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Lawrence Kogan, Esq. NY, NJ, DC
Of Counsel:
James Wagner, Esq. MA
Fred B. Wilcon, Esq. MA

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Mr. Kevin Eastman
Legislative Director
Office of Congressman Doug LaMalfa
1st District of California
322 Cannon Building
Washington, D.C. 20515

Re: 5/16/16 Meeting Recap

Good afternoon, Kevin.

Thank you for meeting with me this past Monday afternoon (5/16/16) on such short notice to discuss the Klamath Irrigation District's and the Siskiyou County Board of Commissioners' concerns regarding the Wyden-Merkley amendment to S. 2012.

While I appreciate hearing that Congressman Walden and the Tulelake Irrigation District are fine with Amendment 3288's language as-is, I must remind you that their approval of such language is not the bellwether I use to determine whether that language adequately protects my clients' interests.

I also appreciate hearing that the legislative counsel believes that the "savings" clause of the amendment protects against Secretarial actions "not otherwise permitted." However, my read of the amendment, based on my 29 years of law, policy and business experience, leads me to a different conclusion, especially considering the intertwined and interlinked nature of the agreements, their objectives and the evolving facts on the ground. In any event, who is the legislative counsel to whom you refer, and may I see his/her written opinion on this issue?

As you may recall, on April 25, I submitted proposed Amendment 3288 language changes to Congressman LaMalfa's office for inclusion in the amendment during conference (attached hereto). These initial changes focused on ensuring that the Secretary may carry out "water, environmental and power activities" only if they are undertaken "[p]ursuant to the reclamation laws and subject to appropriations, required environmental reviews and the review and approval of Congress […]" In addition, these initial changes sought to reaffirm congressional review and approval in the "savings" clause as follows:

> "Nothing in subparagraph (A) or (B) of paragraph (1) authorizes the Secretary – […]
>
> (B) to carry out activities, ***including entering into agreements***, that have not otherwise been ***previously*** authorized ***by Congress***."

If legislative counsel, Mr. Walden and the Tulelake Irrigation District are truly sincere about their convictions that the "savings" clause is adequate to protect KID and Siskiyou County patrons against the Interior Secretary's entering into agreements without Congress' approval, then they should not be troubled by and should not object to my proposed changes. Indeed, I believe Congressman LaMalfa would welcome my proposed change to ensure that ALL his constituents are treated properly and fairly.

My proposed changes to S.A. 3288 state expressly and clearly for the record that Congress' review and approval is required before the Secretary can carry out (as a precondition to the Secretary carrying out) activities, including the entering into agreements, retrospectively as well as prospectively. This means that my proposed changes to S.A. 3288 would require Congress' approval retrospectively of both the Amended Klamath Hydroelectric Settlement Agreement and the Klamath Power and Facilities Agreement, neither of which were previously reviewed or approved by Congress.

If, on the other hand, S.A. 3288 is approved in conference as-is, this would mean that the Interior Secretary was free to bypass Congress when it executed these agreements in April; passage as-is also would free the Secretary prospectively to circumvent Congress by executing new basin agreements in the future without Congress' review and approval. If it is true that Congressman LaMalfa seeks Congress' approval of all Klamath basin agreements, then how is the as-is language of S.A. 3288 consistent with his position?

I trust you also recall the second proposed language change I submitted early Monday on the portion of S.A. 3288 addressing C Canal flume financing. First, it inserts the Klamath Irrigation District's name, just as the Tulelake Irrigation District's name appears elsewhere in the Amendment. My proposed language also would correct the popular misperception that the mere designation of the C Canal flume replacement as an "emergency" extraordinary operation and maintenance ("EXM") item would automatically result in the KID's receipt of up to a 35% write-down of the $7.5-10 million federal government debt it would incur to make that replacement.

