

COQUILLE INDIAN TRIBE

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March 25, 2024

Coos County Community Development
Land Use Planning Department
60 E. Second Street
Coquille, Oregon 97243

RE: Comments of Coquille Indian Tribe for Administrative Record in Support of ACU 23-074/FP 23-012 – Beaver Slough Drainage District/Winter Lake Phase III

I. Introduction and Background

The Coquille Indian Tribe is a federally recognized Indian Tribe, with lands of historic and modern interest encompassing a broad swath of Southwest Oregon. Since time began, the Coquille River and the full of the Coquille River watershed have been central to the identity, culture, and survival of Coquille people. The Coquille people are the original stewards of the Coquille River basin, and restoring its once abundant salmon, steelhead, lamprey, other native populations and ecological function and health is an urgent priority. Furthermore, the Coquille Indian Tribe is a cooperative manager (“co-manager”) of the fish and wildlife resources in Coos, Curry, Douglas, Jackson, and Lane Counties pursuant to the Coquille Indian Tribe/State of Oregon Memorandum of Agreement (*See Oregon Administrative Rules 635-800-0100*).

The Coquille Indian Tribe, a sovereign co-manager of fish and wildlife resources in the Coquille River basin, employs a traditional ecological knowledge based, holistic philosophy to protection and restoration of native species and their habitats in the Coquille River basin. The Tribe seeks to implement, and support, an array of activities that will restore an abundance of salmon, steelhead, and all native aquatic species to the Coquille River. Categories of such

actions include habitat protection and restoration, water quality improvements, and hatchery practices. The Coquille Tribe's holistic, abundance-based management philosophy will restore the Coquille River's once mighty salmon runs for the benefit of tribal members, all Coos County residents, and the many others that will visit our region to fish, boat, and enjoy the beauty and abundance of our shared homelands.

The Tribe's vision of restored and shared abundance requires that we use all the tools at our disposal that have proven to be effective in salmon restoration – not one single tool or approach will suffice to restore healthy, harvestable populations of salmon. The Winter Lake project deploys one of the necessary restoration tools – a “working lands” construct - where private property agriculturalist landowners partner with fisheries restoration agencies like the Tribe and Oregon Department of Fish and Wildlife to enhance the productivity of their lands for agriculture, while also providing key benefits to native species such as coho salmon. Even more, this private landowner/restoration agency partnership model leverages very significant amounts of “outside” federal, state, and Tribal funding to enhance both the agricultural and fisheries economic sectors of Coos County at a scale and pace that the County simply cannot fund.

The Coquille Tribe has invested itself in the Winter Lakes project. Over the last fifteen years, the Tribe has provided foundational support including technical expertise, special projects funding, and in-kind staff resources. In 2016 and 2017 the Tribe secured and committed two large federal funding grant awards totaling over \$700,000 for Winter Lake project implementation. Further, during this time the Coquille Tribe Natural Resources Office staff have attended many project-related public meetings, held Tribal Council informational meetings, and offered Tribal community meetings to educate and provide valuable information to our local communities on the complexities and benefits of these types of habitat restoration projects. Coquille Tribe Natural Resources Office staff have been technical advisors working with the Beaver Slough Drainage District (BSDD), ODFW, The Nature Conservancy, the Bridges Foundation, and others to ensure that the work being conducted is fiscally and scientifically sound, and inclusive of traditional knowledge.

II. Procedural History Regarding the BSDD Permit Application

The Beaver Slough Drainage District, through its District Manager Fred Messerle, and authorized agent Caley Sowers, Coos Soil and Water Conservation District, District Manager,

submitted ACU-23-074/FP-23-012 (hereinafter, “BSDD Application”) to the Coos County Planning Department (hereinafter, “CCPD”) on February 9, 2023 (*See County Commission Workshop Staff Report, February 27, 2023, Appendix A*) (hereinafter, “County Staff Report - 2/27/24”). The “Coos County Conditional Use Land Use Application” form provided by the Coos County Planning Department was utilized and completed by the BSDD applicant. It is necessary for the Board of County Commissioners (and public) to clearly understand who the real party in interest applicant is for ACU 23-074/FP 23-012 – it is the Beaver Slough Drainage District on behalf of its landowner patrons. There are multiple consulting technical and funding partners assisting the BSDD in its project, but the one and only applicant in this matter are the agricultural landowners and producers of the BSDD.

The Board of County Commissioners conducted a public workshop/hearing in Coquille, Oregon on March 5, 2024. The CCPD provided public notice of the workshop/hearing on February 7, 2024, and a written Staff Report was made publicly available. That Staff Report identified, for the interested public, each of the criteria that the BBSD permit application was subject to under the Coos County Land Development Code. Additionally, that Staff Report included the full detailed BSDD permit application for public inspection.

