

1 NOSSAMAN LLP
2 PAUL S. WEILAND (SBN 237058)
3 pweiland@nossaman.com
4 ASHLEY J. REMILLARD (SBN 252374)
5 aremillard@nossaman.com
6 18101 Von Karman Avenue, Suite 1800
7 Irvine, CA 92612
8 Telephone: 949.833.7800
9 Facsimile: 949.833.7878
10 Attorneys for [Proposed] Amicus Curiae County of Siskiyou

11 *Counsel Listing Continued on Next Page*

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

14 THE KLAMATH TRIBES, a federally
15 recognized Indian Tribe,

16 Plaintiff,

17 vs.

18 UNITED STATES BUREAU OF
19 RECLAMATION; UNITED STATES FISH &
20 WILDLIFE SERVICE; NATIONAL MARINE
21 FISHERIES SERVICE,

22 Defendants,

23 and

24 KLAMATH WATER USERS ASSOCIATION,
25 SUNNYSIDE IRRIGATION DISTRICT, and
26 BEN DuVAL,

27 Defendant-Intervenors.

Case No: 3:18-cv-03078-WHO
[Related Case Nos. 3:16-cv-06863-WHO and
3:18-cv-03078-WHO]

**BRIEF OF AMICUS CURIAE COUNTY
OF SISKIYOU, COUNTY OF MODOC,
KLAMATH COUNTY, AND THE
MODOC TRIBE IN SUPPORT OF
DEFENDANTS UNITED STATES
BUREAU OF RECLAMATION ET AL.
AND DEFENDANT-INTERVENORS
KLAMATH WATER USERS
ASSOCIATION ET AL.**

Preliminary Injunction Motion

Hearing Date: July 20, 2018
Time: 9:00 a.m.
Judge: Hon. William H. Orrick
Courtroom: 2, 17th Floor

1 Counsel Listing Concluded:

2 PRENTICE, LONG AND EPPERSON, LLP
3 MARGARET E. LONG (SBN 227176)
4 margaret@plelawfirm.com
5 2240 Court Street
6 Redding, CA 96001
7 Telephone: 530.691.0800
8 Facsimile: 530.691.0700

9 Attorneys for [Proposed] Amicus Curiae County of Modoc

10 KLAMATH COUNTY COUNSEL
11 MIKA N. BLAIN (OSB 130280)
12 *Pro Hac Vice Application Pending*
13 mblain@klamathcounty.org
14 305 Main Street, 2nd Floor
15 Klamath Falls, OR 97601
16 Telephone: (541) 883-4267
17 Facsimile: (541) 883-4270

18 Attorneys for [Proposed] Amicus Curiae Klamath County

19 FREDERICKS PEEBLES & MORGAN LLP
20 PATRICK R. BERGIN (SBN 269672)
21 pbergin@ndnlaw.com
22 2020 L Street, Suite 250
23 Sacramento, CA 95811
24 Telephone: 916.441.2700
25 Facsimile: 916.441.2067

26 Attorneys for [Proposed] Amicus Curiae Modoc Tribe of Oklahoma

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28

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1 **I. INTRODUCTION**

2 The embattled Klamath Irrigation Project (“Project”) is a series of dams, lakes,
 3 reservoirs, and canals¹ that provide irrigation to approximately 200,000 acres of agricultural land
 4 in the interior regions of northern California and southern Oregon. The Project traverses, and
 5 serves irrigators within, two economically disadvantaged rural counties in California, the County
 6 of Siskiyou² and the County of Modoc, as well as Klamath County in southern Oregon
 7 (collectively, the “Counties”). The Project has played, and continues to play, a vital role in the
 8 multi-generational farming and ranching legacies of the Counties, and enables agricultural
 9 operators to produce valuable crops that are critical to the Counties’ small economies. The
 10 United States, through the Bureau of Reclamation (“Reclamation”), owns and primarily operates
 11 the Project under significant physical, hydrologic, and biological constraints. Reclamation
 12 annually walks a water-management tightrope, striving to ensure that Project deliveries are made
 13 within the limitations of the operative 2013 Klamath Project Biological Opinion, which was
 14 developed through consultation, pursuant to the Endangered Species Act (“ESA”), with
 15 defendants U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Services
 16 (“NMFS”). The 2013 Biological Opinion sets forth, among other restrictions, certain threshold
 17 water elevations in Upper Klamath Lake to protect populations of Lost River sucker (*Deltistes*
 18 *luxatus*) and shortnose sucker (*Chasmistes brevirostris*). To that end, in April and May 2018,
 19 Reclamation restricted Project water deliveries to Project irrigators,³ forcing anxious farmers to
 20 find ways to share limited water resources and salvage parched crops. Reclamation and Project
 21 irrigators, having weathered court-ordered fish-health-related flushing flows to the Klamath
 22 River⁴ and April and May’s delivery restrictions, now face the Klamath Tribes’ (“Tribes”)

23 _____
 24 ¹ The Project is comprised of several dams, lakes, and reservoirs, including Clear Lake Dam and
 25 Reservoir, Tule Lake, and Lower Klamath Lake in California, and Gerber Dam and Reservoir,
 26 Upper Klamath Lake, and Link River Dam in Oregon.

