July 27, 2023

VIA E-MAIL: odfw.commission@odfw.oregon.gov

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

Re: August 4, 2023 Commission Meeting – Memorandum of Agreement Between Oregon Department of Fish and Wildlife and the Confederated Tribes of Grand Ronde

Dear Commissioners:

On behalf of the Tribal Council for The Confederated Tribes of the Warm Springs Reservation of Oregon (“Confederated Tribes of Warm Springs” or “Tribe”), I am writing to urge you to take no action to approve the proposed Memorandum of Agreement (“MOA”) between Oregon Department of Fish and Wildlife (“ODFW”) and the Confederated Tribes of Grand Ronde (“CTGR”) during your August 4, 2023 meeting. It is premature to take action because ODFW has not yet resolved serious concerns that we, together with the Confederated Tribes of the Umatilla Indian Reservation (“CTUIR”) and the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), have raised about the proposed MOA’s potential impact to our federally-reserved treaty rights to fish and hunt in areas within the geographic scope of the proposed MOA.

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 (“1855 Treaty”). The 1855 Treaty reserves legally-enforceable rights to take fish at our “usual and accustomed stations, in common with citizens of the United States.” 1855 Treaty, Art 1. We also secured the privilege of hunting outside our reservation on “unclaimed lands.” Id. The geographic scope of treaty-reserved fishing and hunting rights are not limited to the lands ceded to the United States in the 1855 Treaty. With respect to treaty-reserved fishing rights, the United States Supreme Court has expressly rejected the notion that those rights are limited to our ceded area but instead extend to areas where our people have habitually fished before and since the 1855 Treaty. See Seufert Bros. Co. v. U.S., 249 U.S. 194 (1919) (recognizing right of Yakama Nation tribal members to fish as 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).
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Before and since the 1855 Treaty, our people have habitually fished and hunted outside of our ceded area. In western Oregon, we have usual and accustomed treaty 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 for us. We have similar treaty protected rights to hunt unclaimed lands in western Oregon, particularly the western slope of the Cascades, as our ancestors have done since time immemorial.

Neither the State of Oregon (“State”) nor CTGR have acknowledged the existence of our federally protected treaty-reserved fishing and hunting rights in western Oregon. And, the ODFW staff summary incorrectly contends that the proposed MOA “does not affect the rights of any other Tribe.” That contention begs the following question: How did ODFW conclude that the proposed MOA does not affect our treaty-reserved rights to fish and hunt in western Oregon? One possible interpretation is that ODFW has determined that we do not have treaty-reserved rights to fish and hunt in western Oregon. We hope that is not the case, but if it is, ODFW should advise us promptly so that we can initiate an immediate consultation with Governor Kitzhaber about the possible need for us to commence federal litigation to judicially establish our treaty-protected fishing and hunting rights in western Oregon.

On the other hand, ODFW may have simply undertaken a private assessment of the proposed MOA’s impact on our claimed treaty-protected fishing and hunting rights in western Oregon without taking a position as to whether those sovereign rights exist. The State, including ODFW, however, has no constitutional authority to undertake such a quasi-adjudication of our rights. And, when presented with our concerns, ODFW should have recognized its limited sovereign authority and immediately halted any further effort to obtain this Commission’s approval of the proposed MOA unless and until our concerns have been appropriately addressed.

ODFW, however, did not do so. You are now asked to take action on a proposed MOA in face of strong objections from us, CTUIR, and the Yakama Nation based on each of our claimed treaty-protected rights to fish and/or hunt in western Oregon. To our knowledge, this is unprecedented. Never before has ODFW asked you to approve a tribal memorandum of agreement for off-reservation hunting, fishing, trapping and gathering over the objections of other tribes. To avoid triggering possible federal litigation, we strongly urge you to take no action at your August 4 meeting on the proposed MOA and to direct ODFW staff to continue its consultation with us, CTUIR, and the Yakama Nation. The consultation should be timely, meaningful, and respectful of our sovereignty, including our off-reservation 1855 Treaty protected rights to fish and hunt.
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To avoid any misunderstanding, we generally support the notion of ODFW entering into appropriately scoped tribal memoranda of agreement with other Oregon tribes for off-reservation hunting, fishing, trapping and gathering. We have even formally supported in writing the agreement ODFW entered into with the Siletz Tribe. Our objection here is more limited. We object to ODFW entering into these agreements in specific geographic areas where we have made a sovereign determination that the agreement may impair our treaty-reserved rights to hunt and fish.

We have even proposed a geographic amendment to the proposed MOA that would allow it to proceed. That amendment aligns with the geographic scope agreed to by the Siletz Tribe. Unlike CTGR, the Siletz Tribe solicited our input early in its negotiations with ODFW. The Siletz Tribe respectfully accommodated our sovereign concerns and expressly excluded the mainstem Columbia River and the Willamette River from its mouth to the top of Willamette Falls. Unfortunately, in our abbreviated discussions with ODFW and CTGR, there has been no meaningful conferral about a similar geographic limitation. Again, we have made the sovereign determination that the geographic scope of this proposed MOA harms our interests. That ought to be enough. We ask that the Commission take no action and direct ODFW to continue its consultation with us and CTGR about limiting the geographic scope of the proposed MOA in a manner similar to the agreement ODFW entered into with the Siletz Tribe.

We trust that you will understand our concerns and see the wisdom in taking the time to get this right—that is, the time to present an agreement to you for approval that is respectful of the sovereignty of all tribes affected by the agreement. Thank you for your attention to this important matter.

Sincerely,

Jonathan W. Smith, Sr.
Chairman, Tribal Council
The Confederated Tribes of the Warm Springs Reservation of Oregon

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cc: Tribal Council
    Curt Melcher
    Geoff Huntington
    Gerald Lewis, Chair, Confederated Tribes and Bands of the Yakama Nation
    N. Kathryn Brigham, Chair, Confederated Tribes of the Umatilla Indian Reservation
    Cheryle Kennedy, Chair, Confederated Tribes of the Grand Ronde Tribal Community of Oregon
    Aja DeCoteau, Executive Director, Columbia River Inter-Tribal Fish Commission
    Robert A. Brunoe
    Austin Smith Jr.