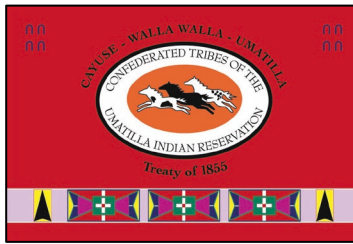


**Confederated Tribes *of the*
Umatilla Indian Reservation**

CTUIR.org



Attachment 7

Office of Legal Counsel

46411 Timine Way
Pendleton, OR 97801
541-429-7400 • fax: 541-429-7400
LegalCounsel@ctuir.org

June 11, 2024

Sent via USPS and by E-mail

Debbie Colbert, Director
Oregon Department of Fish and Wildlife
4034 Fairview Industrial Drive SE
Salem, OR 97032
E-mail: Debbie.L.COLBERT@odfw.oregon.gov

Re: Petition to Repeal OAR 635-800-0300

Dear Director Colbert,

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), I have enclosed a Petition to Repeal or, Alternatively, Amend OAR 635-800-0300. This petition is submitted pursuant to the authorities set forth in ORS 183.390 and OAR 137-001-0070. Please contact me with any questions regarding this Petition.

Sincerely,

Joseph Pitt
CTUIR Office of Legal Counsel
46411 Timine Way
Pendleton, OR 97801
541-429-7400
joepitt@ctuir.org

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

Pursuant to ORS 183.390 and OAR 137-001-0070, petitioner Confederated Tribes of the Umatilla Indian Reservation (“CTUIR” 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 Fish & Wildlife Commission’s vote to approve OAR 635-800-0300: 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 CTUIR’s Treaty of 1855, which terms are incorporated into and have the force of federal law. In the alternative, the CTUIR asks that ODFW initiate a rulemaking procedure to amend the rule.

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

Petitioner CTUIR is the legal successor-in-interest to the Indian signatories of the Treaty with the Walla Walla, Cayuse, and Umatilla Indians, dated June 9, 1855, 12 Stat. 945 (“CTUIR Treaty”). The address for the CTUIR is 46411 Timine Way, Pendleton, Oregon, 97801.

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

Pursuant to OAR 137-001-0070, the CTUIR 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.
Grand Ronde, Oregon 97347

Confederated Tribes and Bands of the Yakama Nation
P.O. Box 151
Toppenish, WA 98948

Confederated Tribes of the Warm Springs Reservation of Oregon
1233 Veterans Street
P.O. Box C
Warm Springs, Oregon 97761

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
P.O. Box 436
501 Chiloquin Blvd.
Chiloquin, OR 97624

Confederated Tribes of Siletz Indians
201 SE Swan Avenue
P.O. Box 549
Siletz, OR 97380

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

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

IV. Background.

In its Treaty of June 9, 1855, 12 Stat. 945, the CTUIR reserved for itself and its members the right to take fish at all usual and accustomed stations and to hunt, gather roots and berries, and pasture stock on unclaimed lands. CTUIR Treaty, Art. 1. Tribal members have fished in the Columbia Basin for subsistence, ceremonial and commercial purposes, and have hunted, gathered, and pastured livestock throughout their area of traditional use since time immemorial. Tribal culture reveres salmon, which is one of the First Foods, and an integral component of longhouse ceremonies and feasts.

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

The geographic scope of the CTUIR’s treaty-reserved fishing, hunting, and gathering rights are not limited to the lands ceded to the United States in the CTUIR 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 Tribe’s members, and their predecessors, have customarily fished before and since the CTUIR Treaty. See *Seufert Bros. Co. v.*

CTUIR PETITION TO REPEAL OR, ALTERNATIVELY, AMEND OAR 635-800-0300 3

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). Similarly, the United States District Court for the District of Oregon has held that the CTUIR’s treaty-reserved hunting rights extend beyond the CTUIR’s treaty-ceded area. *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 262 F.Supp. 871 (D. Or. 1966). 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 CTUIR Treaty, the CTUIR’s members have customarily fished and hunted outside of the treaty-ceded area. In western Oregon, the CTUIR has 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. These treaty-protected fishing 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 have a colorable claim to such treaty rights.¹ In 1954, Congress passed Public Law 588, 68 Stat.

