

IN THE COURT OF APPEALS OF THE STATE OF OREGON

COLUMBIA RIVERKEEPER, NATIVE FISH SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, OREGON WILD, PACIFIC COAST FEDERATION OF FISHERMAN'S ASSOCIATIONS AND INSTITUTE FOR FISHERIES RESOURCES, THE CONSERVATION ANGLER, NEZ PERCE TRIBE, a federally recognized Indian tribe, and CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION,
Petitioners,

v.

OREGON FISH AND WILDLIFE COMMISSION,
Respondent.

Court of Appeals No. A182213 (Control)
A182217

DECLARATION OF CORINNE C. SAMS, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION BOARD OF TRUSTEES MEMBER, CHAIR OF THE FISH AND WILDLIFE COMMISSION OF THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION AND CHAIR OF THE COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, IN SUPPORT OF PETITIONERS' MOTION FOR STAY PENDING JUDICIAL REVIEW

The undersigned, Corinne C. Sams, states as follows:

1. I am a member of the Board of Trustees of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), its governing body. I am also Chair of the Fish and Wildlife Commission of the CTUIR. I am also the Chair of the Columbia River Inter-Tribal Fish Commission.

2. In our Treaty of 1855 with the United States, 12 Stat. 945, the CTUIR reserved for our members the rights we have exercised since time immemorial, including the right to take fish at all usual and accustomed places, rights of hunting, gathering, and pasturing animals on all open and unclaimed lands, and implicit rights and privileges necessary to the exercise of those rights. These rights are not limited to the Umatilla Indian Reservation, but, extend to all places our members traditionally frequented. CTUIR members continue to exercise these rights to this day, including but not limited to throughout northeast Oregon and at Wallowa Lake.

3. The Wallowa Valley in what is now eastern Oregon is a sacred place to my people. In our Sahaptian language, the word *Waláwa* refers to the fish traps or weirs members of the CTUIR once used for salmon fishing, which were common along the Wallowa River. Wallowa Lake, the source of the Wallowa River, is where members of the CTUIR historically gathered to fish for sockeye, the brilliant red salmon that once returned to the Wallowas each summer.

4. For species like sockeye, which require access to a lake to spawn, the lack of passage at Wallowa Lake Dam disrupted a journey that had occurred for millennia. In only a few years, the brilliant red fish that had once returned from the ocean each summer quietly disappeared from the Wallowas.

5. The importance of the Wallowa Valley to the CTUIR, and the providence its formerly plentiful fish and game provided our members is reflected in a report from the Umatilla Superintendent Edward L. Swartzlander to the Commissioner of Indian Affairs in Washington, D.C., dated August 30, 1921:

The Indians tell me that prior to Chief Joseph's war in 1877 the Wallowa valley was the summer home of the Nez Perce Indians and the Indians of the Umatilla Reservation; that game was abundant and the streams were full of fish; that they would camp there during the summer, and in the fall go to the lower levels along the Snake River and camp during the winter, and each succeeding summer return to their old camping ground at Wallowa.¹

Swartzlander's report goes on to discuss the Wallowa Lake Cemetery adjacent to Wallowa Lake, where hundreds of our ancestors are buried. There are many other source materials like Swartzlander's report.

6. Wallowa Lake Dam is located within 'Iwéetem'iitit (lake end) and Ha'amsaxpa (at the boulders in the river). 'Iwéetem'iitit is located along the shores of the north end of Wallowa Lake and used by tribal members from the CTUIR and Nez Perce Tribe for sockeye fishing. The northern portion of the project area is at Ha'amsaxpa, a salmon fishing site used by the CTUIR and Nez Perce Tribe. These are documented in several published materials, as discussed in the CTUIR Department of Natural Resources January 26, 2024 letter to the Corps of Engineers, attached as Exhibit A to this Declaration.

7. The CTUIR has been involved with the Wallowa Lake Irrigation District's (WLID) attempt to rehabilitate the Wallowa Lake Dam for many years. We worked collaboratively with the WLID and others, including the Nez Perce

¹ Swartzlander to the Commissioner on Indian Affairs, August 30, 1921, National Archives, Pacific Northwest Region, Record Group 75, BIA. Referenced in Tom Hampson Associates report "Making Things Right: The Work of the Umatilla Indian Crew of the Civilian Conservation Corps at Old Chief Joseph Cemetery, Wallowa Lake, Oregon 1937-1942." Available at <https://wallowanezpercearchive.org/files/NPWH.000898.pdf>.

Tribe, to secure funding for that rehabilitation. Together, the CTUIR, Nez Perce Tribe, and the WLID secured a \$14 million bond authorization for the project from the State of Oregon in 2021. As part of the receipt of this funding, the WLID has committed to permanently devoting 5,000 acre feet of reservoir storage to be released instream annually for flow restoration in the Wallowa River and its tributaries downstream of the dam. To enable this water to be legally protected instream and stored for flow restoration purposes under the WLID's senior storage right, the district filed T-13931 with the Oregon Water Resources Department in 2022.

8. Until last year, our staff was also involved with discussions about the appropriate type of fish passage for Dam rehabilitation. We paused formal collaboration with the WLID on this project after the Oregon Fish and Wildlife Commission's December 16, 2022 adoption of last-minute changes to Oregon's fish passage rule inserted by Oregon Department of Fish and Wildlife (ODFW) staff, rules that had not gone through public notice and comment and that the CTUIR believes are illegal. We have filed a petition with the Court of Appeals challenging those rules and the matter is under active litigation.

9. The WLID and ODFW now appear to be pushing for approval of a cost-cutting "trap and haul" fish passage plan at Wallowa Lake Dam that is enabled by the illegal December 2022 rule changes, and that would likely not be allowed under the prior version of the rules. No action should be taken on the WLID "trap and haul" fish passage plan until the Court has a chance to rule on the petitions filed by the CTUIR, Nez Perce Tribe and others.

10. As I stated above, Wallowa Lake and the surrounding area is a sacred place to the CTUIR. It is a traditional hunting and fishing area of the CTUIR and was part of our seasonal rounds. Many of our ancestors are buried in the Wallowa Valley. We have consistently worked in many forums, including the courts, to defend our rights to the area. *See, e.g., Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir 1963), *disapproved of on other grounds by Puyallup Tribe v. Dept. of Game of Wash.*, 391 US 392, 88 S Ct 1725, 20 L Ed 2d 689 (1968); *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 262 F.Supp. 871 (D.Or. 1996), *aff'd*, *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir. 1967).