² The Project covers over 64,000 acres in Siskiyou County and approximately 34,500 acres in
 26 Modoc County.

³ See, e.g., “Reclamation pauses Klamath Project deliveries through May 26,” available at
 27 <https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=62294>.

⁴ See *Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp. 3d 450 (N.D. Cal. 2017); *Tribe v.*

1 request for a preliminary injunction, filed in a U.S. District Court serving California’s coastal
2 regions, and far from the interior lakes, dams and reservoirs comprising the Project and subject
3 sucker habitat. The requested injunction would require Reclamation to maintain water elevations
4 in excess of the 2013 Biological Opinion’s minimum thresholds, and to do so prior to FWS and
5 NMFS’s issuance of a new biological opinion. The practical effect of the preliminary injunction
6 that the Tribes seek is to shut down the Project, an unprecedented disaster for the Counties and
7 the farmers, ranchers, and families within the Counties’ borders, all in the context of scientific
8 uncertainty as to whether higher lake levels will even benefit sucker populations in Upper
9 Klamath Lake.

10 The Modoc Tribe of Oklahoma (“Modoc Tribe”) is a federally recognized Indian tribe
11 headquartered in Miami, Oklahoma and is an unaffiliated independent government from the
12 Klamath Tribes. Members of the Modoc Tribe are direct descendants of Modoc warriors and
13 their families who were exiled in 1873 from their homelands located in the present-day Counties.
14 The area irrigated by the Project encompasses the aboriginal territory of the Modoc Tribe.
15 Today, the Modoc Tribe owns 800 acres in the County of Siskiyou and is in the process of
16 reacquiring additional land within its aboriginal territory, including areas irrigated by the Project,
17 as part of a governmental effort to return home.

18 The Counties and Modoc Tribe, though of limited means, are compelled to file this brief
19 as *amicus curiae* in light of the alarming potential for the proposed injunction to significantly
20 harm the Counties, their respective residents, and the Modoc Tribe, while not necessarily
21 benefiting the sucker species. Notably, the Tribes have chosen not only to file this action in an
22 improper venue, but also to inappropriately request that the Court step into the shoes of FWS, the
23 expert resource agency, to impose on the Project what is essentially an interim biological
24 opinion, based only upon the judgment of its one declarant biologist. It is for these reasons that
25

26
27 *U.S. Bureau of Reclamation*, No. 3:16-CV-04294-WHO, 2017 WL 6055456 (N.D. Cal. Mar. 24,
28 2017); *Tribe v. U.S. Bureau of Reclamation*, No. 16-CV-06863-WHO, 2018 WL 2010998 (N.D.
Cal. Apr. 30, 2018).

1 the Counties and the Modoc Tribe now urge the Court to dismiss the Tribes' complaint, or in the
2 alternative, deny its motion for preliminary injunction.

3 **II. ARGUMENT**

4 The flaws in the Tribes' motion for a preliminary injunction are twofold. First, the
5 Northern District of California is an improper venue for this action, and the Court should dismiss
6 the case for lack of jurisdiction. Second, it is uncertain whether higher water levels in the Upper
7 Klamath Lake will benefit the sucker species, while such high levels will undoubtedly result in
8 irreparable harm to the Counties. Accordingly, to the extent the Court considers the Tribes'
9 motion, it should be denied.

10 **A. Venue is Improper.**

11 The Tribes have not, and cannot, establish that venue is proper in the Northern District of
12 California either under the general federal venue statute, or under the ESA. In a civil action
13 against a United States agency, venue is proper only in a judicial district in which: (a) a
14 defendant in the action resides; (b) a substantial part of the events or omissions giving rise to the
15 claim occurred, or a substantial part of property that is the subject of the action is situated; or
16 (c) the plaintiff resides if no real property is involved in the action. 28 U.S.C. § 1391(e)(1). The
17 ESA, under which the Tribes' claims are brought, also includes a venue provision, which states
18 that venue is proper in the judicial district in which the ESA violation occurs. *See* 16 U.S.C.
19 § 1540(g)(3)(A); *McCrary v. Gutierrez*, No. 2:06-cv-0086, 2006 U.S. District LEXIS 45259, at
20 *4-5 (E.D. Cal. June 22, 2006). If venue is found to be improper, the Court must either dismiss
21 the action, or if it is in the interest of justice, transfer the case to a district or division where the
22 case could have been brought. 28 U.S.C. § 1406(a).

