

The Klamath Tribes Tribal Council

June 3, 2015

Dear Klamath Tribal Members:

I am writing to update you on the status of land acquisition and the Agreements that the majority of voting General Council members have supported since 2010.

On February 28, 2015, the Klamath Tribes General Council adopted Resolution #2015-003 which directed me as Tribal Chairman to provide a *Notice of Impending Failure* to the other KBRA parties due to the loss of Mazama Forest, which had been purchased by another entity earlier that month. The resolution also required "that the Klamath Tribes receive a benefit similar in nature to and not of less value than" Mazama Forest.

In response to the *Notice of Impending Failure* directive, and consistent with Klamath Basin Restoration Agreement (KBRA) protocol, the Klamath Tribes Negotiation Team (KTNT) and Klamath Tribal Council initiated an extensive meet and confer process with representatives of the federal government and Congress (the only entities with the power, authority and resources to remedy the loss of Mazama Forest). Those negotiations resulted in a commitment to replace Mazama Forest with a parcel of land that is not only "similar in nature to and not of less value" than Mazama Forest, but land that also has more cultural relevance to the Klamath Tribes. (Please see the enclosed map of the replacement lands.)

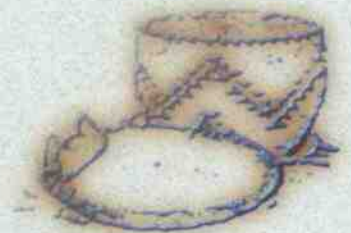
Based on the above facts, the loss of the Mazama Forest – which provided the basis for the *Notice of Impending Failure* - has been remedied and there is no legal basis for withdrawing from the Agreements.

Some Tribal members are under the false impression that the loss of the Mazama Forest opened the door for a vote to implement a new referendum to withdraw from or renegotiate the Agreements. Some of those same Tribal members assert that they can, by a vote at a regular or special General Council meeting, cause a referendum to be issued to the entire General Membership to nullify the three previously adopted referendums that approved the Agreements. Both proposals for a new referendum to withdraw are without legal foundation.

As our Constitution states with regard to Tribal referendum:

"...the vote of the majority of the qualified voters in such referendum shall be conclusive and binding." (Article XIV, Section I).

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Since the General Council referendum voters approved the Agreements (similar to contracts), they cannot be reconsidered or annulled if the Tribe and other parties to the agreement have performed or are performing the actions required by the Agreements. In this instance, the Mazama Forest was lost by sale to another entity, but was replaced with a parcel of land that meets the criteria identified in Resolution #2015-003. Provisions in the KBRA anticipated that changes might be required during the course of the Agreements, and those provisions were implemented to remedy the loss of the Mazama Forest with a suitable replacement.

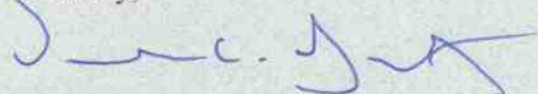
Under our Constitution, neither the Tribal Council nor the attendees at a General Council meeting have the authority to abandon the Agreements that the majority of voting General Council members have supported via referendum. Nor can a petition be used to force an improper referendum. Now that a parcel of land has been identified that is "similar in nature to and not of less value than" Mazama Forest, the Agreement terms will be honored as if Mazama Forest had not been sold.

Some Tribal members who opposed (or now oppose) the Agreements have attempted to disrupt General Council meetings or bring motions to withdraw from the Agreements. Such motions are out of order. They are improper motions under Tribal Law (which includes *Robert's Rules of Order*), and cannot be recognized by me as Chairman. Even if those improper motions were recognized and passed, they would be unenforceable, null and void.

In response to threats and disruption, Tribal Council has had to hire security guards to protect Tribal members at General Council meetings. I have also had to adjourn two recent General Council meetings due to disruptive behavior. Those instances of disorderly conduct at General Council meetings are "dilatary," meaning they are intended to "obstruct or thwart the will of the assembly." In this instance, the assembly is not just those people who are in attendance at a meeting; the assembly includes all of the General Council members who voted in support of the Agreements.

