



4337-15

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[189A2100DD/AAKC001030/A0A501010.999900 253G]

Notice Regarding Upper Klamath Basin Comprehensive Agreement

AGENCY: Office of the Secretary, Interior.

ACTION: Notice.

SUMMARY: The Secretary of the Interior (Secretary) is publishing this Notice under subsection 10.2 of the Upper Klamath Basin Comprehensive Agreement (UKBCA), executed by the Klamath Tribes (Tribes), State of Oregon (State), and numerous irrigators in the Upper Klamath Basin. The UKBCA contains measures to address the needs of water users in the Upper Klamath Basin, who are not affiliated with the Bureau of Reclamation's Klamath Project (Project). The UKBCA also contains conditions that must be achieved before the UKBCA can become permanent. Despite the efforts of the UKBCA parties, one or more conditions in subsection 10.1 of the UKBCA have failed to occur. Accordingly, pursuant to the terms of subsection 10.2 of the UKBCA and as further described below, this statement serves as a "Negative Notice" that the UKBCA is terminated as set forth in UKBCA subsection 10.2.

DATES: The termination of the UKBCA is effective on [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER] or, if judicial review of the termination is timely sought, then the effective date of the termination shall be the date on which the termination is sustained following any and all appeals.

ADDRESSES: The Upper Klamath Basin Comprehensive Agreement (UKBCA) is available at www.oregon.gov/gov/policy/environment/taskforce/Pages/Final_Upper_Klamath_Basin_Comprehensive_Agreement_Documents.aspx.

FOR FURTHER INFORMATION CONTACT: Address all comments and requests for additional information to Christina Kalavritinos, Senior Advisor, Commissioner’s Office, Bureau of Reclamation, (202) 513-0509.

SUPPLEMENTARY INFORMATION: On February 18, 2010, the Tribes joined more than 60 other parties in signing the Klamath Basin Restoration Agreement (KBRA). A subset of those parties signed a second agreement, the Klamath Hydroelectric Settlement Agreement (KHSa), that same day. Those two agreements aimed to restore the Basin fisheries and sustain local economies by restoring fish habitat and implementing a water-sharing agreement among the parties who rely upon water from Upper Klamath Lake (Lake) and the Klamath River. A majority of the water users living above (upstream of) the Lake did not agree to this water-sharing agreement, so the KBRA provided only general direction on a possible Upper Basin water-sharing agreement.

In spring 2013, the Oregon Water Resources Department (OWRD) ruled that the Tribes and United States held water rights for maintaining water levels in the major tributaries above the Lake. The Klamath County Circuit Court subsequently determined that enforcement of those determined in-stream flow rights should not be stayed. In summer 2013, at the request of the Governor of Oregon and several Congressional representatives, the Tribes began negotiating with the State and the non-Indian water users who are upstream of the Lake and not affiliated with the Project (referred to as “Off-Project irrigators”), in an effort to reach a water-sharing and habitat restoration agreement that would benefit their respective interests. The resulting agreement, the UKBCA, was executed on April 18, 2014.

The UKBCA included:

- A Water Use Program that would increase inflow into the Lake by an annual average of at least 30,000 acre feet by reducing consumptive water use in key reaches of the

tributaries above the Lake, while also providing a stable, sustainable basis for the continuation of irrigated agriculture;

- A Riparian Program designed to improve and protect riparian conditions;
- An Economic Development Program designed to create economic opportunities for the Tribes and its members;
- Increased opportunities for the exercise of Tribal cultural rights; and
- A Transition Period to allow for the elements of the UKBCA to be phased in over time.

The UKBCA established a five-year transition period with interim milestones and operating procedures. The parties anticipated that once the conditions contained in subsection 10.1 of the UKBCA were achieved, the UKBCA would become permanent. During the transition period, the Tribes agreed to limit the enforcement of their determined water rights so long as the other parties to the UKBCA met specific interim milestones. In 2017, those interim milestones were not achieved and the Tribes (with the concurrence of the United States as trustee) requested that OWRD fully enforce their determined water rights; OWRD complied with the request.

All three settlement agreements (KBRA, KHSAs, and UKBCA) have interdependencies. For example, the UKBCA was premised in key part on Federal funding being provided for certain actions under the KBRA. Because the KBRA required congressional approval to become fully enforceable and funded, and because Congress failed to act within the time frame set by the KBRA, the KBRA expired of its own terms on December 31, 2015.

After the KBRA expired, the Tribes notified the Secretary in a January 12, 2016, letter that they believed their bargained-for benefits under the UKBCA and KBRA could not be

realized. The Tribes asked the Secretary to issue a Negative Notice as contemplated under subsection 10.2 of the UKBCA. Subsection 10.2 of the UKBCA states that the Secretary shall issue a Negative Notice resulting in termination of the UKBCA if, after completion of required dispute resolution processes, the Secretary determines that there is “no reasonable likelihood” that all required conditions set out in subsection 10.1 of the UKBCA can be met. As noted in the Tribes’ letter, several conditions listed in subsection 10.1 required the enactment of Federal legislation, which did not and has not happened.

The UKBCA allows the Secretary to make a preliminary determination regarding whether the conditions contained in subsection 10.1 can be achieved. On April 4, 2016, the Deputy Secretary responded with a preliminary determination, tentatively agreeing with the Tribes but nonetheless noting that subsection 10.2 of the UKBCA requires a “meet and confer” process among the parties before a Negative Notice could be issued. The Tribes invoked the meet and confer provisions in an August 11, 2016, letter, and the parties met and conferred on October 4, 2016. That meeting was unsuccessful in resolving the issues between the parties.