11. But for the collaborative actions of the CTUIR and the Nez Perce Tribe, this dam rehabilitation project would likely not be possible. The efforts of our tribes were crucial in securing the state and federal funding to allow this project to go forward. Attached as Exhibit B to this Declaration is an April 14, 2021 letter from the sitting CTUIR Chair N. Kathryn Brigham to the Oregon Joint Committee on Ways and Means, Subcommittee on Capital Construction advocating for funding for the Wallowa Lake Dam Rehabilitation Project with an emphasis on fish passage. Attached as Exhibit C is the May 7, 2021 testimony of sitting CTUIR Vice-Chair Jeremy Wolf before the Joint Ways and Means Committee. Attached as Exhibit D is the May 21, 2021 letter from the CTUIR Chair Brigham to Senators Ron Wyden and Jeff Merkley advocating for federal funding “necessary for volitional fish passage.”

12. These efforts to secure funding were successful, as together the CTUIR, Nez Perce Tribe and WLID were able to raise a total of \$29.25 million in funding for the project. The total funding secured includes \$21 million in State of Oregon funds through a 2021 lottery bond authorization from the State of Oregon for \$14 million and \$5 million in grants and \$2 million in low-interest loans from Business Oregon in 2022. The total also includes \$8.25 million in federal funds secured through a 2021 Congressionally Directed Spending request for \$2 million, a 2022 National Fish & Wildlife Foundation grant for \$5 million to Nez Perce Tribe and the CTUIR for the project, and \$1.25 million in passthrough from the 2021 Infrastructure Investment and Jobs Act to ODFW.

13. Attached as Exhibit E to this Declaration is the January 10, 2023 letter from the CTUIR and Nez Perce Tribe to Mary Wahl, Chair of the Oregon Fish and Wildlife Commission. That letter accurately recounts the 18-month long public process to revise Oregon's fish passage rule, with over 20 public meetings and an appointed Oregon Fish Passage Task Force. That Task Force adopted recommended rule revisions, and forwarded them to ODFW, who then filed with the Oregon Secretary of State the formal "Notice of Proposed Rulemaking" with the proposed revisions. The CTUIR Department of Natural Resources received a copy of the proposed fish passage rule revisions on October 25, 2022 via email from ODFW.

14. That Notice of Proposed Rulemaking did not include the changes the CTUIR is now challenging in this matter. Nor could we have known there would be changes to the core definition of "fish passage" or the addition of an entirely

new authority for ODFW to allow “trap and haul” facilities in lieu of true volitional fish passage at obstacles such as dams in Oregon rivers. This is because at the last minute, and without notice, ODFW staff changed the core definition of “volitional” to include “trap and haul” projects and allow trap and haul to be used in lieu of volitional fish passage. The CTUIR never received a copy of the rules that showed the last-minute revisions prior to the December 16, 2022 Commission meeting. The CTUIR could not have reasonably known these fundamental critical changes would be made because, as stated in the Tribes’ January 10, 2023 letter to the Oregon Fish and Wildlife Commission:

These critical rule alterations were nowhere in the August 30, 2022 revision released for public and Tribal comment. They were nowhere in the October 11 draft posted to ODFW’s website. They were nowhere in the October 21 final draft filed with the Secretary of State as a proposed rulemaking and posted to ODFW’s website. They were nowhere in the October 21 "Notice of Proposed Rulemaking" submitted to your Commission as Exhibit G, Attachment 2, for your December 16 meeting. They were nowhere in the detailed "Agenda Item Summary" submitted to your Commission as Exhibit G, Attachment 1, for your December 16 meeting. And nowhere in the Exhibit G "Presentation" document submitted to your Commission for your December 16 meeting.

Exhibit F at p. 3.

15. After having helped the WLID secure the funding necessary for the project to move forward, the ODFW should not now be allowed to illegally change the fish passage rules to allow a “trap and haul” facility to move forward under the current WLID proposal and thereby allow WLID to avoid having to implement, or even adequately study, true volitional fish passage at this dam that is located at a

sacred fishing location to the CTUIR. Such a result would be to inflict a new 100-year injury to the CTUIR's Treaty-reserved fishing rights at Wallowa Lake, and the Treaty fishery resource on which our members exercise those rights. The fish in this sacred area, one of the CTUIR's First Foods, deserve better.

I declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated February 20 2024

State of Oregon
County of Umatilla

Corinne Sams personally
appeared before me on and
acknowledge.



Corinne C. Sams

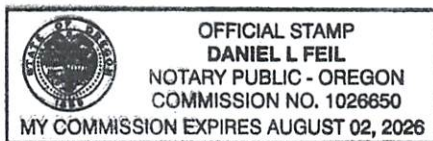
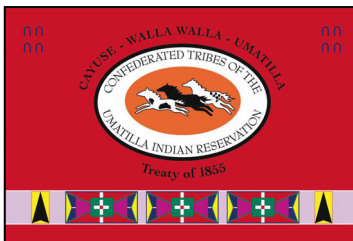



Exhibit A

**Confederated Tribes of the
Umatilla Indian Reservation**

Department of Natural Resources
Administration



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org ericquaempts@ctuir.org
Phone 541-276-3165 Fax: 541-276-3095

January 26, 2024

U.S. Army Corps of Engineers, Portland District
Regulatory Branch
Attn: Ms. Danielle Erb
P.O. Box 2946
Portland, OR 97208-2946

VIA Electronic Transmittal: danielle.h.erb@usace.army.mil

Re: NWP-2022-494, Wallowa Lake Dam Rehabilitation Project

Dear Ms. Erb:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) submits this letter to request that the U.S. Army Corps of Engineers (USACE) consider the following issues surrounding Permit Application NWP-2022-494 and suspend your review of this Joint Permit Application until pending litigation is resolved. This letter is a follow-up to our letter regarding the same matter dated November 22, 2023.

As we stated in our previous letter, the CTUIR has worked closely and in good faith with the applicant, the Wallowa Lake Irrigation District, on this issue. We appreciate that, in response to our earlier letter, USACE has granted a formal government-to-government consultation with the USACE pursuant to Executive Order 13175 and the USACE Tribal Consultation Responsibilities in the Regulatory Program¹. However, we reiterate our request that USACE holds this application to first allow for the resolution of the pending legal issues described below.