As the Chairman of the Klamath Tribes, I have a duty to honor decisions made by our entire General Council. I cannot and will not allow dilatary actions to stop the Klamath Tribes from moving forward.

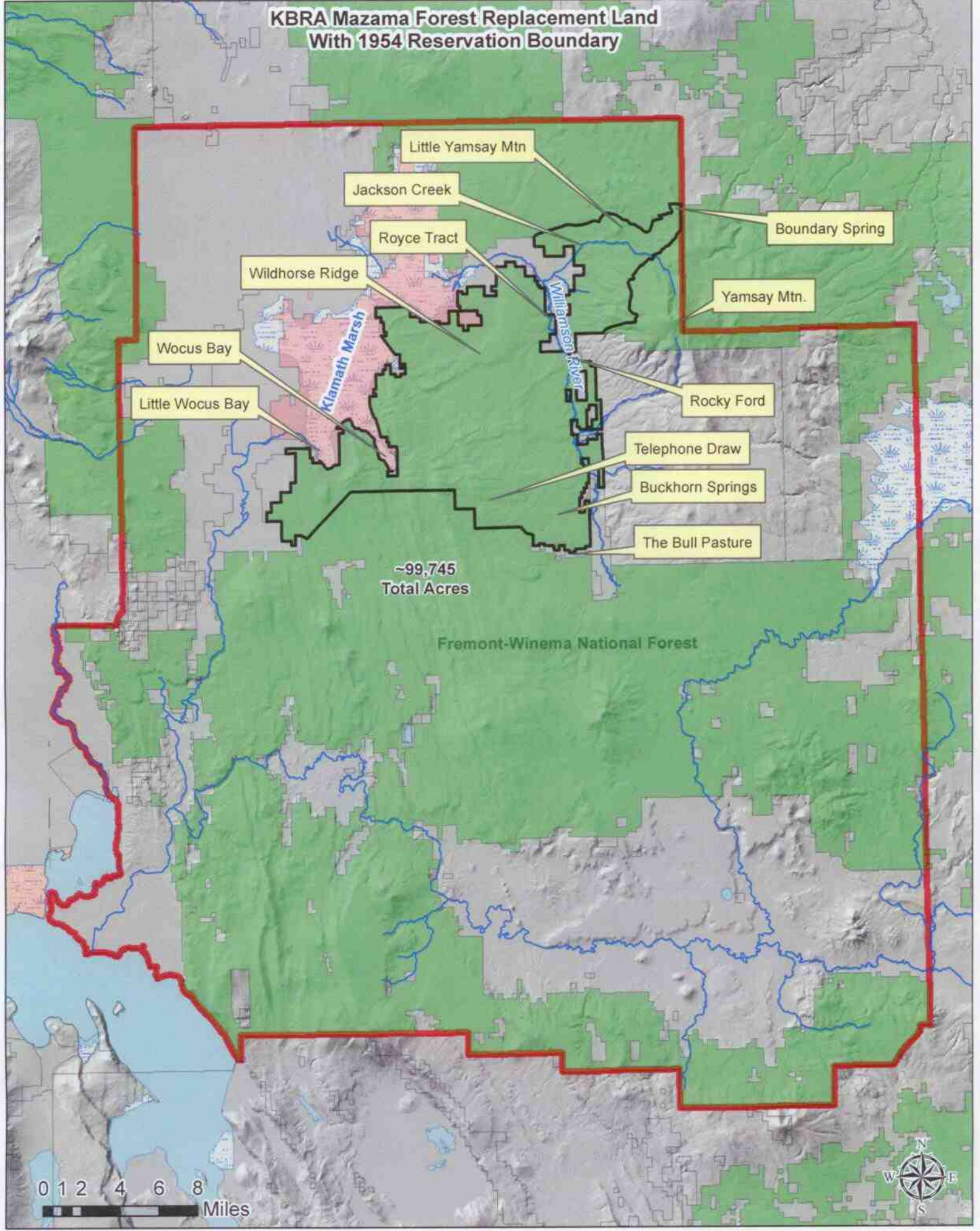
Sincerely,



Don C. Gentry, Chairman
The Klamath Tribes

P.S. General Council also adopted Resolution #2015-004, which directed me to file a *Dispute Initiation Notice*, which provides that if legislation is not enacted by the end of 2015, the Klamath Tribes can withdraw from the Agreements. That resolution remains valid.