The primary purpose of the March 5, 2024, workshop was to provide the Board of County Commissioners an opportunity to engage the permit applicant, its partners including the Tribe, and the general public about the work that BSDD seeks to enable with the ACU. The Staff Report states: “In this case, there appears to be some controversy with this matter which led to the decision to have the Board of Commissioners review the matter to see if they would be the decision-maker in place of the planning department.” (*See Staff Report, February 27, 2024, p. 9*). While the Staff Report does not elaborate on the nature or extent of the “controversy” causing the Board of County Commissioners to take the uncommon step of a public hearing to determine if it will supplant the Planning Director as the decision maker on this ACU, it does include seven letters from the public – six of which generally express some concern about possible effects of the Winter Lake Phase III project (principally mosquito production and water incursion) and one letter expressing strong support for the project. Likewise, the Staff Report did not provide the written findings and conclusions relative to the Coos County applicable criteria. As noted in the Staff Report: “In this report, staff is providing the criteria and

explaining what needs to be addressed. A full analysis will be completed once the Board of Commissioners chooses a pathway for review.” (Staff Report, p. 13).

The March 5, 2024 workshop/hearing lasted over two hours. The first hour was dedicated to BSDD and project partners providing a detailed explanation of the Winter Lake project, and the Phase III element subject to the ACU permit application. Thereafter, every member of the public wishing to comment or having questions was permitted an opportunity to address the Board of Commissioners and/or BSDD and partner representatives. Ultimately, and after a motion by one Commissioner to forego exercising the Board’s preemption authority and allow the Planning Director to make the decision on the ACU in the normal course failed for lack of a second, the Board decided to exercise its preemptive authority and act as the decision maker for the BSDD permit application. The hearing/workshop was recorded. (By this reference, CIT incorporates the recording of the March 5, 2024, session as an appendix to these comments, and in doing so makes that recording a part of the administrative record for the Board’s action on the BSDD application, and for any and all appeal/review proceedings that might follow.

<https://www.youtube.com/watch?v=9TNeUaNt4TA>.

On March 7, 2024, the CCPD posted and mailed public notice of the Board of County Commissioners hearing on the BSDD application set for March 28, 2024, in Coquille, Oregon inviting written comment/testimony on the BSDD permit application. The Coquille Indian Tribe offers these written comments and testimony for the official record.

III. The BSDD Application has Been Deemed “Complete” by Coos County – This Means that BSDD has Presumptively “Adequately Addressed” All Applicable Coos County Zoning and Land Use Criteria and Standards.

The Coos County Conditional Land Use Application Form completed by the BSDD applicant contains clear instructions that the Commissioners must be mindful of as it exercises its preemption authority to make the decision on the permits requested by BSDD:

- D. **ATTACHED WRITTEN STATEMENT.** With all land use applications, the “burden of proof” is on the applicant. It is important that you provide information that clearly describes the nature of the request and indicates how the proposal complies with all of the applicable criteria within the Coos County Zoning and Land Development Ordinance (CCZLDO). **You must address each of the Ordinance criteria on a point-by-point basis in order for this application to be deemed complete.** A planner will explain which sections of the Ordinance pertain to your specific request. The information described below is required at

the time you submit your application. **The processing of your application does not begin until the application is determined to be complete.** An incomplete application will postpone the decision or may result in denial of the request. Please mark the items below to ensure your submittal is complete. (Emphasis added).

- I. PROPOSAL AND CRITERIA. A written statement of intent, attached to this application, with necessary supporting evidence which fully and factually describes the following:
 1. Project summary and details including timelines.
 2. **A complete explanation of how the request complies with the applicable provisions and criteria in the Zoning Ordinance.** A planner will explain which sections of the Ordinance pertain to your specific request. **You must address each of the Ordinance criteria on a point-by-point basis in order for this application to be deemed complete.** This shall be addressed on the supplemental criteria page (see staff for criteria). (Emphasis added).

Further, the CCLDZO requires that the BSDD permit application be “deemed complete” before it can be “acted upon” by the decision-maker – in this case the Board of County Commissioners:

SECTION 5.0.200 APPLICATION COMPLETENESS (ORS 215.427): 1. An application will **not be acted upon** until it has been **deemed complete** by the Planning Department. In order to be deemed complete, the application must comply with the requirements of Section 5.0.150, **and all applicable criteria or standards must be adequately addressed in the application.** (Emphasis added).