The CTUIR is a federally recognized Indian tribe, with a reservation in northeast Oregon and ceded, aboriginal, traditional use areas, and usual and accustomed areas in Oregon, Washington, Idaho, and other Northwest states. In 1855, predecessors to the CTUIR—ancestors with the Cayuse, Umatilla, and Walla Walla Tribes—negotiated and signed the Treaty of 1855 with the United States, 12 Stat. 945. In our Treaty, we ceded millions of acres of land to the federal government, and in exchange received assurances that our sovereignty would be recognized and respected, our various pre-existing tribal rights would be honored, and our interests would be maintained and safeguarded, in perpetuity. The federal government has a duty to honor and uphold all Indian treaties, including our Treaty of 1855 and to act as a steward and trustee to ensure that the terms and commitments of such treaties are fulfilled pursuant to the Trust Responsibility.

¹ <https://www.spk.usace.army.mil/Portals/12/documents/regulatory/tribal-and-106/Tribal%20Consultation%20Responsibilities%20in%20the%20Regulatory%20Program%2029%20Aug%202016.pdf?ver=2020-01-08-045339-067>

Pending Litigation

The CTUIR, the Nez Perce Tribe and others are currently engaged in litigation before the Oregon Court of Appeals regarding last-minute, unlawful alterations of the Oregon Fish Passage Rule made by unknown Oregon Department of Fish and Wildlife staff in late 2022. These unlawful changes were subsequently approved by the Oregon Fish and Wildlife Commission at their December 2022 meeting and the revised rule took effect on January 1, 2023. This change occurred without public notice and altered the regulatory definition of and authorization process for fish passage (*Columbia Riverkeeper, et al., Nez Perce Tribe and Confederated Tribes of the Umatilla Indian Reservation v. Oregon Fish and Wildlife Commission* (A182213 (Control), A182217, Oregon Court of Appeals, 2023)).

These events and the pending litigation directly impact the Joint Permit Application before you, which describes a trap-and-haul facility at the dam as “fish passage,” when it is not a truly volitional fishway for upstream passage into Wallowa Lake. The applicant submits this application under the very rules that are being challenged by the CTUIR and others. If the CTUIR, Nez Perce Tribe, and other petitioners are successful, the approval of a trap facility described in the application will be unlawful, and true volitional upstream fish passage at the Wallowa Lake Dam will be required absent a public regulatory waiver or exemption.

Treaty Reserved Rights

This project is located at ?Iwéetem?iitit, meaning ‘lake end’² and is a unique location for both the CTUIR and the Nez Perce Tribe. The ancestral homeland for both the CTUIR and the Nez Perce Tribe includes much of Northeast Oregon. In the CTUIR Treaty of June 9, 1855, and the Nez Perce Treaty of June 11, 1855, both Tribes specifically reserved the rights they had exercised since time immemorial, including the right to take fish at all usual and accustomed places—places such as Wallowa Lake. These reserved rights are continually exercised by the members of both Tribes and are critical to their present-day culture, religion, and economy.

The CTUIR is in receipt of the revised Corps of Engineers Civil Works Consultation Policy³ and is encouraged by the language of that Policy. Specifically, the policy acknowledges that

- i. The trust responsibility will be honored and fulfilled.
- ii. The federal government has a unique legal and political relationship with Tribal governments that recognizes self-government and self-determination.
- iii. USACE shall work to meet its trust responsibilities, protect trust resources, and obtain Tribal views of trust and treaty responsibilities for actions related to USACE, in

² Hunn, Eugene S.; Morning Owl, E. Thomas; Cash Cash, Phillip E.; Karson Engum, Jennifer; with Haug, Daniel B.; Conner, Roberta L.; Rigsby, Bruce J.; Chess, John M.; Minthorn, Modesta J. *Ćaw Pawá Láakni: ‘They Are Not Forgotten’ Sahaptian Place Names Atlas of the Cayuse, Umatilla, and Walla Walla*. Seattle: University of Washington Press, 2015. ISBN9780295990262 (pb). Ethnographic atlas of Native place names of the Cayuse, Umatilla, and Walla Walla peoples. Pg.180

³https://planning.erdc.dren.mil/toolbox/library/MemosandLetters/Memo_TribalConsultationPolicyUpdate_5Dec2023.pdf

accordance with provisions of treaties, laws and Executive Orders as well as principles lodged in the Constitution of the United States. Integrating consideration of tribal treaty and reserved rights into agency decision-making and regulatory processes is consistent with the federal government's trust responsibility to federally recognized Tribes and to fundamental principles of good government.

This renewed commitment to protecting Treaty Rights and the Trust Responsibility throughout the revised policy is an excellent step. Further, the ongoing efforts of the Biden Administration to restore salmon to the Columbia River⁴, specifically acknowledging the responsibility to uphold Treaty Rights and the Trust Responsibility, brings newfound momentum to our restoration efforts. The newly issued Presidential Memorandum on Restoring Healthy and Abundant Salmon, Steelhead, and Other Native Fish Populations in the Columbia River Basin of September 27, 2023 states:

Section 1. Policy. It is a priority of my Administration to honor Federal trust and treaty responsibilities to Tribal Nations — including to those Tribal Nations harmed by the construction and operation of Federal dams that are part of the Columbia River System (CRS) — and to carry out the requirement of the Pacific Northwest Electric Power Planning and Conservation Act (Public Law 96-501) to operate, manage, and regulate the CRS to adequately protect, mitigate, and enhance fish and wildlife affected by the Federal dams in the Basin in a manner that provides equitable treatment for fish and wildlife with the other purposes for which the Federal dams are managed and operated.

In recognition of these priorities, it is the policy of my Administration to work with the Congress and with Tribal Nations, States, local governments, and stakeholders to pursue effective, creative, and durable solutions, informed by Indigenous Knowledge, to restore healthy and abundant salmon, steelhead, and other native fish populations in the Basin; to secure a clean and resilient energy future for the region; to support local agriculture and its role in food security domestically and globally; and to invest in the communities that depend on the services provided by the Basin's Federal dams to enhance resilience to changes to the operation of the CRS, including those necessary to address changing hydrological conditions due to climate change.