This is not true, however. S.A. 3288 mysteriously omits other requirements imposed by the Omnibus Land Act of 2009 (P.L. 111-11, Sections 9603(c)(3) and 9602(a) (123 Stat. 1347-49, 43 U.S.C. 510a, 510b)) and the applicable BOR Manual (Reclamation Manual Directive and Standards PEC 05-03, paras. 6(C) and 7(A)(3)), which were included as attachments to Monday (5-16-16)'s email. In other words, in order for the KID to be eligible to receive a 35% write-down of the BOR debt it will incur to repair/replace the C Canal flume, an EXM item, the item must also be "Qualified" – i.e., a "Qualified EXM" item. This means the KID must be able to show that, during the past 10 years, it had corrected all Category 1 O&M recommendations within 6 months of BOR identification, and that it had corrected all Category 2 O&M recommendations by the BOR's initial recommended date. Why do you suppose S.A. 3288 omitted this important information? Why would Tulelake Irrigation District, which is already mentioned in the Amendment, need to approve of my proposed language change favoring the KID?

Lastly, please recall the to-do (action) items (6 in total) that we agreed you would undertake pending Congressman LaMalfa's approval. They include:

1. Writing a letter to EPA demanding that the agency provide all EPA-developed and third party

-developed studies upon which EPA relied to assess the direct and indirect human health and safety risks posed by the tens of feet of toxic sludge (nonpoint-source pollution) that would be released upon the removal of the four Klamath dams, including evidence that EPA had properly peer reviewed these studies in accordance with federal law (Information Quality Act and applicable standards/guidelines);

2. Writing a letter to PacifiCorp, a subsidiary of Warren Buffet's Berkshire Hathaway Energy Company, and/or to the California and Oregon Public Utility Commissions demanding a copy of the cost-benefit analysis PacifiCorp prepared upon which the Interior Secretary relied to recommend dam removal rather than dam relicensing. This cost-benefit analysis is expressly referred to as "PacifiCorp's Economic Analysis" within Article 1.4 (Definitional Section) of the Amended KHSA. It serves as:

   - "the primary economic analysis prepared by PacifiCorp and relied upon by PacifiCorp to compare the present value revenue requirement impact of the KHSA against the present value revenue requirement of relicensing of the Facilities under defined prescriptions generally based on the FERC Final Environmental Impact Statement dated November 2007, which analysis PacifiCorp filed with the Public Utility Commission of Oregon ("Oregon PUC") pursuant to Section 4(1) of the Oregon Surcharge Act and with the California Public Utilities Commission ("California PUC") in accordance with Section 4 of the KHSA;"

3. Write a letter to the California and Oregon Public Utility Commissions demanding that they undertake another review of the $200 million of consumer rate increases they previously approved to pay for infrastructure (dam) removal rather than infrastructure expansion, upgrades, improvements and/or replacements that would benefit the public.[1] While it is arguable that it was previously uncertain whether the approved ratepayer increases would be used to make either ESA compliance-related improvements needed for relicensing or for dam removal, this uncertainty does not exist at present. There is no regulation requiring dam removal, and thus, no compliance-related costs. New information clearly confirms that the ratepayer increase was primarily intended for, and will now be used entirely for, dam removal – i.e., removal of infrastructure – a political decision with no payment for expansion, upgrades, improvements and/or replacements. Clearly, the PUCs did not look out for consumer interests when they approved these ratepayer increases. Arguably, the States have sanctioned what has been referred to as "single issue ratemaking"[2] which is tantamount to shifting the risk of doing business from the utility to the public;[3]

4. Write a letter to the Departments of Interior and Commerce and to the States of Oregon and California seeking production of all documents, including written and electronic email communications and correspondences exchanged between KHSA signatories and their representatives and between prospective Amended KHSA signatories and their representatives relating to the agreement's Meet and Confer and Dispute Resolution provisions, and relating to the Klamath Irrigation District's April 4, 2016 email and hardcopy correspondences containing the "formal invocation of the KHSA Notice and Dispute Provisions contained in KHSA Articles 8.5, 8.6 and 8.7." Clearly, since the signatory parties to the original KHSA (other than KID) had

apparently reached a consensus not to follow these procedures in developing, reviewing and executing the Amended KHSA, it is difficult for the KID to trust that these mostly governmental parties intend and will adhere to the substance of the new agreement;

5. Write a letter to the Bureau of Reclamation requesting immediate delivery of annual accounting statements reflecting the net balance of the KID's portion of Klamath Irrigation Project capital costs and operation and maintenance (O&M) expenditures for the period spanning fiscal years ended 2001-2015, as KID recently demanded in response to the BOR's inadequate explanation for why such accountings are unavailable; *and*

