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Ms. Jann Eckman
Acting Executive Director
Columbia Basin Fish and Wildlife Authority
851 SW Sixth Avenue, Suite 260
Portland, Oregon 97204-1339

RE: *CBFWA Membership Request*
Fort McDermitt Paiute and Shoshone Tribe

Dear Jann:

On January 18, 2011, the Columbia Basin Fish and Wildlife Authority (CBFWA) received a letter from the Fort McDermitt Paiute and Shoshone Tribe (FMPST) requesting CBFWA membership for the tribe. The letter included a Resolution from the Fort McDermitt Tribal Council requesting membership, together with supporting documents. As you requested, I am writing to provide my opinion about the tribe's eligibility for CBFWA membership.

CBFWA's Membership Requirements

CBFWA is a consensus-based organization of fish and wildlife managers formed in 1987 to coordinate their management activities in the Columbia Basin. Most of the CBFWA members exercise management authorities over discrete geographic areas of the Columbia Basin. Two of the members, namely the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service, exercise management authority over the entire basin.

The membership request from the Fort McDermitt Paiute and Shoshone Tribe is not the first one to be considered by CBFWA members since the organization was founded in 1987. In 2001 the Idaho Office of Species Conservation requested CBFWA membership, and in 2002 the Confederated Tribes of Siletz and the Confederated Tribes of the Grand Ronde Community of Oregon (CTGR) each requested membership. The CBFWA declined to offer membership to any of these entities.

The process for considering new members was not described in the original CBFWA Charter. In 2006 the CBFWA members amended the Charter to

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include criteria for membership and a process for considering new members. After 2006 the Charter included a new section 402, which reads as follows:

(A) Eligibility -- The proposed entity must be an agency or tribe with fish and wildlife management responsibilities within the geographic boundaries of the Columbia Basin.

Section 407 of the Charter also includes an explicit process for consideration of a membership request. Section 407 is included with this letter as Attachment A.

Fort McDermitt Paiute and Shoshone Tribe

The Fort McDermitt Paiute and Shoshone Tribe is a federally-recognized Indian Tribe whose reservation is located in southeast Oregon and northwest Nevada. The people of Fort McDermitt Paiute and Shoshone Tribe are descendents of the Northern Paiute Indians who inhabited a vast area of the northern Great Basin and parts of the Columbia Basin. Their ancestral territory ranged from the Cascade Mountains on the east and included the Western Snake River Plain on the east, and from mid-Columbia tributaries to the north down into and included parts of northeast California and northwest Nevada. Shoshone Indians, who were linguistically and culturally related, also occupied the same area, although there is little information in the historic record about these people.

Two Northern Paiute bands occupied an area that straddles the divide between the Columbia Basin and the Great Basin that includes the Owyhee River and Quinn River valleys, respectively. In the northern part of this area were the Tsösö'ödö, who occupied the deserts around Steens Mountain.¹ In the south were the Atsaküdökwa tuviwarai, who were also known to others as the "Quinn River people."² This band spent most of each year in the Quinn River Valley. Neither band signed a treaty with United States government. Instead, they were swept up in a series of armed conflicts with United States Army and with settlers known collectively as the Pyramid Lake War (ending in 1860) and the Snake Indian War (ending in 1868).

The Fort McDermitt Indian Reservation is located on the site of an Army post near the Oregon-Nevada border. In 1864, the Army established an outpost at Quinn River Station to guard the stage line between Winnemucca, Nevada and

¹ O.C. Stewart, *The Northern Paiute Bands*, 2:3 Anthropological Records, University of California 131-32 (1939).

² O.C. Stewart, *The Northern Paiute Bands*, 2:3 Anthropological Records, University of California 136 (1939). R.E.M. Houghton, *The Fort McDermitt Indian Reservation: Social structure and the Description of Political and Economic Power* (University of Oregon diss., 1968).

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Silver City, Idaho. This post became known as Camp McDermitt, and later as Fort McDermitt. By Executive Order dated September 3, 1867, President Andrew Johnson reserved two tracts of land for the Fort, consisting of the two-mile square Post Reserve, and the Hay Reserve, a tract five miles long and two miles wide, extending a mile on either side of the Quinn River for five miles. On October 4, 1870, President Ulysses S. Grant signed an Executive Order expanding the Post Reserve to include nearly 4,000 acres of land and the Hay Reserve to 6,400 acres, for a total of about 10,400 acres of land.³

The Army continued to garrison Fort McDermitt after the culmination of the Snake Indian War, even though the Quinn River and Steen's Mountain Indians were relocated to the Malheur Indian Reservation along with other Northern Paiute bands. Many of them fled back to Fort McDermitt after the outbreak of the Bannock War in 1878. Most of the Indians who congregated at the fort were allowed to stay there, but many others were taken as prisoners to Fort Simcoe on the Yakama Indian Reservation. Eventually, however, the prisoners at Fort Simcoe were allowed to leave, and a large number returned once again to their ancestral homeland and to the protection of Fort McDermitt.⁴

The Army closed Fort McDermitt in 1886, and the property was transferred to the Indian Service for reservation purposes. In 1892, the Interior Department divided the Hay Reserve into 89 individual allotments. By 1907 these were further divided into nearly 150 individual allotments, ranging in size from five to 80 acres of land.