**KBRA Mazama Forest Replacement Land
With 1954 Reservation Boundary**



Background Information Regarding the Notice of Impending Failure

According to Resolution #2015-003, the Notice of Impending Failure was based on:

- (1) The failure of the federal government to provide “Timely” funding for the purchase of Mazama,
- (2) An allegation that no funding had been authorized, appropriated or otherwise Timely provided to the Klamath Tribes, and
- (3) A requirement that the Klamath Tribes receive a benefit similar in nature to and not of less value than that which was contemplated by the KBRA (Mazama Forest).

“Timely” funding

Resolution #2015 – 003 asserts that timely funding means that all such funds, including inflation adjustments were to have been authorized, appropriated or otherwise provided not later than the end of the year 2013.

That assertion is inconsistent with the specific language of the KBRA. In fact, the KBRA defines timely as:

“... performance of an obligation or act by the deadline established in the applicable provision, and otherwise in a manner reasonably calculated to achieve the bargained-for benefits of the Agreement.” (p.12)

The assertion that all funds, including inflation were to have been provided not later than the end of 2013 is also erroneous. The KBRA does not provide such a specific timeline:

“The Parties developed Appendix C-1 as *guidance* summarizing the anticipated sequence of performance of certain obligations under the Agreement.” (p. 19, emphasis added)

Funding Provided

The assertion that “no funding” had been authorized, appropriated or otherwise Timely provided to the Klamath Tribes by February 28, 2015 is inaccurate and misleading. At that time, the Tribes had been provided with \$24 million for the purchase of Mazama.

In fact, the federal government had taken numerous actions that were “*reasonably calculated to achieve the bargained-for benefits*” with regard to the purchase of Mazama Forest. Before the end of 2014, the Bureau of Indian Affairs had provided \$19 million and agreed to guarantee a low-interest “bridge loan” if the owners of Mazama accepted a purchase offer before the federal government could provide adequate funding. As a result, in 2014 the Klamath Tribes made several offers to purchase Mazama for various prices that were consistent with a professional appraisal. All of our offers were ignored or rejected by the owners of Mazama.

Addressing the Loss of Mazama Forest

Resolution #2015-003:

- (1) acknowledges that KBRA protocol includes an ability to remedy the loss of Mazama Forest,
- (2) asserts that the KBRA must be amended if the Klamath Tribes are to remain in the agreement, and
- (3) acknowledges that a *Notice of Impending Failure* does not automatically require or cause the Klamath Tribes to withdraw from the KBRA.

Following the *Notice of Impending Failure*, KBRA protocol requires that

“... the Parties shall meet and confer in an effort to remedy the failure *or* to amend this Agreement as provided for in Section 7.2.1B....” (p. 177, emphasis added)

Section 7.2.1.B. provides that

“If, notwithstanding Best Efforts... the Parties do not secure adequate funding on a Timely basis to perform a particular obligation, the Parties shall seek to agree to an alternative schedule *or other appropriate remedies* to permit the performance of that particular obligation.” (p. 29, emphasis added)

Following the protocol outlined in the KBRA, the Klamath Tribes Negotiation Team (KTNT) and Klamath Tribal Council initiated an extensive meet and confer process with representatives of the federal government and Congress (the only entities with the power or authority to remedy the loss of Mazama Forest). Those negotiations resulted in an appropriate remedy for the replacement of Mazama Forest with land that is superior to Mazama Forest in many ways, including

- * a location in the heart of the Klamath Reservation;
- * a location that includes most, if not all, Tribal traditional camping sites;
- * superior timber and other natural resources;
- * superior economic opportunities consistent with the Klamath Tribes Forest Management Plan (which has been adopted by General Council);
- * superior access to important water resources, including some stretches of the Williamson River, Deep Creek, Irving Creek and other important tributaries, creeks and streams;
- * approximately 9,000 more acres of land than is contained in the Mazama Forest.

