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April 28, 2017

**By 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: Response to Klamath Tribes' Request for Negative Notice of Upper  
Klamath Basin Comprehensive Agreement**

On behalf of Fort Klamath Critical Habitat Landowners, Inc. (Fort Klamath), Sprague River Resource Foundation, Inc. (Sprague River) and Modoc Point Irrigation District (Modoc Point), I am writing you to express my clients' opposition to the Klamath Tribes' request that you issue a Negative Notice terminating the Upper Klamath Basin Comprehensive Agreement (UKBCA). Terminating the UKBCA at this time, just as the irrigation season commences, would have devastating consequences for livestock producers in the Upper Klamath Basin by subjecting them to calls for fulfillment of Tribal instream water rights at their full levels as opposed to the reduced levels negotiated under the UKBCA. Moreover, Fort Klamath, Sprague River and Modoc Point believe that with a renewed engagement and leadership by the new administration, the UKBCA can serve as a vehicle for providing all of the settlement parties their bargained-for benefits in a manner that is materially consistent with those contemplated under the UKBCA in accordance with Sections 10.1 and 12.2.3.3.4 of the agreement. Prior to considering termination of the UKBCA, the Upper Basin irrigation community invites and urges you and your administration to meet with the settlement parties to find solutions to the issues expressed in the Klamath Tribes' letter, as well as for issues affecting irrigators and landowners.

Before getting into the UKBCA, I would like to introduce you to the Upper Klamath Basin irrigation community. Fort Klamath,<sup>1</sup> Sprague River<sup>2</sup> and Modoc Point<sup>3</sup> represent numerous livestock producers, farmers, and irrigators operating in the Upper Klamath Basin.<sup>4</sup> Primarily, their members irrigate pastures for grazing cattle. As of the last USDA Agriculture census (2012), Klamath County ranked No. 5 in Oregon for cattle production, with an approximate annual value of more than \$74 million.<sup>5</sup> Modoc Point and numerous members of Fort Klamath and Sprague River hold irrigation water rights that arise under the Klamath Treaty, with a priority date of 1864, which water rights were recognized by the Adjudicator in the Klamath Water Adjudication. Some of these water rights were developed by, or in coordination with, the U.S. Indian Irrigation Service. Today, these are private irrigation water rights that apply to lands within the boundaries of the former Klamath Reservation but which do not depend on the U.S. Bureau of Reclamation's Klamath Project water rights in the Klamath Basin. In 1958, the Solicitor for the United States Department of Interior released a memorandum representing that the Department of Interior would "support the rights of Indian landowners and third party purchasers of Klamath [Reservation] lands as having" water rights under the Klamath Treaty of 1864, such as those held by Modoc Point and members of Fort Klamath and Sprague River.<sup>6</sup>

However, since the late-1970's, the U.S. Department of Justice and the Klamath Tribes have ignored the solicitor opinion and actively opposed the third-party purchaser water rights in exhaustive and burdensome litigation. Collectively, my clients have spent millions of dollars over the course of decades defending and protecting their water rights against this opposition, as well as from the impact of the United States' and Klamath Tribes' assertion of time immemorial instream water rights. Thus, Upper Basin irrigators were relieved when, in 2013, Congress

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<sup>1</sup> Fort Klamath Critical Habitat Landowners, Inc. ("Fort Klamath") is an Oregon nonprofit corporation dedicated to the protection of sustainable agriculture and the sustainable use of water resources in the Wood River valley in Klamath County, Oregon. Fort Klamath's members include numerous family-owned and operated ranches, including those owned by: Agri Water, LLC; Ausaymas Cattle Co.; Double K Ranch (aka Kenneth and Karen Tuttle); E.G. Kerns Ranch LLC; Gerald H. Hawkins; Goose Nest Ranches, LLC; Harlowe Ranch, LLC; Hawkins Cattle Co.; Michael and Janice Hester; Kenneth Owens; Martin Nicholson; NBCC, LLC; Nicholson Investments, LLC; Nicholson Loving Trust; Owens & Hawkins; Productive Timberland LLC; Randall Kizer; Richard Nicholson; Robinson Best, LLC; Roger Nicholson; T and B Ranch; and Wood River District Improvement Co.

<sup>2</sup> Sprague River Water Resource Foundation, Inc. ("Sprague River") is an Oregon nonprofit corporation dedicated to the protection of sustainable agriculture and the sustainable use of water resources in the Sprague River valley and Lower Williamson River in Klamath County, Oregon. Sprague River's members include numerous family-owned and operated ranches, including those owned by: BK Ranch (aka Lillian and Vincent Hill); C and A Vogt Community Property Trust; Estate of Clifford Rabe; David M. and Theresa Cowan; Barnes Lake County, LLC; Duane F. Martin; Duarte Livestock; Five Mile Ranch, LLC; Flynn and Sons, LLC; Gerald H. Hawkins; Greg Harris; Griffith Livestock, LLC; Hawkins Cattle Co.; Jack Flynn Cattle Co.; James Hadyn-Myer; Joe Flynn Ranch; John R. Briggs, Jr.; Lon Brooks; Lynne Richardson Cabral; Michael LaGrande; Newman Enterprises, Inc.; Obenchain Cattle Co. (aka Carolyn Obenchain and Margaret Jacobs); Wilks Ranch Oregon, Ltd.; Tom and Jacqueline Bentley (aka J&T Ranch Co.); TP Bar Ranch, LLC; Estate of Tony Pierce; Vincent Briggs; and Wayne and Margaret Jacobs.

