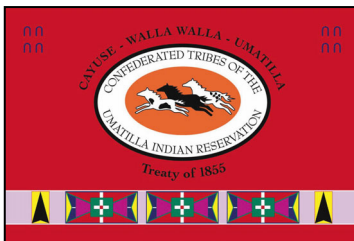


**Confederated Tribes *of the*
Umatilla Indian Reservation**

Department of Natural Resources



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January 2, 2024

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Submitted via Federal eRulemaking Portal, <https://www.regulations.gov>, and via email to identified addressees

RE: Proposed Rule: Land Uses; Special Uses; Carbon Capture and Storage Exemption, RIN 0596-AD55

Dear Director Holzworth:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) offers the following initial comments on the Proposed Rule, “Land Uses; Special Uses; Carbon Capture and Storage Exemption” (RIN 0596-AD55, Document Number 2023-2434), pursuant to your notice at 88 FR 75530.¹ The United States Department of Agriculture (USDA) Forest Service (Agency) is proposing to amend its special use regulations that currently prohibit authorization of exclusive and perpetual use and occupancy of National Forest System lands to provide an exemption for carbon capture and storage (CCS). The Rule also proposes to add a definition for “Carbon capture and storage.”

The CTUIR appreciates the federal government’s efforts to confront the many complex issues associated with Climate Change and the extraordinary threats it poses to us, now and in the future. As you proceed with these efforts and consider the complex web of factors that should weigh into navigating the decisions and actions that must occur to address these threats, we encourage you to remain mindful and vigilant in working collaboratively with tribal governments and in pursuing approaches that will honor your legal and policy mandates in accordance with tribal Treaty Rights and your federal Trust Responsibility.

At this time the CTUIR believes that the Rule, including the proposed definition of “carbon capture and storage,” should not be adopted. It is significantly flawed and unwisely premature, and, at a minimum, further scientific and technical study and investigation is warranted before undertaking such a rulemaking process. Alternatively, the CTUIR believes that additional time is needed to more properly review and comment on the proposal and we therefore ask for an extension of 90 days beyond the original 60-day comment period. Furthermore, we believe that

¹ <https://www.federalregister.gov/documents/2023/11/03/2023-24341/land-uses-special-uses-carbon-capture-and-storage-exemption>.

adequate government-to-government consultation as we define and understand it has not yet taken place to our satisfaction on this matter, and we therefore request such consultation.

The USDA and the Forest Service engage in many actions and activities that affect, both directly and indirectly, the rights, interests, and resources of the CTUIR. The lands and waters over which the Forest Service exercises oversight are essential components in maintaining and sustaining tribal First Foods on which our rights depend. Management of healthy forested ecosystems can often profoundly affect CTUIR Treaty Rights and the ability of our members to exercise them. The USDA and the Forest Service should make decisions and take actions (such as rulemaking) in a manner that maintains (at a minimum)—or more preferably enhances—the ability of the United States to honor and uphold Indian treaties and its Trust Responsibility to tribes. You should also act in a manner that promotes remedies to past and continuing environmental injustices and does not risk the addition of new ones.

Historically, the federal government’s energy policy, development, and generation practices have taken place with little or no regard to tribal rights, interests, and resources, too often resulting in catastrophic loss of or damage to them. Indian tribes and their trust assets usually did not even enter into the equation when decisions were made. It is a story as old as—actually even older than—the United States, and as current as today.²

As we collectively face the undeniable challenges of our human-induced changing climate, we must avoid a repeat of past mistakes, where the CTUIR and other tribes were ignored or dismissed, and great environmental harm was the consequence—harm inflicted not just on tribes but on the country itself and many of its other citizens.

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 and all its constituent departments and agencies (including the USDA and Forest Service) have a duty to honor and uphold the Treaty of

² See, e.g., “Gangsters are the villains in ‘Killers of the Flower Moon,’ but the biggest thief of Native American wealth was the US government,” Oct. 16, 2023, <https://theconversation.com/gangsters-are-the-villains-in-killers-of-the-flower-moon-but-the-biggest-thief-of-native-american-wealth-was-the-us-government-207700> (“The U.S. was built on stolen lands and wealth.”); “The biggest thief of Native wealth,” accessed Jan.1, 2024, <https://www.msn.com/en-us/news/us/the-biggest-thief-of-native-wealth/ar-AA1iwNVg?ocid=entnewsntp&cvid=6f0f5725529b4bea821a46044efe31e3&ei=169>.

1855 and all Indian treaties and to act as stewards and trustees to ensure that the terms and commitments of those treaties are fulfilled.

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.³ In addition to various applicable policies, the CTUIR has developed a First Foods management mission, a *River Vision*, and an *Upland Vision* to guide restoration and management of our First Foods (see discussion below).⁴

Among other things, the Treaty of 1855 explicitly guarantees to the CTUIR and its members the right of “taking fish.” With that right is the implicit, concurrent, assurance that there will be fish to take—that they will exist. That this guarantee has been eroded, to say the least, is evident from the extinction of multiple salmonid populations and listings of many others under the Endangered Species Act (ESA), our myriad polluted rivers and streams (with some even completely de-watered or otherwise rendered virtually uninhabitable), and substantial loss of or damage to the number, health, and extent of many other fish and game species and plant and root resources.⁵

Across the Pacific Northwest, many factors have played a part in causing fish extinctions and diminished populations, including ill-considered energy development (e.g., widespread dam construction) and poor land management practices (including some under Forest Service

³ 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.