[Please see the enclosed map of Mazama Forest Replacement Lands.]

Background Information Regarding Withdrawal from the KBRA, KHSA and UKBCA

Robert's Rules of Order, 10th Edition, addresses the circumstances we find ourselves in with regard to withdrawing from the Klamath Agreements which have been voted for by a majority of voting members of the General Council.

The Chair cannot recognize motions that are Out of Order. To do so would violate the Chair's duties and responsibilities outlined in the Constitution, Bylaws and Roberts Rules of Order (which are incorporated into our Constitution and part of Tribal Law).

Improper Motion (Page 332, lines 15-25)

Motions that conflict with the Constitution, Bylaws and/or procedural rules are out of order. If any motion of this kind is adopted, it is null and void. Likewise, motions are out of order if they conflict with a motion or referendum that has been adopted and has been neither rescinded, nor reconsidered and rejected after adoption. Such conflicting motions, if adopted, are null and void unless timely adopted by the vote required to rescind or amend the motion previously adopted.

Motion to Withdraw from the KBRA and/or a Motion to Initiate a Referendum to Withdraw from the KBRA Agreements

A motion from the floor of the General Council to withdraw from the KBRA by calling for a referendum to withdraw is out of order for two reasons:

1. The Motion to Reconsider (p. 307, lines 22-28).

“...can be applied to the vote on any motion except... (b) an affirmative vote whose provisions have been partly carried out, (c) an affirmative vote in the nature of a contract when the party to the contract has been notified of the outcome; (d) any vote which has caused something to be done that it is impossible to undo....”

A motion to reconsider conflicts with the referendums that approved participation in the KBRA, the Klamath Hydroelectric Settlement Agreement (KHSA) and the Upper Klamath Agreement (which is also part of the KBRA).

The KBRA Agreements are similar to contracts. The three General Council referendums caused Tribal government to notify other parties of the affirmative outcome and enter into the Agreements. The Agreements include bargained-for benefits (such as funding, enforcement of the Specified Instream Flows, federal support for land acquisition and commitments made to and by other parties). Although legislation has not been enacted, some of the provisions of the Agreements have been (b) partly carried out and (d) some things that have been done are impossible to undo.

2. Motions to Rescind and to Amend Something Previously Adopted are not in order under the following circumstances (p. 297):

When something has been done, as a result of the vote on the main motion, that is impossible to undo.

In this case, the referendum votes have been fully executed by signing the Agreements, and bargained-for benefits such as those mentioned above have been delivered and cannot be undone.

A motion/resolution to initiate a referendum to withdraw from the Klamath Agreements would be out of order, and null and void, because such a motion/resolution would conflict with the "conclusive and binding" referendums that Klamath Tribes General Council members have already voted to support. Since the federal government has agreed to transfer a parcel of land that is *"similar in nature to and not of less value"* than Mazama, there is no legal basis for withdrawing from the Agreements.



The Klamath Tribes Tribal Council

RESOLUTION #2015-003

GENERAL COUNCIL RESOLUTION DIRECTING CHAIRMAN TO FILE NOTICE OF IMPENDING FAILURE IN THE KLAMATH BASIN RESTORATION AGREEMENT

WHEREAS, The Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians signed the Treaty of 1864 establishing the Klamath Reservation; and

WHEREAS, The General Council of the Klamath membership is the governing body of the Tribes, by the authority of the Constitution of the Klamath Tribes (Article VI & VII, section IV E) as approved by the General Council and most recently amended on September 26, 2013; and