Sec. 2. Federal Implementation. (a) All executive departments and agencies (agencies) with applicable authorities and responsibilities, including . . . the United States Army Corps of Engineers; . . . are directed to utilize their authorities and available resources to advance the policy established in section 1 of this memorandum.

It is significant to note that the Biden Administration in a release from the White House specifically mentioned the targeting of “\$20 million to the Nez Perce Tribe for restoring

⁴ See <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/27/fact-sheet-president-biden-takes-action-to-restore-healthy-and-abundant-wild-salmon-and-steelhead-in-the-columbia-river-basin/>

sockeye salmon habitat connectivity at the Wallowa Dam[.]”⁵ These efforts and others dictate careful examination of projects and permits that may effect treaty reserved rights and resources such as NWP-2022-494.

Cultural Resources

On Wednesday afternoon, January 24, 2024, we were provided some of the cultural resource documentation for the Wallowa Lake Rehabilitation project, NWP-2022-494. As we just received this information two days ago, our review is cursory at best. Overall, we are disappointed with the contractor’s, Historic Research Associates (HRA), failure to identify and address potential effects to historic properties of religious and cultural significance to the CTUIR. The project area lies within ?Iwéetem?iitit (lake end) and Ha?amsaxpa (at the boulders in the river).⁶ ?Iwéetem?iitit is located along the shores of the north end of Wallowa Lake and used by tribal members from the Cayuse, Walla Walla, Umatilla, and Nez Perce tribes for sockeye fishing. The northern portion of the project area is at Ha?amsaxpa, a salmon fishing site used by the Cayuse, Walla Walla, Umatilla, and Nez Perce. These are documented in published materials, and should be acknowledged in the report, and potential effects to resources need to be assessed. Additionally, Old Chief Joseph Gravesite and Cemetery is adjacent to the project footprint and effects to the viewshed need to be assessed.

The HRA’s section on the Old Chief Joseph Gravesite and Cemetery (Cemetery) lacks important information. First of all, in the report the cemetery is called Old Chief Joseph Gravesite and fails to state that this is a cemetery with numerous other burials present. It solely discusses Old Chief Joseph. While HRA’s report acknowledges that the undertaking is adjacent to the Cemetery, the report does not assess potential effects to the Cemetery. The report only states the Cemetery is part of the Nez Perce National Historic Park. While the Cemetery is one of the 38 discontinuous portions of Nez Perce National Historical Park, the report should acknowledge that the Cemetery is held in trust by the Bureau of Indian Affairs (BIA) for the CTUIR and the Nez Perce Tribe. While the land is owned by BIA, it is the National Park Service that manages the land under a cooperative agreement. This place is both a historic property of religious and cultural significance to the CTUIR under the National Historic Preservation Act as well as being listed as a National Historic Landmark in 1989 as a result of its association with the Nez Perce War of 1877 and Chief Joseph. The report should discuss the features at the Cemetery that were constructed by the CCC-Indian Division Umatilla Agency in the 1940s. Information about this can be easily found in SHPO report 19671. This Hampson report references a 1921 letter that talks about the area being known since the time of the first settlers as an Indian burial ground. We are also attaching a 1923 Letter to the Commissioner of Indian Affairs which describes trying to formally set aside this area as a cemetery. The third paragraph states, “For your information I will state that this land is only used for pasture. The graves of the Indians buried there are not fenced except for one or

⁵ <https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/27/fact-sheet-president-biden-takes-action-to-restore-healthy-and-abundant-wild-salmon-and-steelhead-in-the-columbia-river-basin/>

⁶ See Footnote 2.

two. I am advised by the Indian who visited the spot with us in 1921 that there are probably one hundred Indians buried at this site.”

Furthermore, an April 28, 1961 letter from Perry E. Skarra, Acting Area Director Bureau of Indian Affairs, to the Commissioner of the Bureau of Indian Affairs, Washington, D.C. discusses the cemetery.

Mr. Wilson informed us that while this particular site contained many ancient bones and remains of Indians of the last century, the entire area for miles around contains similar bones. This locality was the summer camping grounds where for centuries many thousands camped annually. It was the practice of the Indians to bury their dead in shallow graves wherever they died. Farmers are continually encountering bones in plowing their fields. Excavations for basements, water lines, etc. in and around the town of Joseph continually turn up many ancient skeletons.

The five-acre tract which was turned over to the tribes was selected for the reason it contained the greatest concentration of ancient graves as it was a principal encampment site overlooking the lake.

The CTUIR DNR is concerned that ancestors are located outside of the fenced cemetery within the area of potential effect and may be impacted by the road or staging area. To this end, what specifically is being proposed in the staging area? The designs did not provide a profile drawing to understand if there will be any grubbing or excavation. The same issue is presented for the road. We request a copy of the profile maps so that we can better understand the cut/fill that will need to occur. Due to cultural resource concerns, it is strongly recommended that the boat ramp parking lot be used for the staging area rather than the undeveloped area adjacent to the cemetery. Due to the high likelihood that ancestors are buried in the APE, we request that human remain detection dogs be utilized in the staging area and the road as part of the identification measures for this undertaking.

In the Colonial Contact, Treaties, and Removal Section of the report, it neglects to discuss how Nez Perce also fled to the Umatilla Indian Reservation. Today numerous Nez Perce descendants live on the Umatilla Indian Reservation. Further, in Section 5.1 Archaeological Survey, the report is unclear on the depth at which the shovel probes terminated. While the report indicates that the disturbance will not exceed 50-52 cm below the surface, it is not clear if they tested below that depth and Section 4.1 indicated that 50cm was the minimum depth of the shovel probes. Please clarify.