⁴ 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 federal 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 betterment.

⁵ As the CTUIR stated in its *Columbia Basin Salmon Policy* in 1995: “For thousands of years, we managed our resources with respect. This land was rich in natural resources when the first non-Indians arrived. The wasteful and disrespectful practices of the last 150 years have used up nearly all of these resources, creating ugly conflicts between those people now dependent on them. These resources would be healthy if the Treaty of 1855 had been honored, and if the United States Government had honored its own laws.” If the Treaty had been honored, no salmon would have gone extinct. If the Treaty was honored, no salmon would be listed under the ESA. In addition to the infringement on Treaty Rights, substantial environmental *injustices* have occurred in the Pacific Northwest—to tribes and tribal people, and others. A thorough assessment and analysis of the profound, unjust losses and vast wealth transfer away from tribes resulting from non-Indian development across the Columbia River Basin can be found in the “Tribal Perspectives Report” (<https://www.critfc.org/wp-content/uploads/2021/03/2019-06-10-CRTT-Trib-Perspect.pdf>) and in the earlier “Tribal Circumstances Report” (https://www.critfc.org/wp-content/uploads/2014/11/circum_exec.pdf) which it incorporates.

jurisdiction). Additionally, within the realm of federal government policy and actions in our region, we cannot overlook the horrid example of the Hanford Nuclear Reservation and its history, with an ongoing, continuing legacy as one of the most polluted sites on earth that will haunt us for generations to come.

There is no doubt that Climate Change is real and serious—now one of the most immediate and prominent of the many threats and challenges to tribal member health and our First Foods (although possibly the most comprehensive, over-arching, and seemingly intractable.)⁶ As we seek to protect our First Foods—and our planet, and our future—we must do so quickly but wisely—not prematurely, without adequate knowledge and understanding of the potential repercussions of our choices, not based on flawed assumptions or deficient data, and not in a manner that may potentially serve as a smokescreen that masks the real problem and diverts us from real solutions.

General Comments

The CTUIR DNR is concerned that, in broad terms, the Rule regarding Carbon Capture and Storage fails to effectively address the fundamental problem causing the crisis—the widespread, continuing generation and use of fossil fuels to satisfy too much of our energy needs. In many respects CCS would appear to be the desired optimum or preferred approach of the fossil fuel corporate industrial sector itself, as their activities—and profits—would continue unabated and the wastes or undesired by-products (and costs) would be externalized and shifted to the care and responsibility of others (as has generally always been the case).

Storage space for capture and sequestration is finite, and while in theory there is capacity for decades of storage in the U.S., committing our National Forests as acceptable sites for permanent storage is in a sense punting this problem—kicking the can down the road—to perpetuate the extractive, exploitive, ultimately unsustainable production and consumption of fossil fuel-derived energy and goods requiring it. The Rule could result in future generations largely inheriting this problem, largely unresolved, while simultaneously constraining their options to more effectively address it.

The CTUIR DNR supports investing in renewable energy, reducing consumption of energy (particularly fossil fuels) and non-essential goods, and embracing the possibilities of reducing our incessant growth and associated resource demands. Excessive reliance on CCS, including permanently devoting portions of our National Forests (belonging to all Americans) to the exclusion of all other uses, is worrisome. We are concerned that over-dependence on Capture and Storage could reduce any momentum toward decreasing fossil fuel use and wasteful,

⁶ This is illustrated by instances where certain salmon sub-populations have been utterly decimated by high water temperatures in our region's rivers (e.g., Snake River sockeye in the Columbia and Snake Rivers in 2015). Recent extensive drought, wildfires, and extreme summer air temperatures in the Pacific Northwest (and elsewhere) have been widely reported.

unsustainable growth. Too much of the status quo could persist, and attention to positive, difficult-but-necessary measures could be diverted.⁷

While appreciative of the many worthwhile initiatives the current Administration has taken on environmental issues and tribal relations—particularly in contrast to the prior Administration—the CTUIR nevertheless does have some concerns about certain decisions and actions that have taken place in the energy and climate context:

- Federal data show that the Biden Administration approved 6,430 permits for oil and gas drilling on public lands in its first two years, outpacing the Trump Administration's 6,172 drilling-permit approvals in its first two years.⁸
- Fossil fuel projects continue to be approved and investments made around the country; for example, the Willow Project in Alaska, the Mountain Valley Pipeline in West Virginia, and the GTX project running from the Canadian Border into California, crossing through Washington in Spokane, and Oregon at Umatilla (within the homelands of the CTUIR).⁹
- Under the current Administration, U.S. oil production is poised to break all-time records set during the preceding Administration; U.S. oil output is now projected to rise to an average of 12.8 million barrels per day this year for the first time ever.¹⁰
- In 2024, U.S. oil output is projected to climb to another record of 13.1 million barrels per day.¹¹

⁷ “Plan to stash planet-heating CO2 under national forests alarms critics,” Dec. 10, 2023, <https://www.ijpr.org/environment-energy-and-transportation/2023-12-10/plan-to-stash-planet-heating-co2-under-national-forests-alarms-critics> (“More broadly, the measure would ‘provide a powerful incentive to continue to burn fossil fuels,’ Furnish said. ‘It’s the opposite of a virtuous cycle.’”).