On November 17, 1934, the Fort McDermitt Indians voted to organize a tribal government under the Indian Reorganization Act (IRA). On May 30, 1936, the tribal membership voted to adopt a Constitution and Bylaws, which were approved by the Secretary of the Interior. Prior to 1936 there was no tribally-owned land. On January 17, 1936, President Roosevelt signed into law an Act withdrawing 21,500 acres of public domain land "for the use and occupancy of Indians of the former Fort McDermitt Military Reserve."⁵ Acting under authority of the IRA, the Secretary of the Interior from 1940 to 1950 purchased an additional 10,720 acres of land for the tribe. In July 1947 the tribal council approved a land consolidation program under which individual allottees could exchange their allotment interests for land assignments from tribal lands. Over 4,000 acres of allotted lands have been added to the tribal land base under the land consolidation program. In 1960 Congress transferred 160 acres of land to

³ General Land Office Annual Report 56.

⁴ R.E.M. Houghton, *The Fort McDermitt Indian Reservation: Social structure and the Description of Political and Economic Power* 6 (University of Oregon diss., 1968).

⁵ Act of January 17, 1936, Public Law 74-419 (74th Cong., 2d Sess.).

the Fort McDermitt Reservation, to be held in trust for the FMPST.⁶ Today the Fort McDermitt Reservation includes approximately 34,800 acres of trust land.⁷

Analysis

To determine whether a tribal entity is eligible to join CBFWA, we reviewed the geographic location of the reservation, the geographic location of off-reservation hunting and fishing rights, if any, and the relevant authorities under which the tribe exercises or could exercise fish and wildlife management responsibility. Authorities considered include relevant treaties, congressional actions, executive orders and other authorities as stipulated in the Charter. See CBFWA Charter §401(A)(2006). In reviewing these authorities, we ask two questions. First, is the geographic location of lands in which the tribe has an interest, whether on reservation or off reservation, within the geographic boundaries of the Columbia Basin? Second, does the tribe have fish and wildlife management responsibility or authority over those lands? If both questions can be answered in the affirmative, the tribe is eligible for membership in CBFWA.

As for the first question, the answer is relatively straightforward. As previously mentioned, the Fort McDermitt Reservation today includes approximately 34,800 acres of land. In Chairman Bell's letter, he explains that the Fort McDermitt Indian Reservation "straddles the Nevada-Oregon border and is within the Great Basin and the Owyhee/Snake River watersheds." We obtained a 2011 Boundary and Annexation Survey (BAS) map from the U.S. Census Bureau, which provides an accurate depiction of the reservation boundaries.⁸ Then we obtained a boundary map of the Columbia Basin from the Interior Columbia Ecosystem Management Project. The two areas indeed overlap in the Owyhee subbasin. Using GIS, we calculated the area of that portion of the reservation that is located in the Owyhee subbasin to include approximately 1,380 acres of land. A general depiction of the Fort McDermitt Reservation is included as Attachment B to this letter, and a close-up of that portion of the reservation located within the Owyhee subbasin is included as Attachment C.

The more complicated question is whether the Fort McDermitt Paiute and Shoshone Tribe exercises fish and wildlife management responsibilities within the geographic boundaries of the Columbia Basin. The Charter does not explain or define what sorts of actions constitute the exercise of fish and wildlife management responsibility. Typically we rely on the ordinary definitions of terms in an agreement in the absence of a technical definition. This principle of

⁶ Act of April 4, 1960, Public Law 86-401, 74 Stat. 12 (86th Cong., 2d Sess.).

⁷ See http://www.census.gov/geo/www/pvs/BAS_PVS.html.

⁸ See <http://www.census.gov/geo/www/bas/bashome.html>.

contract interpretation is referred to as “the plain meaning rule.”⁹ A dictionary definition of the term “exercise” is “the discharge of an official function (i.e., the *exercise* of his judicial duties).”¹⁰ A definition of the term “management” is “the conducting or supervising of something.”¹¹ Finally, a dictionary definition of the term “responsibilities” is “some things for which one is responsible.”¹²

Thus the plain meaning of the phrase “exercises fish and wildlife management responsibilities” would be “the discharge of an official function to conduct or supervise some thing for which one is responsible.”

