

To : Rep. Julie Fahey, Oregon House Rules Committee
From: : Dave Moskowitz
Date : May 23, 2023
Re : HB 3086 regarding Commission Restructuring

This memo provides general information about statutes and administrative related to Oregon's Fish and Wildlife Commission (Commission) and Department of Fish and Wildlife' (ODFW) relationship with nontreaty tribes. It is not legal advice, and you should contact the Legislative Counsel's Office if you have questions about how these laws may apply to a particular situation.

When it comes to fish issues, the relationship between the Oregon Coast tribes and ODFW and Oregon Fish Commission is governed by several statutes and administrative rules, including: Oregon's tribal relations statute, ORS 182.162-168; Oregon's intergovernmental cooperation statute, ORS 190.110; Oregon's fish and wildlife statute, ORS 496.002 *et seq.*; Oregon's Hatchery Research Center Board statute, ORS 498.825-833; ODFW's Native Fish Conservation Policy, OAR 635-007-0503 and -0505; and ODFW's Hatchery Management Policy, OAR 535-007-0545. These statutes and rules do not require ODFW or the Commission to receive the tribes' consent before taking any agency actions. Essentially, these statutes and rules direct ODFW and the Commission to cooperate with the tribes; they do not require agreement.

Tribal Relations Statute

Oregon's tribal relations statute sets broad rules that all state agencies must follow. ORS 182.162-168. Specifically, all state agencies must do the following:

1. Develop and implement tribal relationship policies. ORS 182.164(1). Those policies must promote communication between agencies and tribes and positive government-to-government relationships. ORS 182.164(1)(c)-(d).
2. When developing programs that affect tribes, agencies must include representatives designated by the tribes. ORS 182.164(2).
3. Agencies must make reasonable efforts to cooperate with tribes in developing and implementing agency programs that affect tribes. ORS 182.164(3).
4. The governor must hold annual meetings at which representatives of state agencies and tribes may work together to achieve mutual goals. ORS 182.166(2).
5. All agencies must submit annual reports to the Governor, describing what they did to implement these statutory requirements. ORS 182.166(3).

The statute creates no right of action against a state agency nor does it provide a right of review of state agency actions. ORS 182.168.

ODFW adopted its Tribal Government Relations Policy in December 2014. ODFW, Tribal Government Relations, https://www.dfw.state.or.us/hr/policies/DO_100_04.pdf. Among other things, the policy states that ODFW will:

- Meet with Oregon's federally recognized tribes, which include the Oregon Coast tribes, to discuss mutual interests and opportunities to work together.
- Support and participate in cooperative efforts on fish and wildlife that cross jurisdictional boundaries.

- Seek tribal representation on ODFW’s advisory committees that are of interest to tribes.
- Exchange data.
- Promote strong government-to-government relationships at leadership, management, and staff levels.

Neither the tribal relations statute nor ODFW’s tribal relations policy require ODFW or the Commission to obtain tribal *consent* before taking an agency action.

Intergovernmental Cooperation Statute

Although it is not required to do so, ODFW is authorized to enter into agreements with tribes for the purpose of carrying out ODFW’s policies, programs, and other lawful responsibilities. ORS 191.110.

“In performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it, a unit of local government or a state agency of this state may cooperate for any lawful purpose, by agreement or otherwise, with a unit of local government or a state agency of this or another state, or with the United States, or with a United States governmental agency, or with an American Indian tribe or an agency of an American Indian tribe. This power includes power to provide jointly for administrative officers.”

ODFW cites this statute in support of entering into the mutual agreements with Oregon Coast tribes.

Fish and Wildlife Statute

Oregon’s fish and wildlife statute imposes a single duty on ODFW when it comes to fish and Oregon Coast tribes: it must furnish surplus hatchery salmon to the Confederated Coos, Lower Umpqua and Siuslaw Indian tribes, Cow Creek Band of the Umpqua Indians, and the Coquille Tribe for their historical, traditional, and cultural salmon ceremonies that take place each year. ORS 496.201(1).

Hatchery Research Center Board Statute

ODFW’s Director must appoint one representative of Oregon Indian tribes to serve as a voting member on the Oregon Hatchery Research Center Board. ORS 498.825(3)(j).

Native Fish Conservation Policy & Hatchery Management Policy

The Native Fish Conservation Policy establishes the goal of “[f]oster[ing] and sustain[ing] opportunities for *** tribal fishers consistent with the conservation of naturally produced native fish and responsible use of hatcheries.” OAR 635-007-0503.

The policies require external consultation in two instances. Specifically, ODFW must develop and implement hatchery program management plans “in consultation and cooperation with management partners and the public.” OAR 635-007-0544(3). Additionally, “[a]ffected tribal governments shall be consulted in the development and implementation of conservation plans.” ODFW’s rules do not define the term “consult.”

Summary

If you have questions regarding this information or how it may apply in specific circumstances, we encourage you to contact the Legislative Counsel’s Office. Thank you.