¹ 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, etc. 1855; and Treaty with the Molalla, 1855. The CTUIR 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. Further, another Tribe, the Confederated Tribes of Siletz Indians asserts claims to those same treaties. *See Constitution of the Confederated Tribes of Siletz Indians of Oregon*, p.1. <https://ctsi.nsn.us/wp-content/uploads/2020/12/Constitution-04-19-2009.pdf>

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, in *The Confederated Tribes of the Grand Ronde Community of Oregon v. State of Oregon*, Case No. 86-1620-BU (D. Or.) the Grand Ronde entered into an agreement with the State of Oregon clarifying that it did not possess off-Reservation fishing, hunting, gathering or trapping rights. “Agreement Among The State of Oregon, The United States of America, and The Confederated Tribes of the Grand Ronde Community of Oregon to Permanently Define Tribal Hunting, Fishing, Trapping and Animal Gathering Rights of the Tribe and its Members” (“Settlement Agreement”). *See* Attachment A to the Joint Memorandum in Support of Consent Decree filed by the Parties in 1986. (Attached as Exhibit A to this Petition.). 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 State regulation pursuant to a special license granted by the State. *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 P.3d 705 (2011) (holding that the Settlement Agreement does not prohibit the State from allowing for additional hunting for Grand Ronde Tribe under State regulation).

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.” (“CTGR MOA”) The Commission took such ostensible action despite the CTUIR’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 CTUIR’s objections were presented both in writing before the August 4, 2023 hearing, and also through testimony provided at the hearing. As with objections from three other Tribes and an inter-Tribal organization², the objections were well-developed and clearly articulated strong concern about the expansive geographic scope of both OAR 635-800-0300, and the corresponding memorandum of

² The three other Tribes that presented objections at the August 4 hearing, prior to the unprecedented vote over the Tribal objections, were the Confederated Tribes of the Warm Springs Reservation of Oregon, the Yakama Nation and the Nez Perce Tribe, all of whom have filed similar petitions challenging the CTGR MOA. The inter-tribal organization was the Columbia River Inter-Tribal Fish Commission. Members of the public presented objections to the MOU as well.

agreement (“MOA”). The CTUIR asserted that the MOA would, among other problems, create unnecessary inter-tribal conflict between the Grand Ronde Tribe and the CTUIR’s treaty-reserved fishing rights along with the treaty-reserved rights of the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Nez Perce Tribe (collectively, the “Columbia River Treaty Tribes”). Without meaningfully consulting with the CTUIR or the other Columbia River Treaty Tribes, and without addressing these Tribes’ 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 CTUIR is not aware of any legal basis for Chair Wahl and Commissioner Labhart’s authority to participate in the Commission vote on August 4, 2024.³

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 Grand 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:

³ In a letter dated December 18, 2023, the CTUIR 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 B.

“[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 Grand 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(1).

The geographic scope of the MOA is vastly 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 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 CTUIR objects to the geographic scope of the MOA because it includes areas where the CTUIR 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 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. MOA at § 5.a. Neither ODFW nor the Grand Ronde Tribe have provided the CTUIR with sufficient explanation as to why they believe that the geographic scope of the MOA is appropriate in light of the CTUIR’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

CTUIR PETITION TO REPEAL OR, ALTERNATIVELY, AMEND OAR 635-800-0300 8

drafted, creates conflict with the terms of the CTUIR's Treaty of 1855, which terms 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 P.2d 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 P.2d 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 P.3d 275 (2007) (characterizing statutes contemplating appointees serving at the pleasure of appointing authority as "hiring and firing"). Interpretations of "serves at the pleasure" 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 statutes laid down in *State v. Gaines*, 346 Or. 160, 206 P.3d 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

CTUIR PETITION TO REPEAL OR, ALTERNATIVELY, AMEND OAR 635-800-0300 9

(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 were 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 CTUIR Treaty of 1855.

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 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 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 S.Ct. 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 CTUIR’s Treaty of 1855 is incorporated into federal law. *See* 12 Stat. 945.

The CTUIR’s treaty rights extend throughout its ceded lands as well as the areas that the CTUIR’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 U.S. 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 encompasses usual and accustomed treaty fishing areas of the CTUIR, 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 CTUIR'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 Grand 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 CTUIR's members and the Grand 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 CTUIR's treaty rights.