23 Here, and as more thoroughly set forth in Federal Defendants motion to dismiss, venue is
24 improper under 28 U.S.C. § 1391(e)(1) because: (a) no defendant resides in the Northern
25 District of California, (b) the events or actions giving rise to the claims—namely the water levels
26 in the Upper Klamath Lake—do not and have not occurred in the Northern District of California,
27 and (c) Plaintiff Tribes do not reside in the Northern District of California. *See* ECF No. 18.

28

1 Likewise, venue is improper under 16 U.S.C. § 1540(g)(3)(A) because the Lost River sucker and
 2 shortnose sucker, as well as their critical habitat, are located exclusively in the District of Oregon
 3 and the Eastern District of California. *Id.* The Court therefore lacks jurisdiction to consider the
 4 Tribes' motion, and cannot grant the relief sought. Fed. R. Civ. P. 12(b)(1).

5 **B. The Court Should Deny the Tribes' Request for a Preliminary Injunction.**

6 If the Court elects to consider the Tribes' motion (which it should not, because the Court
 7 lacks jurisdiction), the Court should deny the motion because the Tribes have failed to show that
 8 the balance of hardships tips in their favor, or that an injunction is in the public interest.

9 **1. Legal Standard.**

10 A plaintiff seeking a preliminary injunction must establish: (1) that the plaintiff is likely
 11 to succeed on the merits; (2) that the plaintiff is likely to suffer irreparable harm in the absence of
 12 injunctive relief; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that an
 13 injunction is in the public interest. *Winter v. Natural Res. Def. Council* ("Winter"), 555 U.S. 7,
 14 24 (2008); *Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457, 462 (9th Cir. 1993).
 15 A preliminary injunction is an extraordinary remedy never awarded as of right. *Winter*, 555 U.S.
 16 at 24. Injunctive relief "may only be awarded upon *a clear showing* that the plaintiff is entitled
 17 to such relief." *Id.* at 22 (emphasis added) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972
 18 (1997)). Alleged violations of an environmental statute do not automatically merit injunctive
 19 relief. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544-46 (1987).

20 When balancing the hardships, injunctive relief is properly denied where there is
 21 economic harm to stakeholder parties that outweighs potential environmental impacts. *Tribal*
 22 *Vill. of Akutan v. Hodel*, 859 F.2d 662, 664 (9th Cir. 1998); *Half Moon Fishermans' Mktg. Ass'n*
 23 *v. Carlucci*, 847 F.2d 1389, 1397-98 (9th Cir. 1988) *as amended*, 857 F.2d 505 (9th Cir. 1988);
 24 *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir.2008) (upholding a district court's finding
 25 that the balance of hardships did not tip sharply in plaintiff's favor even though plaintiff
 26 demonstrated environmental harm because the project's benefits to the public, i.e., decreasing the
 27 risk of forest fires and insect infestation and preventing job loss at timber companies, were
 28

1 significant); *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (upholding
2 district court’s consideration, when balancing the hardships, of possible damage to project
3 funding, jobs, and the state). While Congress has limited the weight of economic interests when
4 balancing hardships in ESA cases, courts should not “abandon a balance of harms analysis just
5 because a potential environmental injury is at issue.” *Earth Island Inst. v. Carlton*, 626 F.3d 462,
6 475–76 (9th Cir. 2010). Rather, courts “must balance all of the competing interests at stake.” *Id.*

7 Likewise, when considering whether an injunction is in the public interest, courts should
8 consider the public interest beyond just claims of environmental injury. *Lands Council v.*
9 *McNair*, 537 F.3d at 1005 (“Though preserving environmental resources is certainly in the
10 public's interest, the Project benefits the public's interest in a variety of other ways ...[such as]
11 decreas[ing] the risk of catastrophic fire, insect infestation, and disease, and further[ing] the
12 public's interest in aiding the struggling local economy and preventing job loss”); *Wildwest Inst.*
13 *v. Bull*, 472 F.3d 587, 592 (9th Cir. 2006) (considering the possibility of a severe wildfire and its
14 accompanying danger to human life, and the money the Forest Service would lose in revenue
15 from timber sales as contrary to the public interest).