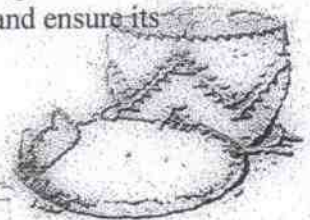
WHEREAS, The Klamath Indian Tribes Restoration Act of August 27, 1986 (PL. 99-398) restored the Federal Government-to-Government recognition to the Sovereign Government of the Klamath Tribes; and

WHEREAS, The Klamath Tribes' Tribal Council is the elected governmental body of the Klamath Tribes and has been delegated the authority to direct the day-to-day business and governmental affairs of the Klamath Tribes under the general guidance of the General Council (Constitution, Article VII, Section I; Tribal Council by-laws, Article I); and

WHEREAS, The Klamath Tribes hold important treaty rights, including water rights, in the Klamath Basin that are of great importance to the Tribes, and that require protection and defense; and

WHEREAS, The Klamath Tribes entered into the Klamath Basin Restoration Agreement ("KBRA") in an effort to protect its treaty rights and to promote and ensure its future and economic sustainability; and

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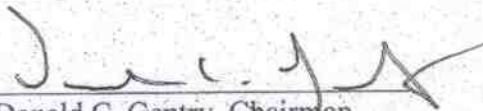
- WHEREAS, KBRA Section 33.2.1 provided for an essential element of that agreement; to wit: [T]he authorization and appropriation of, or otherwise Timely provision to, the Klamath Tribes of \$21,000,000 toward the acquisition of the Mazama Forest Project in Klamath County Oregon” (Mazama Project); and
- WHEREAS, “Timely” funding, for purposes of 33.2.1 means that all such funds, including inflation adjustments, were to have been authorized and appropriated, or otherwise Timely provided to or on behalf of the Klamath Tribes not later than the end of the year 2013;
- WHEREAS, No such funds have been authorized and appropriated, or otherwise Timely provided to the Klamath Tribes;
- WHEREAS, As a result of such failure to Timely provide funds, the Tribes were unable to acquire the Mazama Project and that property has now been sold to another entity making it unavailable for purchase by the Klamath Tribes even if funds were now made available;
- WHEREAS, Such funding for acquisition of the Mazama Project was an essential and bargained for benefit to the Klamath Tribes in the KBRA that is now lost;
- WHEREAS, KBRA Section 33.2.2 provides that, subject to certain protocol, the Klamath Tribes may withdraw from the KBRA in the event that such funds are not Timely provided; and
- WHEREAS, Such protocol includes the possibility of amending the KBRA to remedy the Klamath Tribes’ loss of its benefit under the KBRA;
- WHEREAS, In order to initiate such discussion under KBRA Section 33.2.2, the Klamath Tribes must file a Notice of Impending Failure, a draft form of which is attached to this Resolution;
- WHEREAS, Since the Mazama Farm is no longer available for purchase by the Klamath Tribes and since the Mazama Farm not provided as agreed upon, then the KBRA must be amended if the Klamath Tribes are to remain in the agreement;
- WHEREAS, Any amendment must ensure that the Klamath Tribes receive a benefit similar in nature to and not of less value than that which was contemplated by KBRA Section 33.2.1;
- WHEREAS, The General Council understands that before a withdrawal from the KBRA is effective, an affirmative Notice Withdrawal must be provided to all other KBRA Parties and, therefore, filing a Notice of Impending Failure does not automatically require or cause the Klamath Tribes to withdraw from the KBRA;

WHEREAS, The General Council, in understanding the following believes it is the best interest of the Tribes that the withdrawal process be initiated by appropriately serving proper Notice of Impending Failure to all Parties of the KBRA.

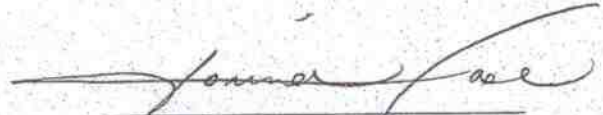
NOW, THEREFORE BE IT RESOLVED that the Klamath Tribes General Council hereby authorizes and directs that the Tribal Chairman immediately provide proper Notice of Impending Failure to all other KBRA Parties.