Conclusion

Wallowa Lake is an extraordinary location. The Tribes' concern for the protection of the natural beauty of Wallowa Lake and its connection with the Wallowa River is unique because of the cultural and religious importance of this place. We have dedicated many years to this project and have worked closely with the applicant and the community. We look forward to the

CTUIR DNR Letter to USACE

Subject: NWP 2022-494, Wallowa Lake Dam Rehabilitation Project

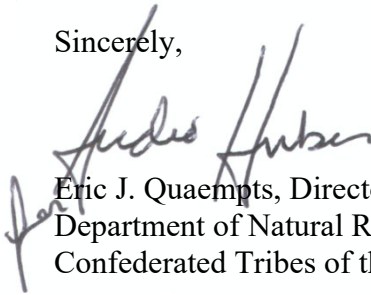
January 26, 2024

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day this project succeeds—but we must ensure that it does so in accordance with the law, and that cannot happen until the litigation regarding the Oregon Fish Passage Rule is resolved. Until this occurs, we demand that you suspend your review of this Joint Permit Application. Further, the assessment of effects of this permit have not been adequately conducted for Old Chief Joseph Gravesite and Cemetery, ?Iwéetem?iitit and Ha?amsaxpa. The CTUIR requires additional time and more specific information on the construction of the road and improvements to the staging area to evaluate potential impacts. There are significant concerns that tribal ancestors may be impacted by activities in these areas.

We look forward to continuing to work with the Corps through these important issues. Please let us know if you would like to schedule a meeting to further discuss. Please have your staff contact Audie Huber, CTUIR DNR Intergovernmental Affairs Coordinator, at audiehuber@ctuir.org or 541-429-7228 to coordinate further discussions on this issue.

Sincerely,



Eric J. Quaempts, Director
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation

cc: Beth Coffey, Director of Programs, Northwest Division, USACE
Wallowa Lake Irrigation District
Nez Perce Tribe

Attachment:

April 7, 1923 Letter of Max Wilson to Chas. H. Burke, Commissioner of Indian Affairs.

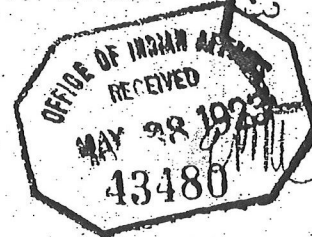
Mr. Wilson
ATTORNEY-AT-LAW
Joseph, Oregon

April 7, 1923.

Hon. Chas. H. Burke

Commissioner of Indian Affairs

Washington, D. C.



My Dear Sir:

In the fall of 1921 Mr. E. L. Swartzlander, superintendent of the Umatilla Indian Agency at Pendleton, Oregon, together with representative members of the Umatilla tribe of Indians and of the Nez Perce tribe of Indians, were present in this vicinity for the purpose of locating certain old Indian Burial Grounds in this County, one of which is situated at the North end of Wallowa Lake about one mile South of Joseph, Oregon. At that time Mr. F. D. McCully of Joseph, and myself accompanied Mr. Swartzlander and some of the Indians to the site of this burial ground for the purpose of having the Indians point out to us the approximate boundary of the burial ground in order that we might get the owner of this ground to deed the land embraced therein to the government of the United States to be used as a permanent burial ground for Indians of the Umatilla Tribe and of the Nez Perce Tribe. The land is owned by an association of ditch companies and these ditch companies are willing to deed the land as pointed out by the Indians to the government for a permanent burial ground, free of charge.

I have recently taken this matter up with Mr. Swartzlander and I am advised by him that there might be some expense to the surveying and platting of this land; that he had asked the Indian Office for the necessary money to defray these expenses but owing to lack of funds had not been able to do anything about it as yet. I am pleased to inform you that so far as concerns the burial ground at the foot of the Lake the Indians need not be asked to contribute any of the tribal money for this work as the City of Joseph is willing to meet all necessary expenses of surveying this ground. I am asking what will be necessary in the way of survey maps and plats in order that the deed to this property will be accepted by the government, also that you may send me a blank deed or give me some idea as to the form of deed which the government would expect in order that we may get this land surveyed and the deed executed by the present owners.

For your further information I will state that this land is used only for pasture. The graves of the Indians buried there are not fenced except for one or two. I am advised by the Indians who visited the spot with us in 1921 that there are probably one hundred Indians buried on this site. We are anxious that this be used by the government are sure that members of both Umatilla and Nez Perce tribes are also desirous of bringing this about. We understand that the government will keep the cemetery in good repair and possibly erect some monuments there.

At the time of the visitation above mentioned, representatives of the Nez Perce tribe of Indians desired that steps be taken to

Max Wilson
ATTORNEY-AT-LAW
Joseph, Oregon

remove the body of Chief Joseph from its present place of interment at Nespelem, Washington, to this cemetery at the foot of Wallowa Lake and it is largely with this object in view that we desire to get this site set apart as a permanent Indian Burial Ground. I am writing the superintendent at the Nez Perce Indian Reservation at Lapwai, Idaho, and superintendent of the Colville reservation in Washington in regard to this matter to determine what steps will be necessary to being about the removal of the remains of Chief Joseph from Nespelem to the foot of Wallowa Lake when this site shall have been accepted by the government as an Indian Burial Ground. There may possibly be some opposition to this from Nespelem but in as much as this Valley was the home of Chief Joseph; that he often expressed his desire to be buried here; that his father is buried near here and his remains can be removed without any difficulty to the site of the cemetery, and that members of the Nez Perce tribe of Indians seem to desire that Chief Joseph should be removed and buried at the foot of Wallowa Lake, we feel that whatever opposition may develop from Nespelem can be overcome.

Trusting that I may receive information relative to what the government will expect in the way of plats and maps and so forth before accepting a deed to the cemetery and thanking you for whatever courtesy you may be able to extend in this matter, I am,

MW/EP

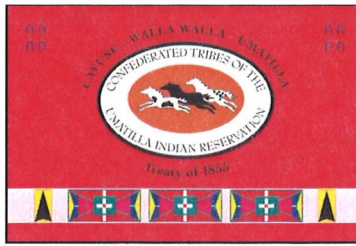
Yours very truly,

Max Wilson

Exhibit B

**Confederated Tribes of the
Umatilla Indian Reservation**

Board of Trustees



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org email: KatBrigham@ctuir.org
Phone: (541) 429-7374

April 14, 2021

Co-Chair Frank Girod & Co-Chair Paul Holvey
Joint Committee on Ways and Means, Subcommittee on Capital Construction
900 Court Street NE
Salem, Oregon 97301

Re: Support for SB 5534 Lottery Bond Funding for Wallowa Lake Dam Rehabilitation Project

Dear Co-Chairs Girod and Holvey:

It is with great optimism that I contact you today on behalf of the Confederated Tribes of the Umatilla Indian Reservation and ask your support for Senate Bill (SB) 5534 and the \$14 million in funding it provides for the rehabilitation of the Wallowa Lake Dam.