The Commissioners should take careful note of the requirements of the Coos County ACU permit application document instructions, as well as County staff and Commission actions on the BSDD application to date. In particular:

- The BSDD application has been deemed “**complete**” by Coos County.
- Because the BSDD application has been deemed complete, it is (and has been) subject to “**processing**” by Coos County. The “processing” of the application includes the following actions taken by Coos County: 1) the CCPD developed a preliminary Staff Report (February 27, 2024), 2) conducting a publicly noticed workshop/hearing (March 5, 2024), 3) CCPD issued Notice of Public Hearing on merits of BSDD application (set for March 28, 2024), and 4) CCPD completed a subsequent Staff Report (March 21, 2024).
- The March 28, 2024, hearing before the Board of Commissioners is being conducted so that the application may be “**acted upon**” by the Board.

As stated repeatedly in the CCZLDO, and in the Coos County ACU permit application the BSDD application must have **already “adequately addressed”** the applicable criteria in order for it to be subject to the “processing” actions already taken by the County. (See ACU permit application, Section D, above). Likewise, CCZLDO section 5.0.200 (above) provides that the County will “act[] upon” the BSDD application **only** if “**all applicable criteria or standards [are] adequately addressed in the application.**” Because the BSDD application has been subject to “processing”, and further, because the Board of Commissioners has set a public hearing for March 28, 2024, so that it may “act upon” that application, the County has **necessarily already presumptively found that the BSDD has, “on a point-by-point basis” “adequately addressed all applicable criteria/standards” on the face of the submitted ACU application.** The BSDD has consistently stated this to be its position - that its ACU permit application, by itself, has adequately addressed all applicable criteria.

The plain reading of the CCLDZO demonstrates that the BSDD ACU permit application could not be processed and may not be acted upon by the County at or after the March 28, 2024, hearing if BSDD had not **already** adequately addressed all applicable criteria. Said another way, the fact that the Board has set a hearing so that it may act upon the application **means** that BSDD has already met its “burden of proof” with respect to compliance with the CCLZDO and ACU permit requirements. BSDD has met its burden of proof with information and evidence already in the record. The CCZLDO makes it clear that we could not be at this stage of application processing and ready for decision action if BSDD had failed to adequately address any applicable criteria. Therefore, the “burden of proof” has **shifted** to opponents of permit issuance (if any) to demonstrate how the application falls short in meeting the applicable criteria. Without substantial and “point by point” **evidence** submitted at the hearing that one or more applicable criteria are **not met** by BSDD, the Board may not deny the BSDD application under the CCZLDO.

IV. The CCPD Staff Report Findings Are that BSDD Has Satisfied All Applicable CCZLDO Criteria and Standards.

The Tribe agrees that the CCPD Planning Director’s March 21, 2024, Staff Report identifies all criteria and standards applicable to the BSDD permit application. (By this reference, and link below, Coquille Indian Tribe incorporates the March 21, 2024 Staff Report as

an appendix to these comments, and in doing so, makes that report a part of the administrative record for the Board's action on the BSDD application, and for any and all appeal/review proceedings that might follow.

https://www.co.coos.or.us/sites/default/files/fileattachments/community_development/page/24140/acu-23-074_staffreport_for_hearing_3-21-24.pdf). In addition, with the caveat below related to discussion in the Staff Report related to compliance with Section 3.3.730, the Tribe agrees that with the March 21, 2024, Staff Report "Findings" in Section II and Section III. That is: **the BSDD has provided substantial evidence and information affirmatively demonstrating full compliance with, and satisfaction of all applicable criteria.**

With respect to CCLZDO 3.3.730, the ultimate Finding and Conclusion is that BSDD has demonstrated compliance. That ultimate Finding and Conclusion states:

Overall, the wetland enhancement project is not likely to bring significant changes to accepted farm or forest practices and associated costs for adjacent landowners. The applicants have provided a comprehensive study to show that the project does not intend to have any significant changes to adjacent accepted farm or forest practices or significantly change the cost of Farm or Forest Practices. The applicant did provide additional information specific to the reductions of mosquito population as a result of this project. Therefore, the applicant has addressed the criteria. (Staff Report, p. 22.).

Although the official Finding and Conclusion is that BSDD has complied with the criteria, the Report includes a fair amount of discussion not germane to CCLZDO 3.3.730. This appears to be motivated by an effort to respond to eight comment letters received that express some measure of concern about possible effects of the Winter Lake Phase III project to be permitted. It is laudable that the County has heard and spoken in depth in its Staff Report to these citizens. However, we believe that it is important to remember that the County Code was developed to protect the property rights of all landowners, including those that are patrons of the BSDD that seek to improve the agricultural productivity of their lands. There is, and must always be balance, and the County's adopted code must guide how that balance is stricken so that citizens and landowners have certainty for the use of their private property – those "rules" can't change permit by permit, landowner by landowner, or as Commissioners or staff come and go over time. The plain and clear code and strict application of its language is what provides the stability.

