



The Klamath Tribes

CONFIDENTIAL SETTLEMENT COMMUNICATION

APRIL 26, 2017

Via Email and USPS
Secretary Ryan Zinke
Office of the Secretary
U.S. Department of the Interior
1849 C Street, NW
Mail stop 7328
Washington, DC 20240

**RE: REQUEST FOR SECRETARIAL NOTICE PER THE UPPER KLAMATH BASIN
COMPREHENSIVE AGREEMENT**

Dear Secretary Zinke,

This letter is a follow up to the Klamath Tribes' January 12, 2016 letter requesting, Secretary Jewell, to commence with the issuance of a Negative Notice as provided for in §10.2 of the Upper Klamath Basin Comprehensive Agreement (UKBCA). In response to Deputy Secretary Mike Connor's letter of March 4, 2016, where he concurred that the termination of the Klamath Basin Restoration Agreement (KBRA) was a "terminable event" for the UKBCA, the Klamath Tribes commenced the §11 Meet and Confer process with UKBCA parties to explore whether a mutually agreeable resolution could be identified that would lead to the successful implementation of the UKBCA. As described below, the Meet and Confer process did not result in a mutually agreeable resolution by the Parties.¹ Consequently, the Klamath Tribes request you issue a Negative Notice pursuant to §10.2 of the UKBCA. The Klamath Tribes appreciate the hard work and commitment demonstrated by your Department, the State of Oregon, as well as the individual landowner Parties

¹ The Mediator's March 9, 2017 written report is attached and describes the specifics of the mediation process and includes the relevant UKBCA §11 Meet and Confer supporting documents generated over the past year.



CONFIDENTIAL SETTLEMENT COMMUNICATION

Letter to Secretary Zinke

April 26, 2017

Page 2

to the Agreement. Although a Negative Notice will lead to the termination of the UKBCA, the Klamath Tribes believe a comprehensive solution to Klamath Basin water issues impacting tribal fisheries and other treaty resources and interests of the Klamath Tribes, and those of other stakeholders in the Basin must be achieved. The Klamath Tribes have been in the Klamath Basin since time immemorial and will forever live in our homelands. As evidenced by past settlement agreements, the Klamath Tribes have been committed to finding solutions to resolve these complex and divisive issues to achieve our goals for harvestable and sustainable treaty resources, and to provide for economic opportunity, parity and self-sufficiency for our people.

As Deputy Secretary Connor noted, the Department of Interior agreed that one or more of the conditions listed in §10.1 of the UKBCA cannot be achieved. Per the terms of the UKBCA the Parties were required to proceed through a Meet and Confer process to ascertain whether the Parties could cure the “terminable event” and the other issues raised in the Tribes August 11, 2016 Notice to Initiate Meet and Confer (Notice). To be sure, the termination of the KBRA is a fatal blow to the successful implementation of the UKBCA. As demonstrated by UKBCA §10.1.3, which conditions implementation of the UKBCA upon Congressional approval of the KBRA, the UKBCA was never intended to be a stand-alone agreement but instead was envisioned as part of the KBRA in §16. In an attempt to gain Congress’ support for federal authorizing legislation, the Oregon Congressional Delegation and Governor’s office encouraged KBRA Parties to build out §16 of the KBRA by negotiating a settlement agreement with the off-project irrigators. Settlement negotiations commenced in the Summer of 2013 and culminated in the signing of the UKBCA on April 18, 2014. As all Parties familiar with the suite of Klamath Agreements know, Congress chose not to enact federal legislation authorizing the KBRA and it consequently terminated at the end of 2015. Of course, upon the KBRA’s termination, the bargained-for benefits due the Tribes (and each respective Party) also terminated, substantially impairing the Klamath Tribes’ efforts to restore the treaty resources and land base necessary to develop a sustainable tribal economy.

In addition to the termination of the KBRA, our August 11, 2016 Notice also identified several deal points that were delayed, incomplete or resulted only in temporary benefit, not the permanency that was required. These problems included:

- Non-operational water-use and riparian-management programs that no longer have binding agreements or identified funding sources to achieve permanency as set forth in §§3-5.
- Delays and unknown limitations with the transition funding described in §2.4.
- Implementation of a tribal jobs program as set forth in §2.6.
- Implementation of a funding program to provide access for exercise of treaty resources as set forth in §6.1.