ODFW is bound to observe the CTUIR's treaty rights and, accordingly, must avoid any conflicts between its regulations and the CTUIR Treaty of 1855. 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 CTUIR'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 CTUIR, and the other

CTUIR PETITION TO REPEAL OR, ALTERNATIVELY, AMEND OAR 635-800-0300 11

Columbia River Treaty Tribes, to adequately hear, understand, and consider their concerns in the interest of recognizing and avoiding conflicts with the CTUIR'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 CTUIR deems to reflect an acceptable remedy to its concerns. The proposed amendments align with those previously proposed by the CTUIR and the other Columbia River Treaty Tribes and are intended to minimize the risk of future conflict between the Grand Ronde Tribe, the State of Oregon, and the CTUIR 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 CTUIR 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 CTUIR. *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” 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 CTUIR’s opposition to the rule is both cultural and economic. The CTUIR’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 CTUIR’s proposed amendments to the rule or promulgating a new rule that does not conflict with the CTUIR’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 CTUIR 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 CTUIR has treaty-reserved rights to fish, hunt, and gather.

The geographic scope amendment advanced by the CTUIR 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 CTUIR 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 CTUIR’s Treaty of 1855.

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 and the lower Columbia River. The rule ignores the MOA’s potential impact on this legally and technically complex management regime, which involves ODFW, the CTUIR, the federal government, and other tribal nations. The rule and the MOA are silent as to the CTUIR’s fishing practices in the areas included in the MOA’s geographic scope. 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 CTUIR prior to approving the MOA and the rule. As a result, the CTUIR 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 CTUIR’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 CTUIR has treaty-reserved fishing 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 members of the CTUIR.

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 CTUIR'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 CTUIR requests that ODFW accept and act upon this Petition to repeal OAR 635-800-0300. In the alternative, the CTUIR 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
UMATILLA INDIAN RESERVATION



Joseph Pitt, OSB No. 081134

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*Of Attorneys for the Confederated Tribes of the
Umatilla Indian Reservation*

Dated this 11th day of June, 2024.

AGREEMENT

AMONG THE STATE OF OREGON,
THE UNITED STATES OF AMERICA
AND THE CONFEDERATED TRIBES OF
THE GRAND RONDE COMMUNITY OF
OREGON

TO PERMANENTLY DEFINE
TRIBAL HUNTING, FISHING, TRAPPING AND
ANIMAL GATHERING RIGHTS OF THE TRIBE
AND ITS MEMBERS

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AGREEMENT

1
2 1. Parties and Definitions.

3 a. The following entities are the parties to
4 agreement and they shall be defined for the purposes of this
5 agreement as follows:

6 i. "Tribe" shall mean the Confederated Tribes of
7 the Grand Ronde Community of Oregon, as referred to in Public Law
8 98-165, 97 Stat. 1064 (currently codified at 25 U.S.C.
9 §§713-713g), and all tribal members, present and future.

10 ii. "State" shall mean the State of Oregon acting
11 through the Oregon Department of Fish and Wildlife, an
12 administrative agency of the State of Oregon; the Department of
13 Justice of the State of Oregon; the Oregon State Police; and any
14 successor agencies or officials of the State of Oregon that may
15 have regulatory jurisdiction over the harvest of fish or wildlife
16 within the State of Oregon.

17 iii. "Department" shall mean the Oregon Department
18 of Fish and Wildlife and any successor agencies that may have
19 regulatory jurisdiction over the harvest of fish or wildlife
20 within the State of Oregon.

21 iv. "The United States" shall mean the United
22 States of America; the United States Department of the Interior
23 and agencies within that department; and the United States
24 Department of Justice and agencies within that department. The

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26 //

1 United States is a party to this agreement solely in its capacity
2 as trustee for the Tribe and its members.

3 b. The term "cultural" shall describe the tribal
4 fishing, hunting, or gathering rights and opportunities set forth
5 in this agreement.

6 2. Statement of Purpose. This agreement has been
7 negotiated because of the following factors:

8 a. The nature and extent of tribal hunting, fishing,
9 animal gathering, and trapping rights are presently unknown.
10 They have not been defined by any court. The question is
11 exceedingly complex, involving numerous acts of Congress,
12 executive orders, and treaties. There is disagreement about the
13 Tribe's hunting and fishing rights. The Tribe contends that it
14 possesses tribal hunting, fishing, trapping, and animal gathering
15 rights. The State, on the other hand, disagrees and presently
16 enforces state law whenever the Tribe or its members hunt, fish,
17 trap, or gather animals, contrary to any provision of the law.