16 Here, both the balancing of hardships and the public interest favor denial of the requested
17 injunction. As described in further detail below, an injunction would cause irreparable harm to
18 the County by halting all water deliveries within the region, destroying the Counties’ agricultural
19 production in the near term. Furthermore, an injunction does not favor the public interest. There
20 is a lack of empirical evidence suggesting that the water levels proposed by the Tribes would
21 appreciably benefit the listed species. Accordingly, the Counties request that the Court deny the
22 Tribes’ motion.

23 **2. An Injunction Will Cause Irreparable Harm to the Counties and the**
24 **Modoc Tribe.**

25 The Tribes seek a preliminary injunction requiring Reclamation to maintain Upper
26 Klamath Lake water elevations consistent with so-called “2018 Transition Levels” through July
27 31, 2018, and with “C’waam and Koptu Conservation Levels” thereafter until the merits in this
28

1 litigation have been decided. ECF No. 13 at 43. Such an injunction would halt delivery of water
2 to nearly 185,000 acres of highly productive, irrigable farmland in the Klamath Basin.
3 Declaration of James Smith (“Smith Decl.”), ¶ 4. The devastation that this would cause to the
4 Counties and their citizens cannot be overemphasized.

5 At this point in the season, farmers have already made their planting decisions, having
6 invested thousands of dollars per acre to produce high quality crops. Smith Decl. ¶ 4. The
7 region that would be most impacted by the injunction contains rich soil, ideal for crops such as
8 barley, wheat, oats, alfalfa, potatoes, strawberries, onions, mint, horseradish, lettuce and carrots.
9 *Id.* But if the injunction is issued, these crops will never be harvested, because the farmers will
10 have no water. *Id.* Farmers, including the Counties’ citizens, will therefore suffer devastating
11 losses, impacting their livelihood and ability to provide for their families. *Id.*

12 The inability of farmers to receive water to irrigate their crops will cause significant
13 economic harm to the Counties. For example, Siskiyou County receives payments in lieu of
14 taxes for 13,000 to 16,000 acres of FWS Tulelake National Wildlife Refuge leased lands. Smith
15 Decl. ¶ 5. This land typically generates between \$300,000 to \$400,000 a year for the County’s
16 general fund. *Id.* In fiscal year 2017/2018, the County estimates that it received \$415,000 from
17 these lands. *Id.* These funds are derived from farmers’ lease payments. *Id.* The injunction
18 could cause Siskiyou County to lose this revenue if farmers, having lost their crops, are not able
19 to make their lease payments, or withdraw from leases due to lack of water. *Id.* The County also
20 receives property taxes for wheel lines and sprinklers that it may not receive if the injunction is
21 granted because farmers, having lost their crops, are not able to make these payments. Smith
22 Decl. ¶ 6. In the near term, property values may also decline significantly without water. *Id.*,
23 ¶ 7. The long term effects of the lack of water include devastation to small agricultural
24 businesses located within the County, which will further reduce County revenue. *Id.*, ¶ 8.

25 In addition, approximately \$84 million of the County’s agricultural value is derived from
26 crops irrigated by the Tulelake Irrigation District (“TID”). Smith Decl. ¶ 9. TID irrigates
27 approximately 64,000 acres, out of the approximate 200,000 acres irrigated by the Project. *Id.*
28

1 The Siskiyou County Agricultural Commissioner estimates that approximately 1,200 jobs would
2 be directly impacted by the non-irrigation of TID. *Id.* Such a downturn in employment would
3 cause, among other things, significant harm to the Counties' citizens, impacting the economic
4 well-being of the entire region.

5 The County of Modoc will also experience significant economic harm if the injunction is
6 issued. Land that is irrigated by the Project accounts for 17.3% of the County's total land value
7 and 27.5% of the County's personal property value. Declaration of Gary Fensler ("Fensler
8 Decl."), ¶ 5. Thus, property taxes generated from this land provide the County with nearly half
9 of its discretionary revenue. *Id.* If the injunction is issued and water deliveries are halted, the
10 County may not receive this revenue. *Id.* This would hinder the County's ability to provide
11 essential services to its citizens, including services relating to public safety and criminal justice.
12 *Id.*