⁸ Data from USDOJ Bureau of Land Management, “Automated Fluid Minerals Support System Reports,” BLM Reporting Application - Automated Fluid Minerals Support System Reports, <https://reports.blm.gov/reports/AFMSS>; Center for Biological Diversity, “Biden Administration Oil, Gas Drilling Approvals Outpace Trump’s,” Jan. 24 2023, <https://biologicaldiversity.org/w/news/press-releases/biden-administration-oil-gas-drilling-approvals-outpace-trumps-2023-01-24/#:~:text=WASHINGTON%E2%80%94Federal%20data%20show%20the,in%20its%20first%20two%20years>.

⁹ See Center for Biological Diversity, “Analysis: Biden-Approved Fossil Fuel Projects Undermine IRA Emissions Cuts,” Nov. 27 2023, <https://biologicaldiversity.org/w/news/press-releases/analysis-biden-approved-fossil-fuel-projects-undermine-ira-emissions-cuts-2023-11-27/>; Oregon Capital Chronicle, “Federal regulators approve natural gas pipeline expansion through Oregon, Washington,” Oct. 19, 2023, <https://oregoncapitalchronicle.com/2023/10/19/federal-regulators-approve-natural-gas-pipeline-expansion-through-oregon-washington/>.

¹⁰ For context, that is about half a million barrels per day more than the prior annual record set in 2019. It is also more oil than any other country produces; the next-closest nation, Saudi Arabia, produces about 10 million barrels per day, according to OPEC. Organization of the Petroleum Exporting Countries (OPEC) Monthly Oil Market Report (13 December 2023), <https://momr.opec.org/pdf-download/>.

¹¹ Production forecast from the U.S. Energy Information Administration, “Short Term Energy Outlook,” Dec. 2023, https://www.eia.gov/outlooks/steo/pdf/steo_full.pdf; CNN Business, “Under Biden, US oil production is poised to

These figures, and the implications from them, are alarming and cause for concern. They suggest a certain lack of consistency among the various elements that are part of this Administration's overall energy/climate approach in response to the world-altering phenomenon of anthropogenic Climate Change. It also raises questions as to what degree of trust can be placed in the somewhat benign (if not glowingly positive) depiction of the merits of the narrow mitigation measure at issue here, the unprecedented, permanent storage of carbon under our National Forests.

The CTUIR DNR is concerned that certain fundamental premises underlying the Rule are inaccurate and/or misleading or are at least stated that way. The Federal Register Notice says that:

“Carbon capture and storage can be used to reduce carbon dioxide emissions to the atmosphere. Possible sources of carbon dioxide include point source emissions from industrial facilities, energy production, and direct air capture from the atmosphere. Authorizing carbon capture and storage on NFS lands would support the Administration's goal to reduce greenhouse gas emissions by 50 percent below the 2005 levels by 2030.”

Carbon capture and storage does not “**reduce**” carbon emissions. Capturing and storing carbon does not affect how much carbon is emitted from existing (and potentially new) sources. Those sources will continue to emit carbon, with or without capture and storage in place, unless other non-emitting energy sources are utilized. Our greatest fear is that carbon capture and storage may serve as not merely a rationale to continue with current emission levels, but even as an excuse to allow increased emissions or new emission sources. We reject the use of CCS in any way as a cynical tool that would serve only to “greenwash” ongoing or expanded industrial fossil fuel extraction.

Carbon emissions are reduced when **less carbon is emitted**. Less carbon is emitted when less fossil fuels are burned. Less fossil fuels are burned when less are produced, and less are mined, fracked, or otherwise extracted. Less fossil fuels are produced when their use, or the means to obtain them, are legally prohibited, regulatorily phased out, or voluntarily phased out because of economic or other reasons.

Carbon Capture and Storage captures and stores carbon that has **already** been emitted. The only way that CCS can lead to **reduced** carbon in the atmosphere—eventual net loss—is if more can be ultimately captured and stored than: (1) what is currently in the atmosphere now, **and** (2) all that is still accumulating now, **and** (3) all that will accumulate in the future from any emission sources that persist or are added. If anthropogenic atmospheric carbon levels are to decrease then we must begin with no net gain in human emissions, with CCS used as a means to chip away at the vast storehouse of atmospheric carbon that has built up since the advent of the industrial revolution.

break Trump-era records,” Aug. 9, 2023, <https://www.cnn.com/2023/08/09/business/oil-production-biden-trump/index.html>.

And we must be extremely careful and cautious about how and where captured carbon is stored, so that we do not compound existing environmental problems or add new and/or possibly unanticipated ones to our already dismally long list. The larger truth cannot be obfuscated: we cannot engineer our way out of this dilemma; the frightful course of anthropogenic Climate Change will not be altered unless greenhouse gas emissions decrease, which in turn cannot occur unless fossil fuel production and use is substantially curtailed.

Specific Comments

1. Contrary to Forest Service Precedent

The Agency is proposing to alter its historic, long-standing special use regulations that prohibit “exclusive and perpetual use and occupancy of National Forest System lands,” and allowing an exception for carbon capture and storage. This would be contrary to precedent.¹² It would authorize projects that would be for a single use, that could theoretically last forever.¹³ It would exclude all other uses in immediate project areas and would have additional negative impacts in adjoining/associated areas (such as those for transport infrastructure) that would further preclude other uses/occupancy; “multiple uses” could be severely constrained. Certain forest lands would essentially be converted to waste disposal sites, for materials originating elsewhere, beyond the forests themselves, and unrelated to the natural processes and functions of the affected forests and subsurface lands.