18 b. Thus, in order to resolve this controversy and to
19 promote sound and orderly management and conservation of fish and
20 wildlife resources, it is the desire of the parties to define,
21 specifically and permanently, the nature and extent of the
22 Tribe's rights.

23 3. Controlling Principles. This agreement shall be
24 construed in accordance with the following principles:

25 a. This agreement shall fully and completely define
26 the tribal hunting, fishing, trapping and animal gathering

1 rights, and no additional tribal rights shall hereafter exist
2 except those which are specifically set forth in this agreement.

3 b. Any hunting, fishing, trapping, and animal
4 gathering, including method, time, and place, which is conducted
5 by the Tribe or its members and which is not specifically
6 permitted by this agreement shall be subject to regulation under
7 applicable state laws.

8 c. Resolution of questions regarding the existence or
9 extent of any tribal right to gather plants is specifically
10 excluded from this agreement.

11 d. The parties are determined to implement this
12 agreement in a cooperative and positive manner. The parties
13 intend to assist each other in the implementation of this
14 agreement and to exchange among themselves all documents and
15 other information concerning the implementation of this
16 agreement.

17 e. All of the parties have negotiated this agreement
18 voluntarily; have signed it free of any pressure, coercion, or
19 duress of any kind; and have been extensively advised by counsel,
20 all of whom are intimately familiar with the legal issues
21 addressed by this agreement. The parties have all had full
22 access to all of the relevant facts, legislative history, and
23 judicial precedent. The parties, therefore, intend this
24 agreement to be the sole, exclusive statement of any tribal
25 hunting, fishing, trapping, and animal gathering rights which the
26 Tribe does possess and of those which it does not possess. The

1 parties expressly intend that this agreement shall not be
2 contested or reopened at any time.

3 f. The Tribe is a sovereign government and is legally
4 empowered to represent its members in this agreement. This
5 agreement, therefore, shall be permanently binding on all tribal
6 members, present and future.

7 g. The parties agree that the State shall retain the
8 sovereign authority to manage fish and wildlife resources under
9 applicable provisions of Oregon law, both on and off any
10 reservation established for the Tribe, subject to the provisions
11 of this agreement.

12 h. This agreement is based on the special
13 circumstances surrounding the relationships of the parties and
14 does not affect the rights of any persons, tribes, or groups who
15 are not parties to this agreement.

16 4. Fishing Rights. In addition to those fishing rights or
17 privileges accorded to citizens or licensees of the State under
18 state law, the Tribe shall have the rights set forth in this
19 paragraph.

20 a. The Cultural Fishery.

21 (1) Fishing by Tribal members shall be subject to
22 all applicable state laws, except that a valid tribal license
23 issued pursuant to this agreement may be used in lieu of a state
24 fishing license within the following area:

25 Beginning at McMinnville; southwest on State
26 Highway 18 to Salmon River; west along Salmon River to Pacific

1 Ocean; north along Pacific Ocean coastline to the south shoreline
2 at mouth of Tillamook Bay; east along south shoreline of
3 Tillamook Bay; east along Wilson River to State Highway 6 at
4 Lee's Camp; northeast on State Highway 6 to State Highway 8 near
5 Gales Creek; southeast on State Highway 8 to State State Highway
6 47 at Forest Grove; south on State Highway 47 to State Highway
7 99W; southeast on State Highway 99W to the McMinnville point of
8 beginning. Cultural fishing is permitted in the Salmon River and
9 its estuary to the Pacific Ocean, and in the Wilson River to
10 Tillamook Bay.

11 (2) All fishing pursuant to this agreement shall
12 occur only during the fishing seasons prescribed for all citizens
13 in the geographic area described in section 4(a)1 above.

14 (3) All tribal fishing pursuant to this agreement
15 shall be subject to all of the rights of landowners and tenants
16 under state trespass laws and other applicable provisions of law.

17 b. The Subsistence Supply. In addition to the
18 cultural right to fish set forth above, the Tribe shall have the
19 right to receive, at its option, 4000 pounds annually of surplus
20 salmon carcasses from a source to be determined by the
21 Department. These fish shall be fit for human consumption and
22 grade one fish shall be supplied if available. After the Department
23 has sorted the surplus salmon and has determined which fish are
24 available for consumption, the Tribe at its option may
25 participate in the final selection of these fish. An authorized
26 agent of the Tribe shall be responsible for pickup of salmon

1 carcasses at an appropriate location or locations designated by
2 the Department and reasonably convenient to the Tribe. The Tribe
3 shall make all arrangements for the consumption of such fish, but
4 such fish shall not be used for any commercial purpose.