CERTIFICATION

We, the undersigned, Tribal Council Chairman and Secretary of The Klamath Tribes do hereby certify that the General Council approved this Resolution on the 28th day of February, 2015, by a vote of 61 for 0 opposed, and 1 abstention.



Donald C. Gentry, Chairman
The Klamath Tribes



Torina Case, Secretary
The Klamath Tribes





The Klamath Tribes

VIA EMAIL DELIVERY

March 1, 2015

Ed Sheets, Facilitator
Klamath Basin Settlement Agreements
3055 NW Cumberland Road
Portland, OR 97210

Re: KLAMATH TRIBES' NOTICE OF IMPENDING FAILURE

Dear Mr. Sheets and fellow KBRA Parties:

The Klamath Tribes hereby provide Notice of Impending Failure ("Notice") in accordance with Section 33.2.2 of the Klamath Basin Restoration Agreement ("KBRA"). That section provides as follows:

In the event that the funding described in Section 33.3.1 is not Timely provided, the Klamath Tribes shall have the right to withdraw from this Agreement.

Relevant Circumstances:

Section KBRA Section 1.7 defines "Timely" as follows:

Timely or **Timeliness** shall mean: performance of an obligation or act by the deadline established in the applicable provision, and otherwise in a manner reasonably calculated to achieve the bargained-for benefits of the Agreement.

Here, the "act" to be accomplished was "the authorization and appropriation of, or otherwise Timely provision to, the Klamath Tribes of \$21,000,000 toward the acquisition of the Mazama Forest Project in Klamath County, Oregon." See, KBRA Section 33.2.1. Acquisition. This has not been accomplished.

KBRA's Appendix C, entitled "Schedule and Budget for Implementation of Agreement" defines Timeliness for purposes of funding. Appendix C consists of Appendix C-1 (Schedule for

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Implementation of Agreement) and Appendix C-2 (Budget for Implementation of Agreement). Appendix C-1, at page C.4, clearly states that the funding described here was to have been completed during the year 2013. Further, at page C.9 of Appendix C, a spreadsheet entitled "COST ESTIMATES FOR SETTLEMENT MEASURES AND COMMITMENTS (2007 THOUSANDS)" clearly shows that the funds were contemplated to have been provided as follows: \$10,000,000 in 2012 and 11,000,000 in 2013.¹

Because the funding described in Section 33.3.1 "has not been Timely provided", the Klamath Tribes are entitled to withdraw from the Agreement in accordance with the provisions of KBRA Section 33.2.2.

Process:

KBRA Section 33.2.2 further provides that

Following such Notice, the parties shall meet and confer in an effort to remedy the failure or to amend this Agreement as provided for in Section 7.2.1.B² ... If, after 30 days, the failure is not remedied or the Agreement is not amended, then the Klamath Tribes may withdraw from this Agreement [KBRA] by providing a Notice of withdrawal to the Parties and the Klamath Tribes shall thereafter have no obligation under this Agreement to provide Assurances, waivers, or relinquishments of any kind, and any Assurances, waivers, or relinquishments of any kind they have provided shall terminate.

The Klamath Tribes recognize that KBRA Section 7.2.1.B requires that, in these circumstances, "the Parties shall seek to agree to an alternative schedule or other appropriate remedies to permit the performance of that particular obligation."

If after 30 days, the failure is not remedied or the Agreement is not amended, then the Klamath Tribes may withdraw from the KBRA by providing a Notice of Withdrawal to the Parties.

This Notice is hereby given in accordance with the KBRA and Klamath Tribal Laws.

Sincerely,



Don C. Gentry, Chairman
Klamath Tribes

¹ The Tribes do not waive right or expectation that the figures described in this notice are further subject to adjustment using federal Office of Management and Budget guidelines to account for the effects of inflation.

² That sentence continues, "provided that the referral to the Dispute Resolution Procedures in Section 7.2.1.F shall not apply."