The CTUIR questions whether this could open the door to other single, exclusive uses that are similarly unrelated to the affected forests’ inherent processes and functions (for example, disposal of other, “outside” wastes). Given the limited time available for research, analysis, and comment, we are curious as to what extent this type and manner of use is or is not consistent with the many various laws and mandates under which the Forest Service operates.¹⁴ The CTUIR would also like to know whether potential impacts of the Rule to federally-listed endangered species have been identified or assessed, and specifically whether the National Marine Fisheries Service and the U.S., Fish and Wildlife Service have been consulted pursuant to Section 7 of the Endangered Species Act.

2. Reliance on Unproven, Potentially Harmful Technology

Underground Carbon Capture and Storage is relatively new, significantly unproven, and characterized by many unknowns, uncertainties, and potential risks and dangers. Reliance on it, as the Rule does, is misplaced, premature, and unwise, and placing these burdens on the lands,

¹² “Plan to stash planet-heating CO2 under national forests alarms critics,” Dec. 10, 2023, <https://www.ijpr.org/environment-energy-and-transportation/2023-12-10/plan-to-stash-planet-heating-co2-under-national-forests-alarms-critics> (“Jim Furnish, a retired US Forest Service deputy chief who consults on forestry issues, said he was startled by the proposal. He said it was a reversal of historic Forest Service policy that only allows temporary use of Forest Service lands, usually for five to 20 years.”).

¹³ CCS on our National Forests appears to be seemingly irreversible; *see* Federal Register Notice (“Carbon dioxide injected in pore spaces may remain for over 1,000 years after injection and would be tantamount to an exclusive and perpetual use and occupancy if authorized on NFS lands.”).

¹⁴ *See, e.g.*, <https://www.fs.usda.gov/about-agency/regulations-policies/laws-regulations>.

waters, and other resources of our National Forest system, already bearing many burdens from past and present practices and responsibilities, is unwise and inappropriate at the present time.

Some issues and questions include:

- The fact that EPA conveniently changed its definition of hazardous waste to exclude stored carbon does not negate its actual hazards and dangers. They still exist whether stored carbon fits the latest definition or not. CO₂ is an odorless gas, making it more difficult to detect, with plumes that can spread for miles. If breaches or leaks occur in transport or at storage sites, CO₂ can displace oxygen, and plumes can be hazardous to humans and other organisms.
- There has been at least one recent notable instance of catastrophic failure of a carbon dioxide pipeline, with damages, injuries, and evacuations.¹⁵
- Underground carbon storage can endanger groundwater sources and availability; future access could be blocked or obstructed by physically filling up pore space necessary for water movement, and acidification could occur through absorption of carbon dioxide.
- Seismic activity is an issue; (i) to what extent new, natural seismic activity may affect stored carbon, and (ii) to what extent subsurface carbon storage operations may trigger new or exacerbate existing seismic activity and risks (new fissures and fractures in bedrock caused by injection of supercritical fluids into limited pore spaces, and other unknown unintended geologic consequences); have these been identified, assessed, or analyzed?

The CTUIR DNR would like to know to what extent you have identified, assessed, or analyzed risks of carbon leaks or ruptures in transit or in storage to people, wildlife, and terrestrial subsurface environments, ecosystems, and habitats in general (including soils, geology, and groundwater). We would like to know to what extent you have identified, assessed, or analyzed risks of carbon leaks or ruptures in transit or in storage **specifically** to tribal First Foods, including their continued existence, degradation or destruction of essential habitats, potential toxic exposure/contamination, and migration/propagation/overall sustainability. Also, the CTUIR is also curious as to what extent you have identified, assessed, or analyzed impacts from carbon storage infrastructure and operations on tribal members' access to First Foods (e.g., restricted access from fencing and monitoring, restriction of movement). It is unclear to us whether these matters have been identified, assessed, or analyzed, and to what degree.

¹⁵ See "The U.S. is expanding CO₂ pipelines. One poisoned town wants you to know its story," Sept. 25, 2023, <https://www.npr.org/2023/05/21/1172679786/carbon-capture-carbon-dioxide-pipeline>; "A rupture that hospitalized 45 people raised questions about CO₂ pipelines' safety," May 10, 2023, <https://www.npr.org/2023/05/10/1175305683/a-rupture-that-hospitalized-45-people-raised-questions-about-co2-pipelines-safet>; "Go read the harrowing story of the world's first CO₂ pipeline explosion," Aug 26, 2021, <https://www.theverge.com/2021/8/26/22642806/co2-pipeline-explosion-satartia-mississippi-carbon-capture>.