In addition, the Tribe believes that BSDD and all of its project partners have heard the speculative concerns made by several landowners and have designed a project that has proactively addressed the concerns about mosquitos and invasive weed species. Again, the Tribe respects the County's attention to the concerns expressed, and will continuously encourage BSDD and our Winter Lake project partners to be good neighbors with the full of the community once and if negative unintended consequences should emerge in the future. This should be done simply as good neighbors. In this case, we are confident that a great pro-Ag/pro-salmon project has been designed and the concerns imagined now will not be realized.

That being said, we do believe it should be noted how some of the narrative in this portion of the Staff Report strays a good bit from the criteria of Section 3.3.730, which provides:

Criteria and Review Standards for Conditional Use Permits (Both Administrative & Hearings Body): A use may be allowed provided the following requirements are met:

1. Such uses will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use.
2. Will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use.
3. Siting Standards for Dwellings and Structures in the EFU Zone. (Not Applicable)

The Staff Report, Pp. 21 - 22, includes narrative drawn from comment letters organized in subsections 1-4. However, the Staff Report narrative does not adequately and specifically address the criteria at hand. First, it does not indicate which, if any, of the commenters own land in farm/forest zoning. While it is fair for any landowner to raise concerns with governmental entities, including those with residential properties, this criteria relates only to lands with farm or forest zoning. Second, the staff narrative does not indicate if any of the concerns raised in comments are from surrounding landowners who are not only in the relevant zoning designations but also currently devoting their land to farm use – as the Staff Report notes on page 14, “farm use” is defined by ORS 215.203, and the key element is that the “primary purpose” of the land is dedicated to obtaining profit through specified agricultural endeavors. The Staff Report does not link its narrative to any evidence in the record about possible effects on specific lands currently devoted to the primary purpose of agricultural enterprise profit-making. It is possible that there are such landowners and properties, but these linkages required by 3.3.730 needed to be made for this portion of the report to be considered at all by the Commissioners. It is literally impossible

to conclude that a “significant change . . . in use” will be “force[d]” on surrounding property farm use without these specific facts and linkages.

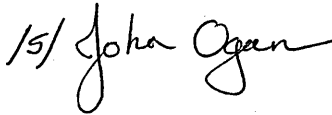
Next, in this portion of the Staff Report narrative (Pp. 21-22, items 1-4) the staff narrative is overly speculative. It repeatedly uses the phrasing “*landowners may need*” to take some type of responsive action as a consequence of the project. Again, it is laudable for the County to hear its citizens, and this “worst case scenario” discussion is understandable to an extent as a “good government” approach. However, it misses the mark of the County Code and evidence that its application requires. The code is in place to protect the property rights of all landowners, including BSDD patrons, ODFW, and others. This is almost certainly why the ultimate Finding and Conclusion is that BSDD has fully satisfied the 3.3730 standard. Without credible and substantial evidence in the record that the permitted project will force significant cost increases on lands currently devoted to profit production from “farm use” (ORS 215.203) the staff discussion cannot bear on the Board of Commissioners’ decision.

Last, the staff discussion that is item 4 on page 22 about loss of agricultural land does not appear to be germane to 3.3.730. We are unable to reconcile the discussion with the plain and clear standards of this criterion being analyzed by the staff. Again, the County Code is the complete package of local regulation that strikes a balance and provides all landowners with certainty about how they may use and enjoy their properties. Building in a new and additional “no ag-land loss” standard to 3.3.370 is not appropriate. That said, the BSDD has explained in detail and repeatedly how completing Phase III of this project will enhance agricultural productivity on project lands, and if loss of agricultural productivity is considered at all by the Board, the increase in agricultural productivity in the County is the only evidence in the record it has to entertain this non-code issue.

In summary, the Tribe appreciates the obvious amount of hard work and time that went into the creation of the March 21, 2024, Staff Report. It also respects the landowners who have voiced concerns with this project, and as a partner in the project, it will remain mindful of the issues raised and be an advocate with its partners to find ways to address any unintended negative impacts on neighbors if they materialize in the future. We are all in this together and have the same vision – bringing our once abundant salmon runs and fishing opportunities back to the Coquille River **and** supporting private property rights and agriculture in Coos County. We also applaud the County for giving so much transparency and public input – this is not typical for

an Administrative Conditional Use permit application where the vast majority of actions planned are outright permitted uses on the EFU zoned properties. We concur with the Staff Report's ultimate Findings and Conclusions that BSDD has met all applicable criteria. We respectfully submit that these ultimate Findings and Conclusion should be adopted by the Board of Commissioners and the BSDD ACU 23-074/FP 23-012 be approved.

Sincerely,

A handwritten signature in black ink that reads "15/ John Ogan". The signature is written in a cursive style.

John Ogan
Executive Director, Natural Resource Office
Coquille Indian Tribe