13 Property values in the County of Modoc are also likely to decline if the injunction is
14 granted. Fensler Decl. ¶ 6. In the County, the price per acre of irrigable land is approximately
15 \$5,000, whereas the price of non-irrigable land is approximately \$2,500. Thus, if the irrigable
16 land within the County becomes non-irrigable due to the Tribes' requested injunction, the land
17 will decrease in value by approximately 50%. *Id.* This is consistent with what happened to land
18 values the last time water deliveries were stopped within the Klamath Basin. *Id.*

19 The County of Modoc also receives additional revenue from agricultural ground leases
20 under the Kuchel Act. Fensler Decl. ¶ 7. This amount was approximately \$90,890 in 2017. *Id.*
21 If the injunction is granted, this revenue could be lost because farmers are not able to harvest
22 their crops, and therefore cannot pay the amounts owed on their ground leases. The County also
23 receives approximately \$170,000 from gas tax revenues. *Id.*, ¶ 8. This revenue could also be
24 impacted if the Tribes' injunction is granted. *Id.*

25 The County of Modoc's economy will also suffer if an injunction is issued because small
26 businesses in the agricultural industry will lose revenue. For example, Basin Fertilizer and
27 Chemical Co. LLC generated \$2.5 million in sales in the County in 2018 supporting crops such
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1 as potato, onion, alfalfa, and mint. *Id.*, ¶ 9. These were all within the areas irrigated by the
2 Project. *Id.* If an injunction is issued, small businesses such as these will suffer severe economic
3 harm because farmers will not be planting and harvesting crops, and therefore will not need their
4 services. *Id.*

5 Moreover, the timing of the requested injunction is particularly problematic. *Id.*, ¶ 10.
6 At this time, the bulk of the cost of the crops that have not been harvested has been borne by
7 farmers. *Id.* If farmers are unable to harvest their crops, which is likely to occur if they do not
8 receive water due to the injunction, they will not be able to fulfill their contracts, and will suffer
9 devastating economic losses. *Id.* Further, contracts for future years will likely be canceled in
10 favor of more reliable agricultural areas. *Id.*

11 The Tribes' requested injunction would also inflict significant economic harm on
12 Klamath County. Klamath County contains a large portion of the acres irrigated by the Project.
13 Declaration of Kelley Minty Morris ("Morris Decl."), ¶ 2. The total direct, indirect, and induced
14 value of agricultural production in Klamath County exceeds \$550 million annually, and provides
15 direct and indirect benefits to the County and its citizens. Morris Decl., ¶ 3, Ex. A. For example,
16 Klamath County receives property tax revenue derived from agricultural production. *Id.*, ¶ 4. In
17 2017, irrigable land produced approximately \$3.5 million in property tax revenues. *Id.* If the
18 injunction is issued, and crops are not harvested due to a lack of water, Klamath County citizens
19 may not be able to pay their property tax assessments, which would result in reduced tax revenue
20 for the County. *Id.*, ¶ 5. Less property tax revenue means that Klamath County would have less
21 disposable income, which would limit its ability to provide much-needed social services. *Id.*

22 Crops grown in Klamath County include, but are not limited to, cereal grains, alfalfa hay,
23 onions, sugar beets, and potatoes. Morris Decl., ¶ 4. If water deliveries are halted, some or all of
24 the current crops will be lost or severely damaged, significantly reducing land values. *Id.* In
25 addition, water delivery shut off (as would occur if the injunction is issued) would likely result in
26 loan default and foreclosure of properties. *Id.*

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1 The farming and agriculture industries impact Klamath County as a whole because a
2 large percentage of the County relies upon these industries for income. Morris Decl., ¶ 6. Using
3 a 1.6 employment multiplier, it is estimated that, for every ten full or part time agricultural jobs,
4 six indirect/induced full or part time jobs are created elsewhere in Klamath County. *Id.*, ¶ 6,
5 Ex. A. Thus, the loss of agricultural jobs would have a County-wide impact. In sum, all of
6 Klamath County's citizens could be significantly and irreparably harmed by the requested
7 injunction.

8 The social impacts of an economic downturn are also important to consider. It is well
9 documented that economic hardship, including joblessness, results in the breakdown of
10 traditional family arrangements, increases use of public assistance, and causes higher rates of
11 crime and violence. *E.g.*, Nichols, Mitchell, & Lindner, *Consequences of Long-Term*
12 *Unemployment*, July 2013, The Urban Institute, at 11-12. Economic hardship can also induce
13 behavioral changes that have important spillover effects on the community as a whole, including
14 reducing investments in housing and other capital improvements. *Id.* at 12. As described below,
15 the uncertain science presented by the Tribes does not justify imposing significant economic and
16 social harm on the Counties and their citizens.

