

**MEMORANDUM OF AGREEMENT
BETWEEN**

**The Wallowa Lake Irrigation District, Confederated Tribes of the Umatilla Indian Reservation,
Nez Perce Tribe, and the Oregon Department of Fish and Wildlife**

This Memorandum of Agreement (MOA) is executed (in counterparts) by the Wallowa Lake Irrigation District, Confederated Tribes of the Umatilla Indian Reservation, Nez Perce Tribe, and Oregon Department of Fish and Wildlife on the dates set out below. These entities are hereinafter referred to collectively as the “Parties.”

RECITALS

- A. Wallowa Lake is a natural glacial lake situated near the headwaters of the Wallowa River (Grande Ronde River, Snake River Basin). Located at the foot of the Wallowa Mountains, the lake is the centerpiece of Wallowa County’s agricultural, natural resource, and tourism economy. Wallowa Lake Dam was constructed in 1916, and rebuilt in 1929, to store water for irrigation purposes. Storage rights for Wallowa Lake are contained in three water rights held by the Wallowa Lake Irrigation District (WLID):
- Certificate 2949 – 9,230 acre-feet (AF) for irrigation, livestock and domestic uses, with a priority date of 1905.
 - Certificate 9310 – 44,000 AF for irrigation, livestock and domestic uses, with a priority date 1915.
 - Certificate 87896 – 5,257 AF for multipurpose uses with priority date 1967. Within this certificate, 480 AF is currently under contract with the City of Joseph, Oregon for municipal purposes.
- B. Wallowa Lake Dam is a high-hazard dam, meaning it would likely result in loss of life if it were to fail. A 1978 report of the U.S. Army Corps of Engineers identified potential structural issues and recommended that water not be stored above a certain level. Subsequent inspections by the Oregon Water Resources Department concurred in the need to restrict the storage levels. In June 2019, the State of Oregon legislature approved House Bill 5030, which authorized the Oregon State Treasurer to issue lottery bonds in an amount that produces \$14,000,000 in net proceeds for the purpose of rehabilitating the Wallowa Lake Dam. The issuance of the funds is conditioned upon the WLID, Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Nez Perce Tribe (NPT), and the Oregon Department of Fish of Wildlife (ODFW) entering into an agreement regarding the protection and release of instream water from the Wallowa Lake Dam.
- C. The purpose of this MOA is to provide for the release of up to 5,000 AF from Wallowa Lake, with 4,500 AF to be protected instream to the Oregon-Washington state line as a secondary instream water right. Additionally, up to 500 AF will be used for voluntary water trades between an individual irrigator, group of irrigators, irrigation company, ditch company, or irrigation district with live flow irrigation rights from a tributary of the Wallowa River. The tributary live flow irrigation water right could be traded with the WLID for stored water from Wallowa Lake pursuant to a trade agreement that has been approved by the Parties. This water trade will allow the irrigator to receive stored water, leaving the existing live flow irrigation right released

instream within the applicable tributary, and protected as instream flow that makes its way downstream through the tributary and downstream instream to the Oregon-Washington state line.

- D. The Parties have a mutual interest in restoring, protecting and enhancing anadromous and resident fish species, wildlife, economic, and cultural resources affected by the Wallowa Lake Dam; and providing long-term water management solutions for the Wallowa and Grande Ronde River basins.
- E. The recitals set forth above are hereby incorporated herein by reference as if set forth in full in the body of this MOA.