On December 4, 2016, some Off-Project irrigators invoked the mediation provision in subsection 11.2 of the UKBCA in an effort to aid the meet and confer process. The Tribes also invoked this mediation provision on December 12, 2016. The parties selected a neutral third-party mediator and held a confidential mediation session on February 23, 2017. That effort did not resolve the differences between the parties. The Tribes sent letters to the Secretary on April 26, 2017, and September 11, 2017, reiterating their request that the Secretary issue a Negative Notice. The Off-Project irrigators sent a letter to the Secretary on April 28, 2017, asking that the Secretary refrain from issuing a Negative Notice.

The Tribes are of the view that all three agreements—the KBRA, the KHSA, and the UKBCA—need to be fully implemented in order to receive their bargained-for benefits. The Tribes have highlighted this position and concern to the other UKBCA parties and in their correspondence requesting a Negative Notice. The UKBCA and KBRA were inextricably linked. Many of the bargained-for benefits for the Klamath Tribes, including funding for fishery and Tribal programs and the purchase of land, were embedded in the KBRA. Funding for many of the actions in the UKBCA, including water right retirements to achieve 30,000 acre-feet of water savings and riparian corridor restoration, was similarly included in the KBRA.

Statement of Findings

Subsection 10.1 of the UKBCA contains fifteen (15) conditions (subsections 10.1.1 through 10.1.15) that all must occur before an Affirmative Notice can be issued that would make the UKBCA permanent. If I find that one or more of these conditions has not or cannot be achieved, and thus there is no reasonable likelihood that an Affirmative Notice will occur under section 10.1, then section 10.2 directs that a Negative Notice be published.

Subsection 10.1.3 of the UKBCA requires enactment of Federal legislation authorizing the execution and implementation of the KBRA, which the UKBCA defines as “the agreement dated February 18, 2010, as amended December 29, 2012.” No legislation was passed by Congress before December 31, 2015, and the KBRA expired of its own terms. Thus, subsection 10.1.3 cannot be met. This fact alone means I will not be able to issue an Affirmative Notice, and warrants issuance of a Negative Notice.

I have reached a similar conclusion for subsections 10.1.1, 10.1.2, and 10.1.4, which also require enactment of Federal legislation that would authorize Federal participation in the UKBCA’s Water Use or Riparian Protection Programs and Federal participation on the Joint

Management Entity. No legislation was passed by Congress to enact these provisions, and I am not aware of any pending legislation that would do so in the foreseeable future. Accordingly, I also conclude that there is no reasonable likelihood that these conditions will be met at any time in the foreseeable future.

The lack of Federal legislation as required by subsections 10.1.1 through 10.1.4 also leads to the conclusion that there is no reasonable likelihood that the additional conditions contained in subsections 10.1.10 through 10.1.13 will be met either. Without legislation authorizing the KBRA, the Tribes do not intend to provide a notice of willingness to proceed with the UKBCA (subsection 10.1.10). Moreover, without authorizing legislation, I cannot sign the UKBCA (subsection 10.1.13). Similarly, the Landowner Entity and State of Oregon, like the Tribes, must determine that Federal legislation authorizing the UKBCA is materially consistent with the UKBCA (subsections 10.1.11 and 10.1.12).

In addition, other conditions in the UKBCA (subsections 10.1.6 and 10.1.7) require the appropriation of Federal funds to provide an economic development fund for the Tribes, as well as funding to enable the Joint Management Entity and Landowner Entity to carry out their responsibilities under the UKBCA. Those funds have not been appropriated, and I am not aware of any plans to provide this funding in the foreseeable future.

Finally, the UKBCA contains a condition requiring the Klamath County Circuit Court to enter a decree affirming the Tribes' water rights as modified by the UKBCA (subsection 10.1.15). Again, without an Act of Congress, there will be no finalized UKBCA, nor the settlement it contemplates for the Klamath County Circuit Court to approve. The unlikely completion of this final condition is further cause to find that no reasonable likelihood remains for me to issue an Affirmative Notice.

Thus, I conclude that the condition in subsection 10.1.3 cannot be met and therefore there is no reasonable likelihood that I can issue an Affirmative Notice. Moreover, consideration of all the other unsatisfied conditions also leads me to the conclusion there is no reasonable likelihood that I can issue an Affirmative Notice under section 10.1. Each of the unsatisfied conditions alone is enough for me to reach this conclusion and, when taken together as a whole, the same is true. Accordingly, under the terms of the UKBCA, this Negative Notice denotes the termination of the UKBCA.

Therefore, in accordance with section 10.2 of the UKBCA, I find as follows:

- (A) One or more conditions that must occur before I can issue an Affirmative Notice have not been achieved and do not seem reasonably likely to be achieved.
- (B) There is no reasonable likelihood that an Affirmative Notice can occur under subsection 10.1 of the UKBCA.
- (C) As provided by subsection 10.2 of the UKBCA, I am publishing this Negative Notice and stating that an Affirmative Notice under section 10.1 will not be published.
- (D) Under the terms of subsection 10.2 of the UKBCA, “this Agreement shall terminate on the date” of publication of this Negative Notice, or in the event that judicial review of the Negative Notice is timely sought, on the date on which the Negative Notice “is sustained following any and all appeals.”

Dated: December 22, 2017.

Ryan Zinke,

Secretary of the Interior.

[FR Doc. 2017-28050 Filed: 12/27/2017 8:45 am; Publication Date: 12/28/2017]