



June 14, 2024

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RE: CTUIR DNR Comments on Proposed Groundwater Allocation Rule Changes

Dear Ms. Hartt,

The Confederated Tribes of the Umatilla Indian Reservation Department of Natural Resources (CTUIR DNR) appreciates the opportunity to comment on the proposed groundwater allocation rule changes. We participated as a member of the groundwater allocation Rules Advisory Committee, received an Oregon Water Resources Department (Department) staff presentation to our Tribal Water Commission, and engaged in public hearings to inform our understanding and position on the proposed rule changes. We appreciate the Department's recognition of the current inadequacy of groundwater allocation rules as well as the science- and data-driven public process utilized to inform the proposed improvements.

### Introduction and Background

The CTUIR is a federally recognized Indian tribe, with a reservation in Northeast Oregon and ceded, aboriginal, usual and accustomed, and traditional use 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. The Treaty is a contract between sovereigns, and law—indeed, “the supreme Law of the Land” under the United States Constitution.

In the Treaty the CTUIR 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 always be considered and safeguarded, in perpetuity. The federal government has a duty to honor and uphold the Treaty of 1855 and all Indian treaties and to act as stewards and trustees to ensure that the terms and commitments of those treaties are fulfilled. The subordinate states similarly have an obligation not to infringe on or otherwise erode tribal Treaty Rights.<sup>1</sup>

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<sup>1</sup> Pursuant to the Constitution's Supremacy Clause, treaties and statutes also bind states. *Antoine v. Washington*, 420 U.S. 194, 205 (1975) (like a treaty, when Congress by statute ratifies an agreement that reserves Tribal rights, “State qualification of the rights is precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State [is] required”); *U.S. v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017) (Holding that “in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the

A paramount objective in the Treaty of 1855 was protecting and maintaining our tribal First Foods—water, fish, big game, roots, berries, and other plants—and the habitats and environmental conditions that support and sustain them, then, now, and forever. This remains an overriding objective of the CTUIR. Protecting and maintaining our tribal First Foods is essential to safeguarding our Treaty Rights and the traditions, culture, and way of life those Rights were meant to uphold and perpetuate. Vital to our authority to protect and maintain the First Foods are our legally recognized rights as resource co-managers.<sup>2</sup> In addition to various applicable policies, the CTUIR has developed a First Foods management mission, a River Vision, and Upland Vision to guide restoration and management of our First Foods.<sup>3</sup>

### Comments:

Water is the first of the tribal First Foods, and is essential to the existence, health, and well-being of our communities and all other First Foods. Water nourishes the ecosystems that provide our First foods that are central to our culture and traditions. Without water, the health of these ecosystems and our communities is compromised.

Many waters in Oregon, over which the State has management authority and jurisdiction, are essential components in maintaining and sustaining tribal First Foods. State water management can profoundly impact CTUIR Treaty Rights and the ability of our members to exercise them. The State's current groundwater allocation rules have and will continue to negatively impact the rights, interests, and resources of the CTUIR if they remain unchanged.

The CTUIR DNR supports the Department's efforts to modernize water laws, including groundwater allocation rules, to be more sustainable and protective of existing water users, both instream and out-of-stream. Groundwater overallocation and its devastating results are not new and are becoming more common in Oregon and elsewhere. Within the CTUIR's aboriginal lands, there are multiple Critical Groundwater Area designations, a Serious Water Management Problem Area designation, other basins coming to terms with severe groundwater declines, and countless groundwater diversions hydraulically connected to and further impairing overallocated surface water sources.

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Tribes under the Treaties.”) aff'd, 138 S.Ct. 1832 (per curiam); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005) (Treaties “constitute the ‘supreme law of the land’” and have “been found to provide rights of action for equitable relief against non contracting parties,” and such equitable relief “ensures compliance with a treaty; that is, it forces state governmental entities and their officers to conform their conduct to federal law.”); *see also* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (noting that “[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making,” and accordingly, the treaty in that case gave the Chippewa Tribe “the right to hunt, fish, and gather in the ceded territory free of . . . state, regulation.”).

<sup>2</sup> Our ancestors were sole resource managers since time immemorial, but beginning less than two centuries ago we began to share this responsibility with federal and state managers. Tribal management is now jointly based on traditional knowledge, expertise, and experience combined with the latest, most reputable, state-of-the-art scientific knowledge, practices, techniques, and data.

<sup>3</sup> These guidance documents are based on the ecology between and among First foods, the ecology of the CTUIR and our Foods, and our relationship to the landscapes and waters that provide the Foods—in other words, our relationship to our environment. The priorities in our management visions are backed by peer-reviewed science publications, and our guidance should be recognized as expressions of applied “Traditional Ecological Knowledge” and given equal weight to other government agency management guidance. Where our management goals or priorities differ, we can consult to address those differences; where our goals and priorities align, we can collaborate to our mutual benefit.

We welcome the Department's use of data and science to acknowledge that groundwaters are not infinite and are often hydraulically connected to surface waters. While late for many watersheds, the proposed rules are vital to avoid more communities facing groundwater overallocation issues with fewer and fewer options available besides curtailment. The proposed rules are also essential to meeting shared water co-management objectives. Baseflow conditions in our ceded lands rely mostly and at times entirely on hydraulically connected groundwater and we are also a groundwater-dependent community. Current rules threaten to worsen conditions that are already concerning and impacting our ability to meet instream and consumptive uses.

Clarifying and updating the definitions of "reasonably stable groundwater levels" and "potential for substantial interference" provides the Department with a much more realistic accounting of water availability to inform decision-making. More decisions made under current rules will create more problems that our future generations will have to overcome with far fewer options than are now available. While we recognize concerns primarily from those that have become accustomed to relying on groundwater to overcome climate change impacts and meet new demands for growth and development, we do not support any further delays in adopting the proposed changes or weakening them.

### Conclusion

The CTUIR DNR supports the proposed rule changes and urges immediate adoption by the Oregon Water Resources Commission. The changes to how water availability is assessed are long overdue and must not be delayed. The Department's rulemaking process was robust, adequately informed by science and data, and confirmed the urgent need to address the deficiencies of existing groundwater allocation rules.

The CTUIR DNR appreciates the Department's commitment to the rulemaking process and for your consideration of our input and comments on the proposed groundwater allocation rule changes. We look forward to continuing to work effectively and collaboratively with the State of Oregon to protect, recover, and restore our shared waters.

Respectfully,



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Confederated Tribes of the Umatilla Indian Reservation