AGREEMENT

THEREFORE, the Parties agree as follows:

1. Definitions: As used in the MOA, all references to:
 - a. the “completion date” of the Wallowa Lake Dam rehabilitation means the date on which the design build contractor responsible for completing the dam rehabilitation executes a written completion notice, and that notice is approved by the OWRD Dam Safety Program. The WLID will provide all Parties with a copy of said written notice. All time periods set out in this MOA that commence upon the completion of the Wallowa Lake Dam rehabilitation shall run from the completion date; and, in addition,
 - b. a “trade agreement” refers to an agreement between WLID and an individual irrigator, group of irrigators, irrigation company, ditch company, or irrigation district for the purpose of trading stored water in Wallowa Lake for surface water rights withdrawn from Wallowa River tributaries to be transferred, leased, or exchanged instream; and, in contrast,
 - c. a “water delivery agreement” is an agreement between WLID and an individual irrigator, group of irrigators, irrigation company, ditch company, or irrigation district, as described in Section 6 below.
2. Commencing one year after the rehabilitation of Wallowa Lake Dam is complete, the WLID will release a minimum of four thousand five hundred (4,500) AF and, subject to the terms and conditions set out below, up to five thousand (5,000) AF of water from Wallowa Lake for instream use and for purposes of trading stored water for existing surface flow water rights to be transferred, leased, or exchanged instream on Wallowa River tributaries. WLID will release water as follows:
 - a. Notwithstanding the one-year waiting period described above, during the first year after the completed rehabilitation of Wallowa Lake Dam, the WLID will maintain a minimum flow of 15 cubic feet per second (cfs) as measured by OWRD or other qualified contractor as determined by OWRD at the Russell Lane Bridge.

- b. The WLID will release 4,500 AF as directed by an Annual Operations Plan (AOP; see Section 9.c) and as measured by OWRD at the Russell Lane Bridge on the Wallowa River near Joseph, OR for compliance purposes. In addition, the Wallowa River gauge below Water Canyon, near Wallowa, OR (USGS Station 13331450) will be used to track protection of the release. The 4,500 AF will be protected through a secondary instream water right applied for by ODFW and held in trust by the State of Oregon (see Section 8), with the proposed instream reach from Wallowa Lake Dam to the Oregon/Washington state line.

OWRD will also monitor USGS gauge records at the station on the Grande Ronde River near Troy, OR (USGS Station 13333000); however, these monitoring records will not be utilized for compliance purposes.

If any of the aforementioned stations become unavailable for gauging flow because of channel conditions, or discontinuance or a lack of funding to support monitoring, OWRD will make a recommendation on station replacement to the parties.

- c. The WLID will release an additional 500 AF for the purpose of trading stored water in Wallowa Lake with surface water rights withdrawn from Wallowa River tributaries to be transferred, leased, or exchanged instream pursuant to a trade agreement that has been approved by the Parties.
 - d. The WLID has no obligation to protect, nor does it guarantee that the 4,500 AF described in Section 2.b above or the 500 AF described in Section 2.c above will remain instream to the Oregon/Washington state line.
3. The Parties will approve a trade agreement based on consistency with the following criteria, as determined by the Parties:
 - a. Surface water to be traded for storage water is senior in priority date relative to the stream of interest, and with proven reliability as determined by the Parties (e.g., Parties determine based upon specific facts that surface water transferred or leased instream either permanently or temporarily would result in meaningful ecological benefits);
 - b. Surface water to be traded for stored water is legally transferred or leased instream either permanently or temporarily in the tributary reach to the Oregon/Washington state line or to the extent to which it can be legally protected as determined by OWRD; and
 - c. Surface water to be traded whether transferred or leased instream either permanently or temporarily to maintain flexibility, must also provide some reliable water to fish, wildlife, irrigators, and serve ecological benefits in tributaries.
 4. If demand for trade agreements exceeds the 500 AF allocated above then the 4,500 AF committed to instream uses under this MOA may also be available for trade agreements upon further agreement of the Parties.

5. Subject to Section 13, ODFW will pay:
 - a. the application fees (excluding attorney fees) of applying for the water trades described above in Section 3;
 - b. the application fees for a secondary instream water right (excluding attorney fees) as described below in Sections 7 and 8, if applicable; and
 - c. the application fee (excluding attorney fees) of applying for the change in character of use as described below in Section 9.b, if applicable.