The CTUIR is additionally concerned with the Proposed Rule because the Columbia River Basalt Group (CRBG) formations that comprise most of the Columbia River Basin and much of the CTUIR homelands are described as being “particularly receptive” to carbon dioxide injection and mineralization. A new “land rush” could result from the amended Rule, with outside entities bearing outside carbon “gifts” descending on our region already struggling with multiple environmental problems. There are also many outstanding unknowns and uncertainties about the viability of CRBG for carbon storage/sequestration:

- Chemical reaction series—the reactions taking place to form carbonate rocks, reaction of CO₂ with native groundwater, etc.—appear to be not yet understood.¹⁶
- The depth of potable groundwater is unknown in some instances.¹⁷
- What happens to displaced native non-potable groundwater after injection is unclear, because the reaction series and pressure changes are unknown.
- Porosity and interconnectedness of the pore spaces is undetermined; many very deep boreholes may need to be drilled to characterize available and interconnected storage space, as well as depth to non-potable water.
- Total practical storage space and practical depth limits for drilling are uncertain, and the premised depth to non-potable water is unclear.
- It is also unclear whether an appropriate Life Cycle Assessment (LCA) has been or will be conducted, looking at CCS costs/benefits that include costs to plan, prepare, analyze sites, drill, transport (pipeline construction or other), energy needed to transport and inject, operations and maintenance, monitoring, etc.
- Pore pressure changes during and after CO₂ injection may not be fully or accurately understood; apparently one experiment at one small site has taken place.¹⁸
- True benefits from CCS in the CRBG region are uncertain and may be exaggerated, as available and areal distribution of storage space, depths of potable/non-potable groundwater, depth of interconnected pores, etc., are unknown.¹⁹

¹⁶ Once carbonate is formed, the site is no longer useful; CCS is not a process that provides a long-term solution to reduce CO₂ in the atmosphere.

¹⁷ It is often difficult to ascertain subsurface geology and connections, such as what may be underneath basalt layers and other underground formations in the Northwest and elsewhere; *see, e.g.*, “6 million-year-old ‘fossil groundwater pool’ discovered deep beneath Sicilian mountains,” Dec. 7, 2023, <https://www.livescience.com/planet-earth/geology/6-million-year-old-fossil-groundwater-pool-discovered-deep-beneath-sicilian-mountains> (Scientists recently found fresh water 2,300 to 8,200 feet deep in Sicily).

¹⁸ Pressure changes disrupt equilibrium in rocks and may cause unforeseen responses over time (migration of non-potable water to potable environments, seismic activity, etc.).

¹⁹ At least one analysis of some of the world's largest carbon capture and storage projects by the Institute for Energy Economics and Financial Analysis found most of them underperformed on emission reduction targets, and many were over budget. *See* “Carbon capture: a decarbonisation pipe dream,” <https://ieefa.org/articles/carbon-capture->

- The CRBG contains a number of critical groundwater areas; pollution and/or extraction of potable groundwater in such areas is misguided, where site characterization and disposition of native groundwater is still being described and pore space for potable groundwater is at a premium; risks would be compounded.
- In the future, withdrawing and treating accessible non-potable groundwater with affordable methods may be possible; CCS would preclude this option of beneficial use of treated groundwater.

3. Implementation Issues; Costs and Liabilities of Facilities and Infrastructure

The Federal Register Notice states that “[s]toring carbon dioxide in pore spaces is intended to mitigate greenhouse gas emissions and is performed via Class VI underground injection control wells.” It is unclear if EPA has sufficient resources at present, or will have them in the future, to oversee a vast new underground injection program for CCS on Forest Service lands. EPA’s regulations for Class VI Wells stipulate that after 20 years of the monitoring phase of a CCS operation by the carbon emitter/producer, the federal government—and by extension the public and the taxpayers—would be responsible for subsequent costs, expenses, and liabilities. To what extent has the Agency determined or estimated these potential future obligations? How long would such facilities operate? Again, this might appear to be another case where the producers of unwanted carbon would seek to internalize the profits and externalize their costs. And, has any analysis been done on both the financial costs of construction and operation of CCS and costs in terms of additional carbon outputs to implement permanent CCS on our National Forests?

The CTUIR would also like to know whether tribes will be provided support and resources, including funding, to meaningfully and effectively engage in Forest Service, EPA, or other federal agency processes associated with a possible onslaught of proposed CCS projects on National Forests, or monitor the projects themselves if they are implemented.

A fundamental problem with the approach of mitigating the release of carbon after-the-fact versus preventing generation and emission of it in the first place is the skewed calculus that attributes higher traditional “economic benefit” to the former and less (if any) to the latter. **Preventing** carbon emissions has value, but one that may not be given proper credit or acknowledgement in this overall technology-and-new-project-driven sequestration scheme. Fossil fuel industries may continue to reap substantial financial rewards from continued carbon generation while simultaneously receiving tax incentives and supplemental federal support to implement CCS and disingenuously labeling their efforts as “green” and “climate friendly.”

[decarbonisation-pipe-dream](https://www.reuters.com/sustainability/climate-energy/comment-carbon-capture-storage-is-dangerous-distraction-its-time-imagine-world-2023-12-11/); “Comment: Carbon capture and storage is a dangerous distraction. It’s time to imagine a world beyond fossil fuels,” Dec. 11, 2023, <https://www.reuters.com/sustainability/climate-energy/comment-carbon-capture-storage-is-dangerous-distraction-its-time-imagine-world-2023-12-11/>.

4. Inadequate Public Comment Opportunity, Tribal Consultation

The public comment period for this Proposed Rule is sixty (60) days. This is inadequate; more time is needed. The CTUIR requests at least a 90-day extension. The initial 60-day period occurs at the end of the year, with multiple holidays and other diversions. It is not clear whether minimizing attention to this significant rule amendment was an unstated goal, but that nevertheless may be the outcome if the comment period is limited to November-December.