With this definition in mind we examined the official functions of the FMPST as they relate to the tribe’s responsibilities over fish and wildlife. In my opinion these can be either proprietary or regulatory responsibilities. My conclusion, as explained below, is that the FMPST meets this definition. A fundamental attribute of tribal sovereignty is the right to exclude non-members from its territory.¹³ From this authority is derived the power of tribes to regulate non-member hunting and fishing on reservation lands.¹⁴ Among other responsibilities the FMPST’s Constitution directs the Tribal Council --

To promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Fort McDermitt Paiute and Shoshone Tribe of Indians of the Fort McDermitt Indian Reservation, providing for the manner of making, holding, and revoking assignments of tribal land or interests therein . . . *providing for the licensing of nonmembers coming upon the reservation for the purpose of hunting, fishing, trading or other business, and for the exclusion from the reservation of persons not so licensed.*¹⁵

⁹ Coast Federal Bank, FSB v. United States, 323 F. 3d 1035, 1038 (Fed. Cir. 2003).

¹⁰ <http://www.merriam-webster.com/dictionary/exercise>.

¹¹ <http://www.merriam-webster.com/dictionary/management>.

¹² <http://www.merriam-webster.com/dictionary/responsibilities?show=0&t=1299202363>.

¹³ Quechan Tribe v. Rowe, 531 F. 2d 408, 411 (9th Cir. 1976). See Felix S. Cohen’s Handbook of Federal Indian Law 252 (1982 ed.).

¹⁴ United States v. Pollmann, 364 F. Supp. 995, 999 (D. Mont. 1973)(interpreting 18 U.S.C. § 1165).

¹⁵ Constitution and Bylaws of the Fort McDermitt Paiute and Shoshone Tribe, Article IV, Section 1(f)(ratified, May 30, 1936, approved by the Secretary of the Interior, July 2, 1936)(emphasis added).

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The FMPST also has been participating in Columbia River fish and wildlife management activities through the Columbia River Treaty (CRT) review. The FMPST participates as one of the 15 United States Columbia Basin tribes that have been working together for the past few years on the CRT. The participating tribes meet together and with the U.S. Entity on a regular basis and are members of the teams organized to evaluate the Treaty and eventually to provide a recommendation to the State Department on renegotiation. The FMPST also is a member of the Upper Snake River Tribes Foundation (USRT) and consequently participates in activities related to managing fish and wildlife resources in the Upper Snake River Basin.¹⁶

Another related question is whether the FMPST exercises fish and wildlife management responsibilities in a proprietary capacity, as the landowner of trust land within the geographic boundaries of the Columbia Basin. We have not considered this issue, primarily because we don't have the information readily available to report on the tribe's management of trust lands on the reservation. In any event, we don't think it is necessary to reach this issue in light of the tribe's regulatory role over on-reservation hunting and fishing by non-members.

Conclusion

The Fort McDermitt Indian Reservation is located in part within the geographic boundaries of the Columbia River Basin. Furthermore, the Fort McDermitt Paiute and Shoshone Tribe of Indians exercises regulatory authority over hunting and fishing by nonmembers, which constitutes the exercise of fish and wildlife management responsibility. For these reasons, in my opinion the Fort McDermitt Paiute and Shoshone Tribe of Indians is eligible for CBFWA membership should the members decide to extend an invitation to the tribe to join the organization.

Sincerely,

MENTOR LAW GROUP, PLLC



JOE MENTOR, JR.

¹⁶ Email from Heather Ray, Executive Director, Upper Snake River Tribes Foundation (March 3, 2011).

**ATTACHMENT A - PROCESS FOR CONSIDERATION OF CBFWA MEMBERSHIP
REQUESTS**

Section 407 - Admission of New Members

(A) Application Process --

(1) The interested entity must meet the eligibility requirement referenced in Section 402(A).

(2) The applicant must submit a written request for admission that clearly explains how the entity meets the eligibility requirement. The application letter must be received at least 60 days prior to a semi-annual Members meeting. Applications will only be considered at the semi-annual winter or summer Members' meetings.

(B) Members Decision Process --

(1) The application letter and any corresponding materials will initially be reviewed by the Members Advisory Group at the first regularly scheduled monthly meeting following receipt of the letter.

(2) If it is determined further information is needed, the Members Advisory Group may request that information from the applying entity.

(3) When it is determined by the Members Advisory Group the application is complete, the application will be forwarded to the Members for their consideration at the next regularly scheduled Members Meeting.

(4) The Members will review the request and will take action to either deny, grant admission, or table the application. If there are objections to the application, they must be explained.

(5) The applicant will be notified of the Members' action within ten business days of the date of the meeting.