While we were disheartened by the cancellation of the bonds authorized for this project in 2019, we are greatly encouraged by its inclusion in SB 5534. We have been hard at work with the Wallowa Lake Irrigation District, the State of Oregon, and the Nez Perce Tribe to craft a Memorandum of Agreement (MOA) to ensure that this public investment results in permanent public benefits. We are proud of the collaboration that went into this MOA, which was signed last year, and stand united behind it today.

The public benefits this project will provide include strengthening the local economy as well as improving infrastructure critical to adapting to a changing climate. The rehabilitation of the dam will better protect downstream communities from the threat of catastrophic flooding while mitigating water scarcity in times of extreme drought—both of which are risks that are expected to increase and intensify with climate change. Just as critically, this project will permanently restore fish passage and instream flow to more than a hundred miles of the Grande Ronde River, the Wallowa River, and its tributaries. This will provide tremendous benefits to the local tourism and recreation industries.

And, as a result of this project, for the first time in more than a century, the path will be cleared for the return of *kálux*—the sockeye salmon—to Wallowa Lake. This species, which has been extinct in the Grande Ronde basin since the early 20th century, has been of critical cultural importance to the Tribes since time immemorial.

With this project, we look forward to finally welcoming them home. Thank you for your help in making this historic achievement possible.

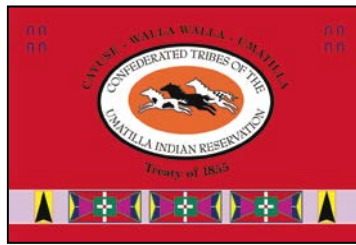
Sincerely,

N. Kathryn Brigham
Chair, Board of Trustees

CC: WLID, NPT, OWRD, ODFW

Exhibit B

Exhibit C



**Testimony of the Confederated Tribes of the Umatilla Indian Reservation
Joint Committee on Ways and Means
Subcommittee on Capitol Construction
SB 5534
May 7, 2021**

Co-Chairs Girod and Holvey, and members of the Subcommittee, my name is Jeremy Wolf. I am the Vice-Chairman of the Board of Trustees for the Confederated Tribes of the Umatilla Indian Reservation. I am here to urge your support of Senate Bill 5534 and funding for the Wallowa Lake Dam project.

Today, I come before you, along with our partners from the irrigation community, to ask for your help in achieving something truly special. We have the opportunity to realize something that prior generations, failing to work together, were unable to accomplish.

The Columbia Basin and its fisheries have been sacred to the culture and traditions of the Tribes since time immemorial. These fisheries are central to exercising the rights reserved to us in our Treaty of 1855, and are sustained by the cold, clean water from high mountain lakes and streams, such as those of the Wallowa Mountains in northeastern Oregon.

In our Sahaptian language, the word *Waláwa* refers to the fish traps or weirs the Tribes once used for salmon fishing, which were common along the Wallowa River. Wallowa Lake, the source of the Wallowa River, is where the Tribes historically gathered to fish for sockeye, the brilliant red salmon that once returned to the Wallowas each summer.

For more than a century, a dam has been present at this location, providing flood control to downstream communities and allowing agriculture to thrive in the Wallowa Valley. And, for more than a century, sockeye have been absent from their natal waters, blocked by this dam from reaching Wallowa Lake.

For species like sockeye, which require access to a lake to spawn, the lack of passage at Wallowa Lake Dam disrupted a journey that had occurred for millennia. In only a few years, the brilliant red fish that had once returned from the ocean each summer quietly disappeared from the Wallowas.

But, for the first time in generations, we have an opportunity to help them return home.

The aging Wallowa Lake Dam is in urgent need of repair. Allowing this infrastructure to crumble not only increases the threat of catastrophic flooding for downstream communities, but also reduces the amount of water that can safely be stored for the community and the river in times of drought. And we would lose the ability to restore fish passage at Wallowa Lake Dam.

We must seize this opportunity. From protecting downstream communities, to restoring fish passage and stream flows, to supporting the agriculture, recreation, and tourism that drive the local economy, the public benefits of repairing the dam are many.

Together, we have worked closely with the Wallowa Lake Irrigation District and Nez Perce Tribe to seek funding to repair the Wallowa Lake Dam and restore fish passage to Wallowa Lake. Though we represent diverse interests, we have come together to forge a Memorandum of Agreement that formally commits us to achieving the great public benefits promised by this project. We greatly appreciate the Governor's recognition of our hard work, and her inclusion of the Wallowa Lake Dam Project in the Governor's budget.

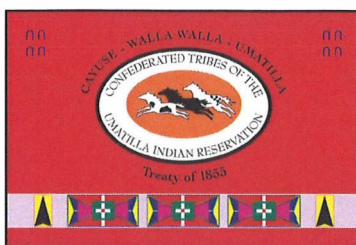
Now we need your support to make this historic undertaking a reality. Together, we come before you to ask your support for the funding of the Wallowa Dam project in Senate Bill 5534. After so long, we look forward to welcoming back the brilliant red fish that once made their way to the Wallowas. We ask for your help in finally bringing them home.

Thank you for your time today.

Exhibit D

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

Board of Trustees



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org email: KatBrigham@ctuir.org
Phone: (541) 429-7374

May 21, 2021

Senator Ron Wyden
221 Dirksen Senate Office Building
Washington, D.C., 20510

Senator Jeff Merkley
531 Hart Senate Office Building
Washington, D.C., 20510

Dear Senators Wyden and Merkley:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation, I ask for your help in achieving something truly special in northeastern Oregon. We have joined together with the Wallowa Lake Irrigation District, Nez Perce Tribe, and the State of Oregon to seek funding to repair the Wallowa Lake dam and restore fish passage to Wallowa Lake. Though we represent diverse interests, we have come together in this shared vision—but we need your help in making it possible.

In our Sahaptian language, the word *Waláwa* refers to the fish weirs once used by the Tribes for salmon fishing at the outlet of Wallowa Lake. For more than a century, the Wallowa Lake dam has been present at this location, providing flood control to downstream communities and allowing agriculture to thrive in the Wallowa Valley. Pre-dating fish passage requirements, this dam lacked a fish ladder, and blocked the once-prolific runs of salmon and steelhead that historically returned to the Wallowa Lake and Wallowa River that feeds it. As a result, sockeye salmon have been driven to extinction, and many of the remaining fish species are now listed under the Endangered Species Act.