6. The WLID must release water in accordance with a trade agreement once OWRD issues an order approving any transfers, leases, or exchanges. The Parties acknowledge and agree that OWRD's order approving a trade agreement will be upon proof of a written agreement between the individual irrigator, group of irrigators, irrigation company, ditch company, or irrigation district and the WLID for the storage and delivery of water. Any water delivery agreement shall be consistent with trade agreements. Water delivery agreements will be negotiated and approved by the WLID in its sole and absolute discretion and will include the following terms:
 - a. The amount of water to be stored by the WLID for the irrigator consistent with the trade agreements;
 - b. The acres to which the stored water may be put to beneficial use consistent with the trade agreements;
 - c. That the irrigator will be responsible for the acquisition of any easements and all costs associated with the transmission of water from the point of delivery to the place of use;
 - d. That the irrigator will indemnify the WLID for any claim arising out of the irrigator's diversion and use of water;
 - e. For the rationing of water by the WLID in the event of water shortfall, drought, emergency, or dam maintenance or repair; consistent with other irrigators with same water right seniority (see Section 9.a);
 - f. Payment by the irrigator to the WLID of all annual assessments, surcharges or other costs approved by the WLID Board of Directors; pursuant to ORS 545.271 and ORS 545.484 or such other applicable provisions of ORS chapter 545 as it may be amended from time to time pertaining to WLID's authority to impose charges to water users;
 - g. The right of the WLID to terminate that agreement in the event of breach by the irrigator or in the event the irrigator's water right is cancelled or terminated; and
 - h. Such other terms determined by the WLID Board of Directors as necessary and appropriate to deliver water consistent with the trade agreements.

7. If, after 15 years following the completion of the Wallowa Lake Dam rehabilitation project, no storage water from Wallowa Lake has been permanently transferred or subject to a lease on a temporary basis and no trade agreement application for stored water has been filed with OWRD, then every year thereafter WLID agrees to release a minimum of 4,600 AF, protected instream consistent with Section 2.b above, provided however that any Party to this MOA is entitled to extend this 15-year period for an additional term of five (5) years by written notice to the other Parties not later than 180 days prior to the expiration of that 15-year period. If this 15-year period runs and no Party timely provides notice of a 5-year extension, then at that time, no further trade agreements may be formed and ODFW will apply for a secondary instream water right for an additional 100 AF to be held in trust by the State of Oregon. The secondary instream water right for 100 AF will be combined with the existing secondary instream water right of 4,500 AF (see Section 2.b above) to meet the annual release of 4,600 AF.
8. Following completion of the Wallowa Lake Dam rehabilitation, ODFW will file a secondary instream water right application with OWRD to use stored water from Wallowa Lake referred to in Section 2.b above. The proposed instream reach will be from Wallowa Lake Dam to the Oregon/Washington state line. The source of water for the secondary instream water right will utilize the most senior water available, consistent with Oregon water law. In the event the secondary instream water right application is denied by OWRD, the WLID will continue to release the 4,500 AF described in paragraph 2.b above in perpetuity; however, all parties to this MOA acknowledge and agree that the WLID does not guarantee and is not required to take any action whatsoever to protect the water instream from Wallowa Lake to the Oregon/Washington state line.
9. The Parties understand and agree that:
 - a. At the time of signing of this MOA, existing Oregon water law prevents use of Certificates 2949 and 9310 from being used for instream use. Accordingly, Parties agree that the 500 AF used for trade agreements will come from Certificate 2949 and the initial source of water for instream releases will be an instream water right (ISWR) utilizing 4,500 AF from Certificate 87896, which is currently characterized as multipurpose, and specifically, the WLID agrees to 'call' on the certificate under which the 4,500 AF for instream releases is held for storage first (e.g., Certificate 87896), such that instream water provided pursuant to this MOA is ensured annually in full; provided further that this ISWR will include a cancellation clause describing the process by which it may be cancelled in favor of a more senior priority right in the future.
 - b. If and when laws that allow for a change in character of use for stored water are enacted, adopted, or ratified, WLID will apply for a change in character of use from irrigation to multipurpose on Certificate 2949 by submitting such an application within 180 days of the effective date of the new law; provided further that following approval of the change, ODFW will apply for a new instream right from Certificate 2949 in the amount of 4,500 AF, and also, following issuance of an ISWR utilizing stored water from Certificate 2949, ODFW will request OWRD cancel the ISWR from Certificate 87896.
 - c. Water released from Wallowa Lake Dam for instream purposes will be guided by an Annual Operations Plan (AOP), which must be developed annually by consensus of a group that includes a representative from each of the Parties to this MOA as well as a

representative from OWRD and that must include a schedule of releases of stored water from Wallowa Lake that may differ from year to year but are intended to serve ecological benefits in the Wallowa River, including tributaries, and the Grande Ronde River.