5 c. Prohibited Acts. The following acts shall not be
6 included within the Tribe's cultural fishing rights and are
7 subject to regulation under applicable state or federal law:

8 (1) The taking of salmon, steelhead, or other
9 game fish that require, now or in the future, a state tag, stamp
10 or similar control over and above a state fishing license.

11 (2) Net fishing, including gill netting, and dip
12 netting.

13 (3) The use of fish, or parts thereof, for
14 commercial purposes.

15 (4) The taking of fish in a geographic area other
16 than that established pursuant to this agreement.

17 (5) The taking of fish in violation of any of the
18 limitations set forth in this section 4 or the licensing and
19 tagging provisions as set forth in section 7 below.

20 5. Hunting Rights. In addition to those hunting rights or
21 privileges accorded to citizens or licensees of the State under
22 state law, the Tribe shall have the rights set forth in this
23 paragraph.

24 (a) Cultural Hunting

25 (1) The Tribe shall have the opportunity to
26 harvest a total of 395 deer and elk (which total shall not

1 include more than 45 elk) and 5 bear per year within the area
2 described in section 4(a)(1) above. The parties acknowledge that
3 the annual harvest may be less than 395 deer and elk and 5 bear
4 and that there shall be no makeup of deer or elk or bear harvest
5 in subsequent years. No state license shall be required for game
6 taken pursuant to this section. Tribal hunting shall be subject
7 to the State's right to regulate for conservation purposes.

8 (2) All hunting pursuant to this agreement shall
9 occur only during deer and elk and bear seasons prescribed by the
10 Department for all citizens in the geographic area described in
11 section 4(a)(1), above. If the Department prescribes a controlled
12 deer or elk season whereby participants must draw for permits, and
13 all of the hunt will be within the geographic area described in
14 section 4(a)(1), the Department shall provide permits to the Tribe,
15 at the Tribe's option, for the controlled hunt of up to 10 percent
16 of the total controlled permits authorized for all citizens. If the
17 section 4(a)(1) geographic area is only a percentage of a larger
18 controlled hunt area, the Tribe shall be entitled to 10 percent of
19 that percentage of the total permits issued. For instance, if the
20 portion of the 4(a)(1) geographic area included in a controlled hunt
21 is determined to be 47 percent of the total area designated for the
22 controlled hunt, and 100 permits are available for the total hunt
23 area, the Tribe's allocation will be calculated on 47 percent of
24 100, or 47, permits. Ten percent of 47 permits would yield five (5)
25 controlled permits allocated to the Tribe (rounding 4.7 to the
26 nearest whole number).

1 (3) The Tribe shall have no right to additional
2 deer or elk permits under the landowner preference provisions of
3 ORS 496.146(4).

4 (4) Permits issued to the Tribe for controlled
5 hunts shall be valid only when used with an unused tribal tag.
6 Thus, total harvest of deer and elk cannot exceed 395 animals, as
7 provided for in section 5(a)(1). Weapons, antler regulations,
8 methods, and other regulations for tribal hunting shall be the
9 same as established by the State for all citizens.

10 (5) All tribal hunting pursuant to this agreement
11 shall be subject to all of the rights of landowners and tenants
12 under state trespass laws and other applicable provisions of law.

13 (6) All hunting pursuant to this section shall be
14 in accordance with the licensing and tagging procedures set forth
15 in section 7 below.

16 b. Prohibited Acts. The following acts shall not be
17 included within the Tribe's cultural hunting rights and are
18 subject to regulation under applicable state or federal law.

19 (1) The hunting of animals other than deer and
20 elk and bear.

21 (2) The use of deer or elk or bear meat for
22 commercial purposes.

23 (3) The taking of deer or elk or bear in a
24 geographic area other than that described in section 4(a)(1),
25 above.

26 //

1 (4) The taking of deer or elk or bear in excess
2 of the number specified in this agreement.

3 (5) The taking of deer or elk or bear in
4 violation of any of the limitations set forth in this section 5
5 or of the licensing and tagging provisions, as set forth in
6 section 7 below.