Today, the aging Wallowa Lake dam struggles to fulfill its original purpose. Designated a high-hazard structure in 1996, the dam has been prevented from operating at full capacity unless repairs are made. Allowing this infrastructure to crumble increases the threat of catastrophic flooding for downstream communities, and reduces the amount of water that can safely be stored in times of drought. It risks losing an opportunity to restore fish passage.

Repairing the dam will cost \$16 million and restoring volitional fish passage will require \$10 million. We are extremely pleased that the State of Oregon is already on track to provide \$14 million for dam repair, and that the irrigation district has requested \$2 million in federal appropriations for the remaining dam repair costs. We are glad to voice our support for that request.

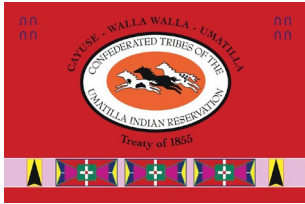
We now ask for your help in securing the \$10 million necessary for volitional fish passage. We must seize on this opportunity provided by the state, and the unity we stakeholders have developed.

Together, we believe we can achieve a resilient community, thriving economy, and healthy river ecosystem. For too long, these ideals have been viewed as mutually exclusive. Today, with your help, we have an opportunity to demonstrate they are not.

Sincerely,

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

Exhibit E



10 January 2023

Ms. Mary Wahl
Chair of the Oregon Fish and Wildlife Commission
4034 Fairview Industrial Drive SE
Salem, OR 97302
ODFW.Commission@odfw.oregon.gov

Re: Nez Perce Tribe and Confederated Tribes of the Umatilla Indian Reservation Statement on Unlawful Fish Passage Rule Revisions

Dear Ms. Wahl and Commission Members:

The Nez Perce Tribe (NPT) and the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) write to you with serious concerns about concealed, late-hour, no-public-notice revisions to core principles, definitions, and procedures of the Oregon Fish Passage Rule.

We write to you on a government-to-government basis. We write in advance of your January 13 public meeting and request that you acknowledge this letter and the issue it presents at that meeting. Our government-to-government request is straightforward: that the State of Oregon timely correct this situation. We will not be attending your meeting beyond this letter.

First, regarding process:

In 2021, the Oregon Department of Fish and Wildlife (ODFW) began a process to revise Oregon's Fish Passage Rule at OAR 635-412. "Aligning the state's passage rules with the ODFW Climate and Ocean Change Policy is a driving force behind this initiative."¹ During 2021 and 2022 there were 20 rules subcommittee meetings and additional Fish Passage Task Force Meetings where rule changes were discussed. These were all public meetings. There were two public comment periods on draft rule revisions, one to kick off the process in 2021, and then another in 2022. The 2022 public comment period ran from August 31 through September 29 and focused on the draft rule revisions that were noticed to the public on August 30 as the result of this 18-month-long rule revision process.

¹ See, [ODFW Fish Passage Requirements \(state.or.us\)](https://state.or.us/odfw-fish-passage-requirements) (Last visited January 10, 2023.)

ODFW received 175 comments on the publicly noticed August 30 draft rule revisions. These comments were considered and a final draft rule was prepared for the Fish Passage Task Force to consider at its October 7, 2022 meeting. The Task Force adopted the rule revisions at that meeting, and on October 21 ODFW filed with the Secretary of State the formal “Notice of Proposed Rulemaking” for the fish passage rule revisions, Chapter 635.²

The NPT and CTUIR reviewed the August 30 rule revisions. Of particular importance to our Tribes were any revisions having to do with the definitions of “fish passage” and “volitional” movement of fish. There was a minor revision which only strengthened the existing rule in our Tribes view. The definition to “Fish passage” in OAR 635-412-0005 was revised (prior to the October 21 draft) to include the words “minimal delay”:

“Fish passage” means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move volitionally, with minimal stress, minimal delay, and without physical or physiological injury upstream and downstream of an artificial obstruction.

The definition of “Volitionally” was unchanged and continued to specifically exclude trapping of fish:

“Volitionally” means with minimal delay and without being trapped, transferred, or handled by any person, unless specifically allowed under OAR 635-412-0035(6).

The reference in “Volitionally” to “. . . unless specifically allowed under OAR 635-412-0035(6)” was a reference to a subsection with special allowances at traps as a *specific category of obstruction*. Under -0035(6), traps (defined as devices that “prevent [fish] from passing volitionally”) were a unique type of obstruction where fish could be “trapped, transferred, or handled,” actions otherwise prohibited by the definition of “volitionally” at any other type of obstruction. The reference was plainly not – given the language and purpose of -0035(6) itself (see below) – a reference to a subsection providing authority for traps to be used as a form of fish passage *at dams or other obstructions*.

Because these revisions as of October 21 continued the long-standing Oregon approach to favoring true volitional fish passage our Tribes were not concerned with the rule revisions.

However, after this long 18-month public process, at the last hour new language was inserted by Oregon staff to change the definitions of “Fish passage” and “Volitionally” and, critically, to alter the purpose and authority of subsection -0035(6), in the packet of materials submitted to the Fish and Wildlife Commission. These changes were not a “tweak,” but a substantial change that did not undergo public notice and comment and fundamentally altered the core concept of volitional fish passage.

² See Exhibit G, Attachment 2 to the December 16, 2022 Oregon Fish and Wildlife Commission Meeting Materials. This Attachment bears the “Filed” stamp from the Secretary of State’s Office.

These last-hour no-public-notice revisions, made on or after November 30, 2022, changed the central definition of "Fish passage" to add "trap collection and transport" as an alternative to volitional passage:

([18]20) "Fish passage" means the ability, by the weakest native migratory fish and life history stages determined by the Department to require passage at the site, to move *either* volitionally **or by trap collection and transport if consistent with requirements of OAR 635-412-0035(6)**, with minimal stress, **minimal delay**, and without physical or physiological injury upstream and downstream of an artificial obstruction.