6. Write a letter to the Burlington Northern Santa Fe Railway, a subsidiary of Warren Buffet's Berkshire Hathaway, Inc. and owner and operator of the Oregon Trunk (railway) Line spanning Oregon and California, requesting a copy of BNSF's demands for the Klamath Irrigation District to pay right-of-way and flagman fees in connection with its planned $10 million replacement of the C Canal flume, as well as, all documentation discussing or otherwise concerning the potential and actual adverse impacts the close proximity of the railroad bridge to the C Canal flume likely had upon the structural integrity of the C Canal flume. It is the KID's opinion that since 1940, the close proximity of the bridge has contributed to the premature obsolescence of the C Canal flume.

I trust that you will find my prior recall of our May 16, 2016 meeting accurate, grounded and balanced. I also look forward to receiving copies of all dispatched correspondences discussed above to the extent approved by Congressman LaMalfa.

Moreover, I look forward to receiving from you a reasoned explanation of why you believe my proposed language changes to S.A. 3288 would not meet the approval of Congressman Walden's offices and/or the legal and political representation of the Tulelake Irrigation District. As we discussed, and as these changes clearly indicate, they are intended simply to require, consistent with Congressman LaMalfa's position, Congress' retrospective and prospective review and approval of all of the Klamath basin agreements before they may be executed (Amended KHSA and new KPFA included). These changes, as discussed, also elaborate upon the need for the KID to meet the statutory and administrative requirements for "*Qualified* EXM" status (which entails an extra step not evident in the as-is language) to secure 35% non-reimbursable financing for the C Canal flume replacement. Consequently, S.A. 3288 proponents who have conveyed publicly that the Wyden-Merkley Amendment's as-is language guarantees the KID a 35% write-down are being less than truthful.

Please don't hesitate to contact me if you any questions.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
Managing Principal

100 United Nations Plaza • Suite 14F • New York • NY • 10017
• Ph (212)644-9240 • Fax (646)219-1959
• www.koganlawgroup.com

Cc: Hon. Doug LaMalfa
Mark Spannagel, Chief of Staff, Cong. Doug LaMalfa
Erin Ryan, Redding Office, Cong. Doug LaMalfa
Brent Cheyne, Chairman, Klamath Irrigation District

100 United Nations Plaza • Suite 14F • New York • NY • 10017
• Ph (212)644-9240 • Fax (646)219-1959
• www.koganlawgroup.com

ENDNOTES

[1] *See* Nilgun Atamturk and Marzia Zafar, *Trends in Utility Infrastructure Financing*, California Public Utilities Commission Policy and Planning Division Briefing Paper (Aug. 2012), available at: http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=3246.

[2] *See* Rod Kuckro, *Utilities: Consumer Advocates Dogged in Fight Against Higher Rates*, E&E Reporter – Energy Wire (Jan. 22, 2014), available at: http://www.eenews.net/stories/1059993263 ("One of the latest trends is an accelerating move away from traditional rate making, where a utility's financial future is determined in an all-inclusive rate case, a proceeding that can take a year or more to be decided. *More and more, state lawmakers and regulators are approving the use of targeted charges to compensate a utility for a singular type of expenditure*. Whether they are called riders, surcharges, trackers or adjustment clauses, they all have the same result: a more frequent transfer of money from ratepayers to the utility and often with less scrutiny than a full-fledged rate case" (emphasis added)). *See also* Larkin & Associates, LLC, *Increasing Use of Surcharges on Consumer Utility Bills*, AARP (2012), available at: http://www.aarp.org/content/dam/aarp/aarp_foundation/2012-06/increasing-use-of-surcharges-on-consumer-utility-bills-aarp.pdf;

[3] *See* Stateline, *States Grant Utilities Extra Rate Increases*, Governing (Nov. 29, 2012), available at: http://www.governing.com/news/state/States-Grant-Utilities-Extra-Rate-Increases.html ("…18 states now permit natural gas companies to fully recover infrastructure costs through trackers, according to the American Gas Association. Eleven states do so for water systems, the National Association of Water Companies says. The practice is growing rapidly in the electric utility field as well. All of this is stirring concern not only among state consumer advocates but among advocacy groups such as *AARP, who say trackers unfairly shift financial risks to consumers who may never benefit from projects that can take decades to complete*" (emphasis added)).