17 In addition, the Modoc Tribe has an interest in preserving water deliveries to its
18 aboriginal territory in the area irrigated by the Project. Declaration of Blake Follis ("Follis
19 Decl."), ¶ 9. The Modoc Tribe is acquiring land in California for the benefit of the Modoc
20 people and the natural resources under its jurisdiction. *Id.*, ¶ 10. Among the needs of the Modoc
21 Tribe is a sustainable supply of water within the Project area. *Id.* In addition, the Modoc Tribe
22 intends to bring much needed economic development to the area, such as agricultural products
23 and services, which rely on ample water supplies. *Id.* The inability to receive Project water, as
24 would occur if the Tribes' injunction is granted, will irreparably harm the governmental interests
25 of the Modoc Tribe. *Id.*

26 The Tribes seek to diminish the water flows into the Modoc Tribe's aboriginal territory.
27 While the Modoc Tribe believes that protection of the Lost River sucker and shortnose sucker
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1 habitat is important, scientific evidence does not support the Tribes' contention that water levels
2 alone are causing the species' decline. *See* Section 3, *infra*. Moreover, increased retention of
3 water in the Upper Klamath Lake, as would be needed to satisfy the Tribes requested lake levels,
4 will ensure that essentially no water is made available downstream to the Modoc Tribe and its
5 neighbors, including Project irrigators. Follis Decl., ¶ 10.

6 Lastly, Lost River suckers occupy the waters of the Lost River, Tule Lake, and Lower
7 Klamath Lake. Follis Decl., ¶ 11, Exs. A, B. The Modoc Tribe is concerned that efforts to
8 reduce water flows downstream to Tule Lake and other parts of the Lost River system will
9 further harm the fish in those areas. *See id.* This result is seemingly contrary to the stated aims
10 of the Tribes to protect these fish and impairs the Modoc Tribe's interests in these fish.

11 In sum, the injunction that the Tribes seek would devastate the economy of the Counties,
12 significantly impair the governmental aims of the Modoc Tribe, and would imperil the livelihood
13 of the citizens in the region.

14 3. Irreparable Harm to the Suckers is Uncertain.

15 The Tribes allege that the "elevation of [Upper Klamath Lake] is the single most
16 important parameter for the continued existence of the [Lost River sucker] and [shortnose
17 sucker], as it directly controls the quality and quantity of habitat available to the species...."
18 ECF No. 13 at 13. The Tribes further allege that increased lake elevations "are needed to satisfy
19 the physical habitat ... and water quality needs of specific life stages" of the species. ECF
20 No. 13-3, ¶ 5. As described in further detail below, the Tribes' assertions are inconsistent with
21 two blue-ribbon National Academy science panels that have concluded there is an absence of
22 scientific evidence establishing that lake levels will improve the status of the Lost River and
23 shortnose suckers.

24 The Counties recognize that the populations of Lost River sucker and shortnose sucker
25 have declined substantially over the past half century. Declaration of Richard A. Valdez
26 ("Valdez Decl."), ¶ 4. This decline is likely a consequence of diminishing recruitment over time.
27 *Id.* However, the cause(s) of such diminishing recruitment is not well understood. *Id.*

28

1 The hypothesis underlying the Tribes' position—that Upper Klamath Lake levels are the
 2 cause of poor sucker recruitment—originated in the early 2000s. Valdez Decl., ¶ 5. This has led
 3 Reclamation and FWS to increase lake levels since that time, to the detriment of water deliveries
 4 and the local economies. *Id.* Most recently, the 2013 Biological Opinion sets forth minimum
 5 Upper Klamath Lake thresholds to protect the imperiled suckers. *Id.*

6 Despite the fact that Upper Klamath Lake levels have been maintained above prior levels
 7 for over a decade, including most recently pursuant to the 2013 Biological Opinion, there is no
 8 evidence of improving recruitment. Valdez Decl., ¶ 6; *see also, e.g.,* Hewitt et al.,
 9 *Demographics and run timing of adult Lost River and shortnose suckers in Upper Klamath Lake,*
 10 Oregon, 2012, U.S. Geological Survey Open-File Report 2014-1186, *available at:*
 11 <https://pubs.usgs.gov/of/2014/1186/>; Hewitt et al., *Demographics and Run Timing of Adult Lost*
 12 *River and Shortnose Suckers in Upper Klamath Lake,* Oregon, 2011, U.S. Geological Survey
 13 Open-File Report 2012–1193, *available at:* <https://pubs.usgs.gov/of/2012/1193/>. This suggests
 14 that simply altering lake levels will not result in improved sucker population levels.