7 6. Trapping and Cultural Animal Gathering. In addition to
8 those trapping and animal gathering rights or privileges accorded
9 to citizens or licensees of the state under state law, the Tribe
10 shall have the rights set forth in this paragraph. The Tribe
11 shall have no tribal trapping rights. The Tribe and its members
12 shall have the right to gather eels (lampreys) and fresh water
13 mussels for non-commercial uses subject to the State's right to
14 regulate for conservation purposes, within the area described in
15 section 4(a)(1), above. Gathering of sea anemones, rock oysters
16 (piddocks), crawfish, and saltwater mussels by tribal members
17 within, or in the ocean adjacent to, the area described in
18 section 4(a)(1) shall be subject to all applicable state laws,
19 except that upon request of the Tribe, the Department may issue
20 special gathering permits which will provide the Tribe an
21 opportunity to gather these animals for ceremonial and
22 subsistence purposes. The Department shall designate the number
23 of special gathering permits to be issued annually, the quantity
24 of animals to be harvested, size limits, gear, degree of
25 allowable removal, and area of harvest. A valid tribal license
26 issued pursuant to this agreement may be used in lieu of any

1 personal use state license that may be required for such
2 gathering of the above listed species and clams.

3 7. Licensing and Tagging System. The Tribe and its
4 members shall not exercise any of the tribal rights provided for
5 in this agreement to harvest fish, deer, elk or bear (referred to
6 as "animals" in this section), except pursuant to the terms of
7 this section. Any person who has not complied fully with the
8 provisions of this section shall be subject to prosecution under
9 state law. Except for the provisions of this section, no state
10 licenses or tags shall be required for animals taken pursuant to
11 this agreement.

12 a. Every tribal member exercising tribal fishing or
13 hunting rights shall have in possession a valid tribal license
14 (containing at a minimum the member's name, photograph, and
15 enrollment number). Every tribal member exercising tribal
16 hunting rights shall also have in possession a valid tag issued
17 pursuant to this section for the type of animal being sought.

18 b. The Department shall annually issue without charge
19 to the Tribe 350 deer tags, 45 combination tags valid for taking
20 either one deer or one elk, and 5 bear tags. The Tribe shall
21 control the issuance of such tags to its members.

22 c. Whenever an animal is taken, the tag shall be
23 promptly filled out by the tribal member and promptly affixed to
24 the animal. The information listed on the tag shall be provided
25 to the tribal office within a time period prescribed by the
26 Tribe.

1 d. The Tribe shall keep accurate, current records
2 concerning the number of animals taken and the persons to whom
3 tags have been issued.

4 e. Any tribal member shall be subject to state
5 regulation under state law if (1) the tribal member does not have
6 a valid tribal license and a valid applicable tag in possession,
7 (2) a tribal member has not properly filled out a tag and affixed
8 it to the animal, or (3) a tribal member has not complied with
9 all other state tagging, possession, and transportation
10 regulations, so long as they are not inconsistent with this
11 agreement.

12 f. All tribal records kept pursuant to this section
13 shall be complete and current in all respects, and shall be
14 subject to inspection by the State upon reasonable notice.

15 g. If the State believes that the tribal licensing
16 and tagging system is inadequate in whole or in part, the State
17 shall so notify the Tribe. The Tribe shall take necessary
18 corrective measures. If the State believes that such corrective
19 measures are inadequate, the State shall negotiate with the Tribe
20 for the assumption of licensing and tagging responsibilities by
21 the State. If agreement is not reached by the parties, the State
22 may petition the United States District Court for an order
23 directing that full control of licensing and tagging be assumed
24 by the State until necessary corrective measures have been taken
25 by the Tribe.

26 //

1 8. Relationship of this Agreement to the Establishment of
2 a Tribal Reservation.

3 a. This agreement shall contain the exclusive
4 definition of tribal hunting, fishing, trapping and animal
5 gathering rights. The creation of a tribal reservation, or the
6 addition of lands to an existing reservation, shall not in any
7 way add to or detract from the provisions of this agreement. All
8 hunting, fishing, and trapping by the Tribe, on or off any tribal
9 reservation or lands of any tribal member shall be in accordance
10 with the terms of this agreement.

11 b. This agreement does not imply any state position
12 on proposals for designation of particular lands as a
13 reservation. If a reservation is created, the State shall have
14 the right, subject to the specific provisions of this agreement,
15 to manage all fish and wildlife resources on the tribal
16 reservation, in accordance with applicable provisions of Oregon
17 law.