- d. The Parties obligations under this MOA are contingent upon the issuance of the lottery bonds described in Recital B above sufficient to produce \$14 million in net proceeds for the purpose of completing the Wallowa Lake dam rehabilitation as provided in HB 5030. In the event the bonds are cancelled or reduced in amount, the Parties will convene within 60 days from the date of cancellation or reduction to confer on the feasibility of alternate funding sources. If the WLID determines that no such alternate funding sources are feasible, the WLID may terminate this MOA upon written notice to the Parties.
10. In the event of a dispute or controversy arising out of or in connection with the AOP, or implementation of this MOA, the Parties agree to use good faith efforts to resolve the dispute. If the Parties are unable to resolve the dispute amongst themselves, the Parties agree to submit the matter to mediation for resolution. Any single Party may initiate mediation upon seven (7) calendar days' prior notice to the other Parties. The Parties will mutually agree upon the selection of the mediator. If the Parties are unable to agree upon the selection of the mediator, each party will vote for a mediator, and the Parties agree that the mediator with the majority of votes will be selected to preside over the mediation. If there is a split decision between the Parties as to the selection of the mediator, the Parties agree that OWRD will cast a vote to break the split decision. The costs of the mediator shall be equally shared by the Parties.
 11. The terms of this MOA may not be altered, modified, supplemented or otherwise amended, except by written agreement of the Parties.
 12. Each Party reserves all rights, powers, and remedies now or hereafter existing in law or in equity, by statute, treaty or otherwise, in participating in this MOA, and no clause herein is or shall be construed to be a waiver of the sovereign immunity of the Nez Perce Tribe, the CTUIR or the State of Oregon. Notwithstanding the foregoing, the Nez Perce Tribe and the CTUIR grant a limited waiver of sovereign immunity from unconsented suit for purposes of enforcing this MOA if all of the following four conditions are met: 1. The claim is made by a party to this MOA, and not by any other party, whether an individual or an entity of any kind; 2. The claim alleges a breach by the Nez Perce Tribe or the CTUIR of a specific obligation or duty expressly assumed by the Nez Perce Tribe or CTUIR under the terms of this Agreement; 3. The claim seeks either: a) specific reasonable action by the Nez Perce Tribe or CTUIR to bring the Nez Perce Tribe or CTUIR into compliance with the obligations or duties expressly assumed by the Nez Perce Tribe or CTUIR in the Agreement; and 4. This section is the sole basis for suit by a Party to the MOA against the Nez Perce Tribe or CTUIR, regardless of any other express language contained in the body of the Agreement and any references therefrom. Provided further; if any Party brings any suit to compel compliance with a Party's obligations in this MOA no Party will assert that the failure to join a Party, and the inability to join that Party due to state or tribal sovereign immunity, as applicable, prevents judicial determination of the rights of a Party or enforcement of the MOA on the theory that such Party is a necessary and indispensable party.