15 The Tribes assert that higher lake levels—namely those identified as “2018 Transition
 16 Levels” and “C’waam and Koptu Conservation Levels” in their briefing—are sufficient to cause
 17 the population levels of Lost River sucker and shortnose sucker to improve. Valdez Decl., ¶ 7.
 18 There is no empirical scientific evidence to support this assertion. *Id.* Put another way, even if
 19 Upper Klamath Lake levels are increased to the levels requested by the Klamath Tribes, this
 20 alone will not improve sucker recruitment such that it will increase their population and insure
 21 their viability. *Id.* Indeed, juvenile sucker populations increased in 2015, when Upper Klamath
 22 Lake levels were lower as compared 2017 and 2018, further suggesting that lake levels alone are
 23 insufficient to improve sucker recruitment.⁵ Rather, other variables in Upper Klamath Lake
 24 (e.g., predation of larvae by fathead minnows; algae blooms causing oxygen depletions, etc.) all
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26 _____
 27 ⁵ *See, e.g.,* “Reclamation Announces Increased Numbers of Lost River and Shortnose Sucker
 28 Fish in the Klamath Project,” *available at*
<https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=51788>.

1 impact sucker recruitment. *Id.* As such, merely increasing lake elevations in Upper Klamath
2 Lake will not improve sucker populations. *Id.*

3 This conclusion—that higher lake levels do not necessarily improve sucker populations—
4 was confirmed by two blue-ribbon science panels established by the National Research Council,
5 a branch of the National Academies. Valdez Decl., ¶ 8. The panels produced peer-reviewed
6 reports entitled *Endangered and Threatened Fishes in the Klamath River Basin: Causes of*
7 *Decline and Strategies for Recovery* in 2004 (“2004 Report”) and *Scientific Evaluation of*
8 *Biological Opinions on Endangered and Threatened Fishes in the Klamath River Basin* in 2002
9 (“2002 Report”). Valdez Decl., ¶¶ 2, 8. Indeed, in the 2004 Report, the expert panel addressed
10 the same two aspects of sucker survival now put forth by the Tribes: physical habitat and water
11 quality. Valdez Decl., ¶ 9.

12 With respect to physical habitat, the expert panel concluded that: “For the present there
13 is no indication of a strong relationship between [sucker] spawning success, as inferred from
14 abundance of larvae, and water level in Upper Klamath Lake.” Valdez Decl., ¶ 9 (citing 2004
15 Report at 226). The panel continued, stating: “Overall, maintaining full pool elevation for
16 promotion of spawning, although intuitively appealing, is difficult to defend scientifically.” *Id.*
17 (citing 2004 Report at 227); *compare to* ECF No. 13-3 at ¶ 27 (recognizing that certain
18 elevations requested by the Tribes are “near the full pool elevation”).

19 Regarding water quality, the panel was equally unpersuaded. For example, the panel
20 stated that “monitoring data show no relationship between pH and water level,” concluding that
21 “the weight of current evidence does not support the argument that higher lake levels will
22 mitigate problems associated with high pH.” Valdez Decl., ¶ 9 (citing 2004 Report at 115-116);
23 *see also* Valdez Decl., ¶¶ 2, 11 (citing Martin & Saiki, *Effects of Ambient Water Quality on the*
24 *Endangered Lost River Sucker in Upper Klamath Lake, Oregon* at 959 (“Collectively, these
25 findings indicate that water temperatures and un-ionized ammonia concentrations in Upper
26 Klamath Lake were not directly responsible for the occasional episodes of high fish
27 mortality...”)).

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1 These conclusions are consistent with the expert panel’s determination in the 2002
 2 Report, which stated: “Overall, the presumed causal connections between lake levels and
 3 recruitment of the sucker populations in Upper Klamath Lake do not have strong scientific
 4 support at present.” Valdez Decl., ¶ 2, Ex. 2 at 18 (2002 Report). The panel further found:
 5 “Despite a monitoring record of substantial length, there is no clear evidence of a connection
 6 between the lake levels and the welfare of the two sucker species in Upper Klamath Lake. *Id.* at
 7 19. As determined by the esteemed members of the National Academy panel, there simply is no
 8 scientifically justifiable connection between lake levels and improved sucker population levels.