CCS is a new and highly technical engineering tool to sequester carbon, and as such, seeking input and consent on a major rule-reversal allowing it needs to include information and education on the science, pros/cons, etc. Many communities, including the CTUIR, have not yet had sufficient opportunity to provide or share adequate information and education necessary to obtain informed input on such a significant, permanent, long-lasting measure that appears to be on a “fast track.” Thus, it is difficult to obtain meaningful and truly informed consent, due to both the issue’s complexity and the short time frame.

The CTUIR is in the early stages of engaging, informing, and seeking input from tribal communities about a wide range of carbon capture strategies as part of the EPA’s Climate Pollution Reduction Grant (CPRG) planning grant, in partnership with the Oregon Department of Environmental Quality (ODEQ). Geologic injection was one of many carbon capture strategies that was shared with the CTUIR members.

Presentations have included an educational poster and presentation on geologic injection, facilitated by the Oregon Department of Geology and Mineral Industries (DOGAMI). As part of these listening sessions, CTUIR community members were asked to indicate their preliminary strategy preferences. Geologic injection CCS received unanimous expressions of concern and disapproval. Specific posted written comments included the following:

“Put C[arbon] pollution where it came from, if you must, need to REDUCE energy-use nation-wide + treat as an emergency. This science is asking CTUIR + its neighbors to be a [sacrifice] zone for over-consumption and asking CTUIR, AGAIN, to [sacrifice] for the greater good.”

“We need to be reducing our carbon use before we start injecting anything. DAC [Direct Air Capture] and other approaches can use more energy to convert CO₂ than is beneficial with this.”

The CTUIR DNR asks that our concerns be heeded and recognized, particularly given the poor record of notice to and consultation with us regarding prior underground injection actions. In 2013, without adequate consultation, permitting, or notice to interested communities, the U.S. Department of Energy’s Pacific Northwest National Laboratory (PNNL) drilled a “test” borehole into the Columbia River Basalt Group rock formation at Wallula Gap in Washington, on lands owned by Boise Cascade Company but also a part of tribal ceded lands. One thousand tons of carbon dioxide were injected into this “test” well. This was the first experiment of its kind in our country, and only the second in the world (the other being in Iceland). It was done without any

kind of permitting process and bypassed tribal consultation by relying on a “Finding of No Significant Impact” (FONSI). Because of this example the CTUIR is cautious, at best, over hasty, aggressive CCS projects in our area, in general, and specifically with the Proposed Rule which would further enable them on Forest Service lands.

Serious, respectful government-to-government tribal consultation requires “free, prior, and informed” consent. Tribal communities must be given time and opportunity to fully understand the implications and consequences of proposals set before them. This rulemaking has so far not afforded the appropriate amount of time and information needed for such consent.

5. *Environmental Injustice is Perpetuated, Exacerbated*

As noted in the tribal members’ comments above, residents of our area (that includes the Hanford Nuclear Reservation, various military bombing ranges, a former nerve gas storage site, massive industrial Confined Animal Feeding Operations (CAFOs), natural gas-fired generating plants, excessive logging, grazing, irrigation, etc.) are sadly all too familiar with living in a sacrifice zone and the experience of Environmental Injustice. We hope that the USDA and the Forest Service will appreciate this fact in the rulemaking process. We also encourage you to, additionally, recognize the distinct, unique feature or attribute that distinguishes the CTUIR and its members from most other Americans (such as those commonly identified among “Environmental Justice” communities): we have Treaty Rights, and derived from that fact, the federal government has a Trust Responsibility to us.²⁰ Treaty Rights and the Trust Responsibility, and the vast and extensive case law and legal interpretations arising from them, present a substantial array of concepts, doctrines, principles, guidelines, histories, and backgrounds.²¹ There are legally-enforceable mandates, supported by long legal history with judicial decisions and opinions dating back nearly three centuries.

6. *Tribes and Treaty Rights Inadequately Considered*

This Rule Proposal is made possible by EPA’s definitional change whereby captured carbon is deemed not a hazardous waste. In the Rule the Forest Service also looks to EPA criteria

²⁰ This Trust Responsibility also extends to those tribes who may not have a specific treaty; for example, “Executive Order” tribes.

²¹ See, “What Environmental Justice Means in Indian Country,” <https://www.kcet.org/shows/earth-focus/what-environmental-justice-means-in-indian-country>:

“[A typical, non-tribal environmental justice] framework, however, doesn’t take into consideration the very different circumstances of Native American tribes. Native Americans as individuals are U.S. citizens, but they are also citizens of Indigenous nations, not ethnic minorities. As individuals, they are subject to normal American laws. As nations, however, they are subject to a completely separate legal regime, constructed on the basis of the pre-existing sovereignty acknowledged by treaties and the U.S. Constitution, which exist in perpetuity (forever), in addition to the laws of their particular nations. That extremely complex legal regime, among other things, delineates and affirms the sovereignty of Indian lands and the treaty rights they still retain on lands that were ceded to the United States . . .” Further, because Indigenous peoples’ relationships to the state (i.e. the United States) are different than those of ethnic minorities, environmental justice must exceed equality and be able to live up to the concepts of tribal sovereignty, treaty rights, and government-to-government relationships.”

governing wells and underground injection.²² To further inform this process, the CTUIR also suggests that you look to other EPA sources—namely, EPA’s recent “Treaty Rights Guidance.” It may be helpful, to more fully and appropriately consider the Proposed Rule and what subsequent steps you may take in this process, to examine the 2016 Guidance, “EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights.”²³ The Guidance states that:

“[The agency] recognizes the importance of respecting tribal treaty rights and its obligation to do so. . . . [It] will . . . consider all relevant information obtained to help ensure that [its] actions do not conflict with treaty rights, and to help ensure that [it] is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.” [Footnote omitted]

The Guidance summarizes the significance of Indian treaties:

“The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of long-standing principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes. As the Supreme Court has explained, treaties should be construed liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Only Congress may abrogate Indian treaty rights, and courts will not find that abrogation has occurred absent clear evidence of congressional intent.” [Footnote omitted]

²² From the Federal Register Notice:

“The United States Environmental Protection Agency (EPA) has excluded carbon capture and storage from classification as a hazardous waste (40 CFR 261.4(h)) if carbon dioxide is captured, transported, and stored in compliance with the requirements for Class VI Underground Injection Control wells and the requirements in 40 CFR parts 144 and 146 of the Underground Injection Control Program of the Safe Drinking Water Act, including the requirements for EPA authorization by rule or by permit. A Class VI Underground Injection Control well is used to inject carbon dioxide into deep rock formations. Before issuing a permit for a Class VI Underground Injection Control well, the EPA conducts a detailed technical review to ensure that the area around the proposed location for the well does not have abandoned wells that could leak carbon dioxide and to determine whether the well would be constructed in a manner that would protect it from seismic activity and from leaking carbon dioxide into the groundwater (40 CFR parts 144 and 146, Underground Injection Control (UIC) Program Class VI Implementation Manual for UIC Program Directors). To protect public health and underground sources of drinking water for these wells, including for those that may be sited on NFS lands, the EPA regulates all aspects of the wells, including siting, construction, injection operations, testing and monitoring, emergency response, financial responsibility, and plugging and closure of the wells and injection sites through permitting, site inspections, required reporting, and compliance reviews. The public may comment on proposed permits for Class VI Underground Injection Control wells, as well as request and attend public hearings and in some cases file appeals with EPA's Environmental Appeals Board regarding permits for Class VI Underground Injection Control wells.”

²³ https://www.epa.gov/sites/production/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf.

EPA’s Guidance specifically notes as an example that “. . . protecting fish may involve protection of water quality in the watershed.” Similarly, for the Forest Service, protecting fish (and other trust assets) may involve protection of their habitats found on the lands and in the waters of our nation’s forests.

“. . . [T]reaty rights most likely to be relevant to an [agency] action are rights related to the protection or use of natural resources, or related to an environmental condition necessary to support the natural resource, that are found in treaties that are in effect. . . . Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.” [Emphasis added.]

The 2016 Guidance—still in effect—suggests a question and a process to consider in rulemakings and elsewhere:

“How are treaty rights potentially affected by the proposed action? This question is designed to help [the agency] understand how a treaty right may be affected by the proposed action. [The agency] should explain the proposed action, provide any appropriate technical information that is available, and solicit input about any resource-based treaty rights. It is also appropriate to ask the tribe for any recommendations for [the agency] to consider to ensure a treaty right is protected. . . . [The agency’s] next steps typically will involve conducting legal and policy analyses in order to determine how to protect the rights. These analyses are often complex and depend upon the context and circumstances of the particular situation. Issues that may arise often involve precedent-setting questions or warrant coordination with other federal agencies. It is expected that the [agency’s] lead office or region that engaged in the tribal consultation about the potentially affected treaty rights will coordinate with [other appropriate agency offices and divisions] to conduct these analyses. Although the details of how to conduct such legal and policy analyses are not addressed by this Guidance, the . . . process may warrant continued or additional consultation with tribes.”

7. *Inconsistent with/Contrary to CTUIR’s Policies, Missions, Plans*

a. *CTUIR Climate Adaptation Plan*

The Proposed Rule is inconsistent with, and arguably contrary to, the CTUIR *Climate Adaptation Plan* (CAP). During the CAP’s development, the CTUIR community did not view CCS as a priority action due to the technological risks and uncertainties, the attention, time and funding it would take from higher-priority and more meaningful renewable energy actions, and the perpetuation of fossil fuel reliance and the hazardous materials and discharges that result from it.

b. CTUIR Uplands Vision

The CTUIR’s vision for uplands landscapes is to:

“[E]nsure healthy, resilient and dynamic upland ecosystems capable of providing First Foods that sustain the continuity of the Tribes’ culture. . . . [Healthy upland hydrologic function] refers to the capacity of an area to (1) capture, store, and safely release water from precipitation and run-[off] from adjacent areas, (2) to resist reductions in this capacity and recover following disturbance events (resistance and resilience), and (3) the ability of a site to process and filter nutrients, sediments, and pollutants as water moves through upland ecosystems into streams and rivers.”

Within the CTUIR’s ceded lands are three National Forests: Umatilla, Wallowa-Whitman, and Malheur. Other National Forests outside of our ceded lands are within our usual and accustomed areas and discharge into the Columbia River. National Forest lands include important habitat and migration corridors and perform vital ecological functions. Rain and snow percolating through the ground and replenishing surface waters is a natural, desired and vital process for watershed health, ensuring water quality and quantity for our Tribal community and sustaining our First Foods.

