Contrary to Nez Perce evidence-based, treaty-negotiated, and court-confirmed off-reservation fishing rights, the CTGR seeks to assert non-existent and non-recognized rights to these same areas fished by the Nez Perce Tribe (and other tribes with valid treaty fishing rights to the area). Clearly, agreeing to add new fishers to existing tribal fishers in the area would infringe on these existing lawful rights. Despite this well-known Nez Perce right to fish in the Willamette Falls area, the CTGR has not attempted to contact the Nez Perce Tribe to discuss their proposed fishery.

The Nez Perce Tribe opposes any effort by ODFW to allow CTGR tribal members to fish in the Willamette Falls area and any other area in which the Nez Perce holds usual and accustomed rights to fish. The Nez Perce Tribe would like to discuss our interest in the area and our federally recognized treaty right to fish at Willamette Falls. Please contact Marsan Lawyer, Executive Assistant, at (208) 843-2253 or marsanl@nezperce.org to schedule a government-to-government consultation.

Sincerely,



Shannon F. Wheeler  
Chairman

cc (via email only): Mary Wahl, Chair, Oregon Department of Fish and Wildlife Commission  
(ODFW.Commission@odfw.oregon.gov)