9 The conclusions in the 2002 Report and 2004 Report were endorsed by another National
 10 Academy panel expert report, entitled *Hydrology, Ecology, and Fishes of the Klamath River*
 11 *Basin*, in 2008 (“2008 Report”), which stated: “The [2002 Report] concluded that ... available
 12 scientific data did not support the higher minimum lake levels or the higher minimum river flows
 13 recommended in the biological opinions to benefit the species listed under the Endangered
 14 Species Act. The [2004 Report] confirmed those conclusions.... This committee endorses the
 15 recommendations of the earlier reports” Valdez Decl., ¶ 12 (citing 2008 Report at 5).

16 Instead of addressing the scientific weaknesses identified by the National Academy
 17 panels, the Tribes assert without evidentiary support that higher lake levels will benefit the
 18 species. The arguments for higher lake levels advanced by the Tribes, and specifically by their
 19 declarant Mark Buettner, are based on his personal judgment, rather than empirical research (that
 20 is, quantitative analyses of the relationships between dependent and independent variables using
 21 prevailing methods or tools that are reproducible and that, preferably, have been subjected to
 22 peer review). *See* Valdez Decl., ¶ 13. Moreover, in June 2018, Mr. Buettner conceded that
 23 conditions other than higher water, such as “climatic conditions,” led to increased recruitment in
 24 1991, which was “not a particularly high-water year” in the Upper Klamath Lake.⁶ In sum, there
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26 ⁶ June 27, 2018 Klamath Herald & News “Basin Views Podcast,” *available at*:
 27 [https://www.heraldandnews.com/multimedia/podcasts/basinviews/basin-views-podcast-](https://www.heraldandnews.com/multimedia/podcasts/basinviews/basin-views-podcast-wednesday-june----don-gentry/audio_89332d10-b34e-5594-9b89-808acb924422.html)
 28 [wednesday-june----don-gentry/audio_89332d10-b34e-5594-9b89-808acb924422.html](https://www.heraldandnews.com/multimedia/podcasts/basinviews/basin-views-podcast-wednesday-june----don-gentry/audio_89332d10-b34e-5594-9b89-808acb924422.html) (at about
 min. 46:15).

1 is an absence of empirical research suggesting that the lake levels requested by the Tribes, as
2 compared to those already maintained pursuant to the 2013 Biological Opinion, will contribute to
3 improved recruitment and therefore conservation of the suckers. *Id.*, ¶ 14. Instead, the Tribes
4 ask this Court to issue an injunction based solely on the professional judgment of a single
5 scientist.

6 **4. The Balance of Hardships and the Public Interest Do Not Support**
7 **Issuance of An Injunction.**

8 Injunctive relief is properly denied when balancing the hardships does not tip in the
9 plaintiffs favor, and an injunction is not in the public interest. *E.g., Tribal Vill. of Akutan v.*
10 *Hodel*, 859 F.2d at 664; *Lands Council v. McNair*, 537 F.3d at 1005. Here, the balance of the
11 hardships does not tip in the Tribes' favor, because there is no empirical evidence showing that
12 the lake levels proposed by the Tribes will appreciably benefit the sucker species. Nor does an
13 injunction favor the public interest, as halting water deliveries to irrigators within the Counties
14 will cause irreparable harm to the Counties' economy and the agricultural production in the area.
15 Taken together, a speculative environmental harm does not outweigh the concrete harm that will
16 occur if an injunction is issued. Indeed, the enormity of the water supply loss associated with the
17 injunction sought by the Tribes stands in stark contrast to the absence of any competent scientific
18 data indicating that higher water levels in Upper Klamath Lake will improve the sucker species'
19 population levels.

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1 **III. CONCLUSION**

2 For the foregoing reasons, the Court should deny the Tribes request for a preliminary
3 injunction.

4 Date: July 3, 2018

NOSSAMAN LLP
PAUL S. WEILAND
ASHLEY J. REMILLARD

By: /s/ Paul S. Weiland
Paul S. Weiland

Attorneys for [Proposed] Amicus Curiae
County of Siskiyou

10 Date: July 3, 2018

PRENTICE LONG & EPPERSON LLP

By: /s/ Margaret E. Long (auth. 7/3/2018)
Margaret E. Long

Attorneys for [Proposed] Amicus Curiae
County of Modoc

15 Date: July 3, 2018

FREDERICKS PEEBLES & MORGAN LLP

By: /s/ Patrick R. Bergin (auth. 7/3/2018)
Patrick R. Bergin

Attorneys for [Proposed] Amicus Curiae
Modoc Tribe Of Oklahoma

21 Date: July 3, 2018

KLAMATH COUNTY COUNSEL

By: /s/ Mika N. Blain (auth. 7/3/2018)
Mika N. Blain

Attorneys for [Proposed] Amicus Curiae
Klamath County