Due to our already dry climate, most if not nearly all surface water flows during summer months in our ceded lands is from groundwater discharge. The CTUIR recognizes that today’s captured precipitation may not be seen as surface flow for thousands of years. Other communities in eastern Oregon and Washington have also recognized the immense value that healthy watersheds and functioning uplands provide for supplying drinking water supply and have sought to protect those values with access and use limitations. Shifting burdens to future generations, no matter how far in the future, is unacceptable.

c. CTUIR Water Code

The CTUIR’s Water Code seeks “to protect the water resources of the Reservation from over appropriation, pollution, contamination, degradation, or other acts injurious to the quantity and quality of the waters on the Reservation.” The Water Code also recognizes and seeks to protect the health of the entire watershed due to the connectivity between the uplands and the floodplains. Degradation of the uplands impacts ecological functions and, while timescales of impacts are difficult to predict, will have a direct negative impact on water quality and water quantity.

The CTUIR is diligently trying to better understand groundwater to help meet the objectives of the Water Code. Information and knowledge about groundwater is constantly improving but how water percolates into the ground, flows through the ground, and discharges into surface waters is still not well understood, particularly in our vicinity. Adding stored carbon to subsurface areas where we don’t yet fully understand water movement is imprudent, to say the least.

In addition, the hydrology of many watersheds is in flux due to Climate Change. Expected impacts in our area are likely to include more frequent and intense flood events with more rain and less snow. How hydrological changes will impact upland functions that capture, store, and discharge water is unknown. Water scarcity is an existing and growing issue due to our changing climate; actions that could aggravate our water scarcity problems should be avoided. Polluting lands and the waters beneath them now will exacerbate those problems even if it is not apparent until a thousand years from.

d. CTUIR Energy Policy

The purpose of the CTUIR Energy Policy is to help guide the use of energy and the development of energy security and independence. While the Energy Policy considers and supports carbon storage opportunities in general, the emphasis is on natural sequestration, including:

- Research and analyze carbon sequestration opportunities and develop a plan for pursuing such opportunities by promoting the protection and restoration of natural resources and wildlife habitat as natural carbon sequestration, the use of forest lands, carbon farming and grazing on the Umatilla Indian Reservation.
- Research and promote forest management and grazing practices that enhance the natural carbon sequestration of the native flora.

Conclusion

Indian Treaty Rights infringement and Trust Irresponsibility have occurred in the Pacific Northwest, too often under active federal oversight, or from the lack of it. Since the arrival of non-Indian people in ever-larger numbers beginning in the mid-1800s, many of the Columbia Basin's First Foods—in particular anadromous fish such as salmon and others—have been subject to enormous harm. In some cases, this has meant outright eradication—extinction—and in others significant decreases in abundance, diversity, and distribution. All these impacts have reduced access to these Treaty-reserved resources and reduced Tribal harvest. Of the fish that remain, there is evidence of toxic contaminants in many of them and in their essential habitats. Those habitats, of course, include lands and waters under USDA and Forest Service jurisdiction.

With these losses and damage, fish have become less available, with less opportunity for reliable tribal harvest, and consequent negative impacts on tribal economies and cultural practices. Along with its immediate specific intended aim, another fundamental objective of any federal rule or regulation should be to facilitate the correction of such past and continuing infringements, irresponsibilities, and injustices. Climate Change undeniably threatens First Foods and other tribal resources with further loss and damage, but in confronting it we should not be adding new or expanded avenues of harm.

The CTUIR continues to explore and support nature-based solutions to atmospheric carbon removal. There are several exciting strategies that offer improvements for First Foods, regional economies, and tribal families, including measures that seek to modify and update local

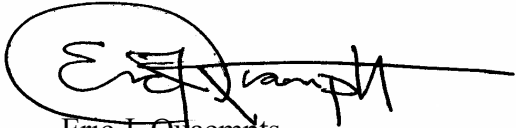
industries that generate much of the carbon emissions that come from our region. The CTUIR's Climate Adaptation Plan incorporates community thoughts and concerns and identifies how CTUIR staff work plans can help promote climate resiliency. Carbon capture strategies potentially can offer alternative economic scenarios, based on removing atmospheric carbon and preventing further emissions.

The CTUIR is concerned that the carbon capture and storage technology envisioned in the proposed rule change may be used inappropriately to extend the life of fossil fuel operations. Our priority should be on rapidly reducing the use of fossil fuels like coal, oil, and natural gas to limit the devastating impacts already being caused by Climate Change. CCS is relatively new and not thoroughly tested, with many outstanding uncertainties; it would be unwise to excessively rely on it with too little regard for its drawbacks, unintended and unaccounted-for harms, and the absence of solid proof for many of its claims and assertions.

The CTUIR DNR thanks you for your consideration of our comments on the Proposed Rule on Carbon Capture on Forest Service lands. We can appreciate your desire to rapidly facilitate carbon sequestration in response to Climate Change, but nevertheless we believe that this Rule is premature and should not be adopted at this time.

The CTUIR requests government-to-government consultation on this Rule. We encourage you, in this rulemaking and others, to respect how regulatory mechanisms can and should be developed, interpreted, and applied in tandem with both your treaty-based obligations and your other authorities under federal statutory law to be mutually supportive and reinforcing. Federal government rules and regulations should assist and promote agency decisions and actions in a manner that enhances the ability of the United States to honor and uphold Indian treaties and fulfill its Trust Responsibility to tribes. The CTUIR looks forward to continuing to work effectively and collaboratively with the USDA and the Forest Service to protect, recover, and restore our shared natural and environmental resources for the benefit of all people.

Sincerely,



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

Cc: CTUIR Fish and Wildlife Commission
CTUIR Tribal Water Commission
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