<sup>3</sup> Modoc Point Irrigation District ("Modoc Point") is an Oregon special district organized under Oregon Revised Statutes, Chapter 545. The district services 57 patrons owning approximately 4610 acres of land lying near the confluence of the Sprague and Williamson Rivers before the Williamson River enters Upper Klamath Lake.

<sup>4</sup> Additional Upper Basin irrigator parties include Allottee members of the Klamath Tribe and the Upper Klamath Water Users Association. Fort Klamath, Sprague River and Modoc Point are not purporting to speak on their behalf in this letter.

<sup>5</sup> See [https://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/County\\_Profiles/Oregon/cp41035.pdf](https://www.agcensus.usda.gov/Publications/2012/Online_Resources/County_Profiles/Oregon/cp41035.pdf) (last visited August 19, 2016).

<sup>6</sup> See [http://thorpe.ou.edu/sol\\_opinions/p1826-1850.htm](http://thorpe.ou.edu/sol_opinions/p1826-1850.htm) (last visited August 18, 2016).

informed the former administration and the Klamath Tribes that it would not legislate the Klamath Basin Restoration Agreement (KBRA) without a settlement that included the off-project Upper Basin irrigators. This led to the Klamath Tribes and Upper Basin irrigators signing the historic UKBCA on the banks of the Williamson River, a monumental achievement.

To be sure, implementation of the UKBCA has been challenging. The Upper Basin irrigation community recognized that while funding the UKBCA programs would be a challenge, it has been made even more difficult due to the expiration of the KBRA. However, despite these challenges, Upper Basin irrigators, through the Landowner Entity, have continued to work on the riparian restoration and water leasing and retirement programs to provide support of the Tribal resources envisioned under the UKBCA. They continue this work even today, despite the Klamath Tribes' insistence that the UKBCA should be terminated. The irrigation community shares the Klamath Tribes' frustration with the challenges all UKBCA parties have endured but the answer is not to terminate the settlement. The irrigation community remains committed to working through these issues.

The Upper Basin irrigation community recognizes that new legislation will need to be developed, and passed into law, in order for the Klamath Tribes to achieve their goals such as land return. However, this is one of many issues that need to be addressed at the Secretary level in order to successfully implement the UKBCA. For example, some of the UKBCA programs will need to be revisited in a manner that provides the protections and benefits needed to sustain agriculture in the Upper Basin while achieving all of the riparian restoration goals sought by the Klamath Tribes. Further, many UKBCA signatory parties are disappointed that progress has not been made on settling additional disputes in the Klamath Water Adjudication. For example, under Section 1.3.2 of the UKBCA, the parties agreed to pursue good-faith negotiations to settle the United States' and Klamath Tribes' challenges to the water rights of off-project irrigators that signed the UKBCA. Yet, despite requests to the U.S. Department of Justice and U.S. Department of Interior officials serving under the prior administration, no progress has been made to date on those issues. The numerous family ranches represented by Fort Klamath, Sprague River and Modoc Point look to your leadership on behalf of the United States to make good faith efforts to settle all pending litigation between off-project irrigators and the United States and Klamath Tribes.

Although the Klamath Tribes requested you to terminate the UKBCA due to the expiration of the KBRA at the end of 2015, under Section 10.2, the UKBCA may only be terminated if you make a specific finding that "there is no reasonable likelihood that an Affirmative Notice under subsection 10.1 will occur." Fort Klamath, Sprague River and Modoc Point respectfully request and urge you and your administration to directly engage with the UKBCA parties in a dispute resolution setting so that you can either find a reasonable opportunity to move forward or, in the alternative, make a fully informed determination under Section 10.2. At this critical juncture, your leadership is crucial to finding a viable path forward for a long term solution to the difficult issues facing the Klamath Tribes, irrigators and the rest of the Upper Basin community.

If the UKBCA is terminated, it will have devastating consequences for Upper Basin livestock producers as well as to Klamath County's entire agricultural-based economy. In the absence of the UKBCA, we anticipate the U.S. Bureau of Indian Affairs will make calls to the full

awarded levels of the Tribal instream claims. Even though this is an above-average year for snowpack and stream flows in the region, the tribal instream claims were awarded at such high levels that, if a call is made, the vast majority of irrigators would be shut off very early in the irrigation season, which will have a dramatic impact on the forage available for livestock. Fort Klamath, Sprague River and Modoc Point request that you use this summer to engage with the UKBCA parties and not make a decision on termination until after the irrigation season has concluded.

Fort Klamath, Sprague River and Modoc Point hope to have the opportunity to meet with you and your administration to discuss these matters in the near future. They are committed to finding a path forward for permanently resolving the decades-long conflicts that have affected the Klamath Basin.

Sincerely,



Dominic M. Carollo, Esq.  
Attorney for Fort Klamath, Sprague River and MPID

Cc:

Klamath Tribes c/o David Gover, Esq.  
Oregon Governor Kate Brown  
Tom Paul, Oregon Water Resources Department  
Landowner Entity c/o Randall Kizer  
Joint Management Entity c/o Dani Watson  
Becky Hyde, Upper Klamath Water Users Association  
Rep. Greg Walden, c/o Nick Strader  
Sen. Ron Wyden, c/o Sarah Bittleman  
Sen. Jeff Merkley, c/o Jeremiah Baumann