13. ODFW's obligation to pay any amounts and otherwise perform its duties under this MOA is conditioned upon ODFW receiving funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow ODFW, in the exercise of its reasonable administrative discretion, to meet its obligations under this MOA. Nothing in this MOA may be construed as permitting any violation of Article XI, Section 7 of the Oregon Constitution or any law limiting the activities, liabilities or monetary obligations of MOA.
14. If an administrative or judicial action is brought by a third party against any Party to challenge the validity of this MOA, its implementation, or any necessary component of this MOA including but not limited to any water right held by the WLID or the ISWR issued to ODFW as contemplated in Sections 7 and 8 above, each other Party shall endeavor to intervene or otherwise participate in such action, subject to necessary funding described in Section 13, above, to support implementation of the MOA in accordance with its terms herein. In addition, the WLID and ODFW must defend the validity of their respective water rights described in this MOA and unless and until a final, unappealable court decision has been rendered as to such rights, neither the WLID or ODFW may assert that any of its obligations set forth herein are rendered impossible or impracticable; provided further that if any administrative or judicial proceeding impairs the WLID's or ODFW's ability to implement the terms of this MOA, the Parties shall confer in good faith to reach agreement on alternative(s) to avoid any such impairment and otherwise to maintain the Parties' bargained-for benefits herein. For the purposes of this Section 14, an increase in cost for the performance of any obligation set forth in this MOA will not be deemed to prohibit or otherwise impair the WLID's or ODFW's ability to implement this MOA.
15. Nothing herein in this MOA is intended or shall be construed to affect or limit ODFW from complying with its obligations under applicable laws and regulations. Without limiting the generality of the foregoing, nothing herein affects ODFW's authority to request issuance of instream water rights in Oregon waters. This MOA establishes no principle or precedent with regard to any issue addressed herein or with regard to any Party's participation in any other pending or future administrative or judicial proceeding; provided further that this MOA shall not be offered in evidence or cited as precedent by any Party to this MOA in any such proceedings, mediation, or arbitration, except in a proceeding to establish the existence of or to enforce or implement this MOA. This Section 15 shall survive any termination of this MOA.
16. Subject to the obligations described in Section 14 above, a Party shall not be considered to be in default of any obligation under this Agreement, if failure of performance is due to an "Uncontrollable Circumstance. "Uncontrollable Circumstance" means any act, event, or condition that is caused by or due to circumstances beyond the reasonable control of the Party relying thereon as justification for not performing an obligation or complying with any condition required of such Party under this MOA and that materially interferes with such Party's obligations under this MOA to the extent that such act, event, or condition is not the result of the willful or negligent act, error, or omission, failure to exercise reasonable diligence, or breach of this MOA on the part of such Party. By way of example, but not limitation, each of the following shall constitute an Uncontrollable Circumstance: failure of dam facilities, flood, earthquake, tornado, storm, fire, epidemic, war, restraint by court order, law, or regulation issued by a governmental body (provided such law or regulation is not the result of lobbying by any Party to this MOA), which by exercise of due diligence and foresight such Party could not reasonably have been expected to avoid and which, by exercise of due diligence, it is unable to overcome. A

June 22, 2020

Party rendered unable to fulfill any obligation by reason of an Uncontrollable Circumstance shall, as soon as reasonably practicable, notify the other Parties of the event giving rise to such Uncontrollable Circumstance, and exercise due diligence to remove such inability with all reasonable dispatch.

17. This MOA may be executed in several counterparts, all of which when taken together shall constitute one agreement, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of the MOA so executed constitutes an original.

18. EACH PARTY, BY SIGNATURE OF ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT IT HAS READ THIS MOA, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

IN WITNESS WHEREOF, the Parties have executed this MOA as of the dates set forth below.

(SIGNATURES TO FOLLOW IN COUNTERPARTS)

June 22, 2020

N. Kathryn Brigham

N. Kathryn Brigham
Board of Trustees Chair
Confederated Tribes of the Umatilla Indian Reservation

8/3/20

Date

June 22, 2020



Shannon F. Wheeler
Chairman
Nez Perce Tribe

7-20-2020

Date

June 22, 2020

Rachel P. Edwards

Rachel P. Edwards
Secretary
Nez Perce Tribe

7-20-2020

Date

June 22, 2020

Curt E Melcher

Curt Melcher
Director
Oregon Department of Fish and Wildlife

7/7/2020

Date

June 22, 2020

Dan Butterfield

Dan Butterfield
President
Wallowa Lake Irrigation District

6-30-20

Date