18 c. The Tribe intends to leave any reservation
19 established open to the public for hunting and fishing and
20 general recreation. The Tribe does not by this agreement, waive
21 any rights it may have to close all or part of such reservation
22 when necessary in the future. If there is to be any closure, or
23 partial closure, the Tribe shall consult with the Department
24 before taking action. If the Tribe acquires any land containing
25 any watercourse on which there is now a public right to float or

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1 fish from a boat, such public right shall be unaffected by the
2 acquisition of such lands.

3 d. The Tribe reserves the right to regulate or
4 prohibit the public's gathering of plants on any reservation
5 established.

6 e. Whenever the Tribe plans to engage in any activity
7 for which a permit would normally be required from the Department,
8 the Tribe shall consult with the Department and meet the minimum
9 standards established by the Department for such activities.

10 f. The Tribe agrees that it will meet minimum
11 environmental standards established by state and local laws for
12 resource development activities which may impact fish and
13 wildlife habitat, including but not limited to water development,
14 fill and removal, and timber harvesting. The parties recognize
15 that the Tribe intends to use most of the lands identified in the
16 Grand Ronde Reservation Plan dated November, 1985, for the
17 purpose of harvesting timber. The Tribe shall conduct land use
18 planning in an environmentally sound manner generally consistent
19 with state and local land use goals as they relate to fish and
20 wildlife habitat.

21 9. Effective Date of Agreement. No part of this agreement
22 shall be effective until this agreement is approved by the United
23 States District Court and merged into a final and permanent
24 decree and order issued by such Court. If such action is taken
25 by the Court, the provisions of this agreement shall go into
26 //

1 effect immediately except that the provisions relating to the
2 cultural fishery (section 4(a), above), cultural hunting (section
3 5(a), above), and cultural animal gathering (section 6, above)
4 shall go into effect 30 days after the Tribe notifies the State
5 in writing of the establishment of its licensing and tagging
6 procedures (section 7, above).

7
8 _____
9 Date Don Barth 11-29-86
10 Don Barth, Chairman
11 Oregon Fish and Commission
12 Wildlife Commission

_____ Mark Mercier
Date 12/1/86
Mark Mercier, Chairman
Confederated Tribes of
the Grand Ronde Community
of Oregon

13 _____ Anne W. Squier
14 Date 12/1/86
15 Anne W. Squier
16 Assistant Attorney General
17 State of Oregon
18 Of Attorneys for Oregon
19 Department of Fish and Wildlife

_____ Sande Schmidt
Date 12/1/86
Sande Schmidt, Attorney
Confederated Tribes of the
Grand Ronde Community of
Oregon

20 _____ George D. Dysart 12/2/86
21 George D. Dysart
22 Special Assistant United States
23 Attorney
24 United States Department of
25 Justice

_____ Stanley Speaks
Date 12/2/86
Stanley Speaks
Portland Area Director
Bureau of Indian Affairs
Department of the Interior
United States of America

Umatilla Indian Reservation

Board of Trustees



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December 18, 2023

VIA E-MAIL

Honorable Ellen F. Rosenblum
 Attorney General
 Office of Attorney General
 Oregon Department of Justice
 1162 Court Street 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 Umatilla Indian Reservation (“CTUIR”). I am writing to inquire about 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.

On August 4, 2023, the OFWC 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 this action despite substantial objections by each of the Columbia River Treaty Tribes¹ about the expansive geographic scope of the memorandum of agreement (“CTGR MOA”). The CTUIR expressed significant concern that the CTGR MOA would create unnecessary inter-tribal conflict within that geographic scope. Without meaningfully consulting with the CTUIR or the other Columbia River Treaty Tribes or addressing our sovereign concerns, 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 Oregon Department of Fish and Wildlife 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, [ODFW Commission Members \(state.or.us\)](https://www.odfw.state.or.us/commission-members) (last visited Dec. 11, 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 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.

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

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 Oregon Department of Fish and Wildlife and CTGR are currently taking actions pursuant to the CTGR MOA. Time is, therefore, of essence with respect to 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, please communicate directly with our Lead Attorney, Joe Pitt, 541-429-7400 or JoePitt@ctuir.org.

Sincerely,



Gary I. Burke, Chairman
Chairman, Board of Trustees

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

Shannon Wheeler, Chairman
Nez Perce Tribe

Gerald Lewis, Chairman
Confederated Tribes and Bands of the Yakama Nation

Aja K. DeCoteau, Executive Director
Columbia River Inter-Tribal Fish Commission

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.