Following the Tribes’ Notice, the Klamath Tribes convened a Meet and Confer session on October 3, 2016 in accordance with UKBCA §11.1. The Parties, which included the Klamath Tribes, State of Oregon representatives, Joint Management Entity Director, Landowner Entity representatives and Interior officials, discussed the challenges we all face with the continued implementation of the UKBCA in light of the termination of the KBRA. While all Parties shared the frustration of the KBRA’s termination, the Klamath Tribes determined that the Parties alone

CONFIDENTIAL SETTLEMENT COMMUNICATION

Letter to Secretary Zinke

April 26, 2017

Page 3

could not cure the losses incurred by the termination of the KBRA or address the issues listed in our Notice, as these programs were inextricably tied to KBRA funding sources.

Soon thereafter both the Klamath Tribes and a select group of landowners initiated non-binding mediation as required by UKBCA §§11.1 and 11.2. After a prolonged planning period representatives of the Parties attended the mediation session on February 23, 2017. The mediation was conducted by Susan Driver, an experienced mediator who has extensive experience in natural resource disputes and specific familiarity with Klamath Basin issues. Parties to the mediation included the same Parties to the October Meet and Confer meeting as well as a few additional individual party landowner representatives. The United States was represented by officials from the Bureau of Indian Affairs, Interior's Office of the Solicitor and the Department of Justice. The mediation process included pre-meeting conferences with each of the Parties and a one-day in-person session in Klamath Falls, Oregon. Ms. Driver concludes that "the parties were not able to resolve the circumstances identified by the Klamath Tribes in their August 11, 2017 [*sic*] Notice For Meet and Confer that led to the scheduling of the Non-Binding Mediation Session pursuant to Section 11.2 of the UKBCA." As our team noted in the mediation session, the expiration of the KBRA is too big to overcome to successfully implement the UKBCA. The UKBCA is inextricably tied to the KBRA's funding, and the overall benefits the KBRA was designed to provide to the Klamath Tribes cannot be accomplished through the UKBCA alone. In our opinion, Ms. Driver's report satisfies the reporting requirements under UKBCA §11.2 and concludes the Meet and Confer process required in §§10.2 and 11. Therefore, in accordance with UKBCA §10.2, the Secretary should determine "that there is no reasonable likelihood that an Affirmative Notice under subsection 10.1 will occur" and then publish the required Negative Notice in the Federal Register.

As our team noted throughout the Meet and Confer process the Klamath Tribes remain committed to the Klamath Basin's restoration and are always available to explore proposed solutions that may accomplish this goal. Our experience with the KBRA has taught us, however, that any future settlement process must allow the General Council to provide meaningful direction and guidance to its negotiating team, and sufficient time and opportunity to fully review, consider and approve any proposed settlement framework. At a minimum, any future framework must adequately address treaty resource reintroduction, restoration and protection resulting in sustainable and harvestable treaty resources that will support the meaningful exercise of treaty rights. This must include return of homelands and co-management of land and resources that affect treaty resources (e.g., forest health). Tribal benefits must be prioritized and realized through timely appropriations and funding with direct mandatory spending commitments, treaty-resource-access issues must be remedied, and all relevant litigation must be resolved. Ultimately, the Tribes' goal is a robust and sustainable tribal economy that will provide for the Klamath people and the regional community alike. While these concepts provide insight about the Tribes' goals generally, the Tribes' General Council will direct any effort to resolve these issues in the event it decides that the Klamath Tribes should again engage in such activity. As Interior and the Justice Department have advocated for throughout the Klamath Adjudication, at the end of the day these natural resources issues are about respect for and recognition of the Treaty of 1864 between the United States and the Klamath and Modoc and Yahooskin Band of Snake Indians. Furthermore, as you are keenly aware

CONFIDENTIAL SETTLEMENT COMMUNICATION

Letter to Secretary Zinke

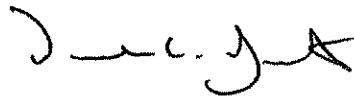
April 26, 2017

Page 4

these Treaty rights are not rights that the United States granted to the Klamath Tribes but are rights that were reserved by the Klamath Tribes.

I hope to meet with you and your staff to discuss these matters as soon as possible. If your staff needs additional information or has questions please direct them to contact the Klamath Tribes' attorney, David Gover, at 303.447.8760 or by email at dgover@narf.org. Finally, I personally invite you to come visit the Klamath, Modoc and Yahooskin Paiute homelands and to witness firsthand the beauty and spirit of the Klamath Basin.

Sincerely yours,



Donald C. Gentry
Chairman, Klamath Tribes

Attached: Mediator's Written Report

CC: Governor Kate Brown c/o Richard Whitman
OWRD c/o Tom Paul
BIA c/o NW Regional Director Stanley Speaks
Landowner Entity c/o Randall Keizer
Joint Management Entity c/o Dani Watson
Dominic Carollo