Subsection 635-411-0035(6) was also altered at the last minute. Its defining header was edited to change the *purpose* of the section from non-volitional allowances at traps as a type of obstruction, to the use of trap and transport as a type of fish passage at other obstructions. "(6) Requirements for fish **passage by trap** collection and transport ~~[at traps are]~~ **include:**" And an entirely new section (g) was added to authorize and implement this entirely new section purpose:

(g)Traps shall be utilized where the feasibility of other fish passage structures or other site-specific considerations warrant use of trap collection and transport, or otherwise, the Department determines, using its professional judgment, trap collection and transport will result in an effective means of ensuring access to habitat above or below the artificial obstruction by native migratory species.

These -0035(6) changes are critical. Hidden from public view, they altered the very purpose of a subsection for traps (-0035(6)) as a type of fish *obstruction* – like dams -0035(2) and culverts -0035(3) – with unique non-volitional passage allowances, into a new authority for traps to be used *as a form of passage* at dams and other obstructions. The prior reference in the definition of "Volitionally", stated above, to the prior version of -0035(6), had functioned to allow fish to be "trapped, transferred, or handled" at traps as a special type of obstruction regulated under -0035(6). It did not authorize traps to be used as a form of fish passage *at other obstructions by trap and transport*.

These critical rule alterations were nowhere in the August 30, 2022 revision released for public and Tribal comment. They were nowhere in the October 11 draft posted to ODFW's website. They were nowhere in the October 21 final draft filed with the Secretary of State as a proposed rulemaking and posted to ODFW's website. They were nowhere in the October 21 "Notice of Proposed Rulemaking" submitted to your Commission as Exhibit G, Attachment 2, for your December 16 meeting. They were nowhere in the detailed "Agenda Item Summary" submitted to your Commission as Exhibit G, Attachment 1, for your December 16 meeting. And nowhere in the Exhibit G "Presentation" document submitted to your Commission for your December 16 meeting.

The PDF document adding these alterations, from internal data, appears to have been created November 30, 2022, after Division Director, Director, and Attorney General signatures had been made below "Reviewed and Approved" on the packet Cover for Exhibit G for your December 16 meeting. The public had no lawful notice that the publicly filed rule revision had been replaced with a document that

included alterations of the central definition of "Fish passage" and of the purpose of a subsection that allowed non-volitional passage *at traps* (-0035(6)) *as a specific type of obstruction* – to create a new ODFW authority to use traps as a form of fish passage *at dams and other artificial obstructions*.

Bluntly, this concealed alteration is a disgrace as a matter of required Oregon public notice-and-comment.

Second, regarding significance:

Nowhere in the rule revised in this way did ODFW have prior authority to treat "trap and transport" as a form of fish passage at other obstructions such as dams, or anywhere other than *at a trap*. There is no possible sense in which this was a "tweak" or "rearrangement" of existing authority. It was a rewrite of core rule concepts, definitions, and procedures. The existing definitional reference in "Volitionally" to "...*unless specifically allowed under OAR 635-412-0035(6)*" was *not* a reference to a subsection providing authority for traps to be used as a form of *fish passage at dams* or other obstructions. It was a reference to a subsection with special non-volitional criteria allowed at *traps as a specific category of obstruction*. Under -0035(6), traps (defined as devices that "prevent [fish] from passing volitionally") were a *specific category of obstruction* where fish could be "trapped, transferred, or handled," actions otherwise prohibited by the definition of "volitionally." Thus the inclusion of "unless", with reference to -0035(6), in the prior definition of "volitionally." This is emphasized in the section -0020(3)(a) reference to "Obtain[ing] from the Department an approval determination of a fish passage plan that meets the requirements of OAR 635-412-0035 *for the specific artificial obstruction*." Traps were a specific artificial obstruction with unique criteria under -0035(6), as dams are under -0035(2), and culverts under -0035(3). Subsection -0035(6) was *not* a special allowance for traps to be used as a form of *fish passage at other obstructions*. This is emphasized by the prior -0035(6) criteria themselves: they addressed unique allowances for non-volitional passage *at traps as obstructions*. Subsection -0035(6) was in no respect existing authority for traps to serve as a form of fish passage *at dams or other artificial obstructions*.

This alteration of the very purpose of -0035(6) is spotlighted by the late-hour, no-public-notice editing of the subsection header, from criteria for "passage at traps" into "fish passage by trap collection and transport." This alteration and the insertion of an entirely new -0035(6)(g) authority to implement the new subsection purpose at ODFW's "professional judgment," is a nearly perfect example of a rule alteration that requires public notice and comment, not concealed late-hour alteration.

These no-notice revisions are serious and consequential for all of Oregon's watersheds and dams, and for the large areas of Eastern Oregon where the NPT and CTUIR hold reserved treaty fishing rights. Our focus here is the failure to provide lawful public notice of these alterations. But it should go without saying that no Tribal consultation occurred either, and that Tribal consultation requires formal government-to-government policy-level engagement, not informal tribal staff contacts if such occurred.

As the NPT and CTUIR conveyed to ODFW staff on December 28 and again on January 3, through our tribal legal counsel, our Tribes expect Oregon policy leaders to take timely steps to correct this unlawful rule alteration. Should such timely action fail to occur, our Tribes reserve the right to seek all appropriate legal remedies.

Please direct communication on this matter to legal counsel for the NPT, David J. Cummings at djc@nezperce.org, and CTUIR, Brent H. Hall at Brent@Bhhall.com.

Thank you for your timely attention to this important matter.

Sincerely,



Samuel N. Penney, Chairman
Nez Perce Tribe Executive Committee



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

cc: The Honorable Tina Kotek, Governor of Oregon
Burns Paiute Tribe
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indian
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians
Confederated Tribes of the Warm Springs Reservation of Oregon
Coquille Indian Tribe
Cow Creek Band of Umpqua Tribe of Indians
The Klamath Tribes

CERTIFICATE OF FILING AND SERVICE

I certify that on February 20, 2024, I filed the original copy of this
DECLARATION OF CORINNE C. SAMS with the Appellate Court
Administrator, Appellate Court Records Section, using the Appellate Court
Electronic Filing System.

I further certify that on February 20, 2024, I served a copy of the same using
the Appellate Court Electronic Filing System on:

Dustin Buehler
Oregon Department of Justice
Attorney for Respondent

CRAG LAW CENTER

s/ Maura Fahey

Maura Fahey, OSB # 133549

*Attorney for Petitioners
Columbia Riverkeeper, et al.*