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[Proposed] Amicus Curiae Modoc Tribe of Oklahoma

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

THE KLAMATH TRIBES, a federally
recognized Indian Tribe,

Plaintiff,

vs.

UNITED STATES BUREAU OF
RECLAMATION; UNITED STATES FISH &
WILDLIFE SERVICE; NATIONAL MARINE
FISHERIES SERVICE,

Defendants,

and

KLAMATH WATER USERS ASSOCIATION,
SUNNYSIDE IRRIGATION DISTRICT, and
BEN DuVAL,

Defendant-Intervenors.

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

**DECLARATION OF BLAKE FOLLIS IN
SUPPORT 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.**

DECLARATION OF BLAKE FOLLIS

I, Blake Follis, declare as follows:

1. I am the Attorney General of the Modoc Tribe of Oklahoma (“Modoc Tribe”), a federally recognized Indian Tribe headquartered in Miami, Oklahoma.¹ I am duly licensed to practice law in all courts of the Modoc Tribe and the State of Missouri. I am also an enrolled member of the Modoc Tribe. Unless otherwise stated on information and belief, I have personal knowledge of the facts stated herein and, if called as a witness, could testify competently thereto.

2. As Attorney General, I am familiar with the Modoc Tribe’s history, laws, governmental and business operations, and treaties with the United States. I have reviewed the Klamath Tribes’ Motion for Injunction, ECF No. 13, filed in the above-captioned lawsuit. I submit this declaration in support of the joint amicus curiae brief of Siskiyou County, Modoc County, Klamath County, and the Modoc Tribe.

3. The Modoc Tribe’s ancestral home is an area along the California-Oregon border, extending from the summit of the Cascades near Happy Bend, CA to the summit of the Warner Mountains in the Sierra Nevada mountain range and the lands between. As Euro-Americans began settling the area in large numbers, the Modoc Tribe, along with the Klamath Tribe and the Yahooskin Band of Snake Indians, entered a joint treaty with the United States in 1864, ceding their lands and agreeing to live together on a reservation in present-day Oregon. *See Treaty with the Klamath Indians, 1864., Art. I, 16 Stat. 707.*

4. Unable to live peaceably alongside the Klamath, the majority of the members of the Modoc Tribe led by Captain Jack left the reservation in 1865 and later returned to the reservation in December of 1869; departing again in April, 1870. The Modoc again returned to their ancestral homelands, and requested that a separate Modoc reservation be established there. The United States refused. The United States Army repeatedly tried to force the Modoc onto the Klamath reservation, leading to an armed conflict initiated by orders from the Bureau of Indian

¹ Also known as the Modoc Nation, Modoc Tribal Nation, Captain Jack’s Band of Modocs, Modoc Indians in Oklahoma, and the Modoc Tribe of Oklahoma; to be distinguished from other groups and individuals promoting themselves as Modoc.

1 Affairs that was known as the Battle of Lost River and the beginning of the Modoc War, which
2 was fought in 1872-73, in and around the lava beds south of Tule Lake, California.

3 5. At the end of the Modoc War, the United States executed Captain Jack and three
4 other Modocs, and sentenced two others to life imprisonment at Alcatraz. The United States
5 removed the belligerent Modocs to Indian territory, taking 153 individuals east by railroad under
6 armed guard, originally to Cheyenne, Wyoming, then to Fort McPherson, Nebraska, down
7 through Kansas City, Missouri and unloading the Modocs in Baxter Springs, Kansas and
8 ultimately settling them at a location in the Quapaw Agency, in the northeastern corner of
9 present-day Oklahoma.

10 6. The Act of March 3, 1909, placed the removed Modoc to be enrolled with the
11 Klamath Agency in Oregon. In 1954, the United States terminated federal supervision of “the
12 Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and Yahooskin Band of
13 Snake Indians.”

14 7. In 1978, Congress enacted a law recognizing the “Modoc Indian Tribe of
15 Oklahoma.” The law stated that the recognized tribe “shall consist of those Modoc Indians who
16 are direct lineal descendants of those Modocs removed to Indian territory (now Oklahoma) in
17 November 1873, and who did not return to Klamath, Oregon, pursuant to the Act of March 9,
18 1909 (35 Stat. 751), as determined by the Secretary of the Interior, and the descendants of such
19 Indians who otherwise meet the membership requirements adopted by the Tribe.” The law
20 repealed the application of the 1954 Klamath Termination Act to the Modocs in Oklahoma. The
21 Modoc Tribe remains an unaffiliated independent government from the Klamath Tribes.

22 8. The Modoc Tribe owns 800 acres in the County of Siskiyou and is in the process
23 of reacquiring additional land within its aboriginal territory as part of a governmental effort to
24 return home. The Modoc Tribe also possesses “the exclusive right of taking fish in the streams
25 and lakes” and “gathering edible roots, seeds, and berries” from areas now irrigated by the
26 Project. *Treaty with the Klamath Indians*, 1864., Art. I, 16 Stat. 707. *See also, United States v.*
27 *Adair*, 478 F. Supp. 336 (D. Or. 1979), *aff'd as modified*, 723 F.2d 1394 (9th Cir. 1983) (Treaty
28 signers reserved water rights associated with fishing and gathering have not been abrogated.).

1 Even in exile, the Modoc Tribe members continue to possess these reserved rights. *See Kimball*
2 *v. Callahan*, 493 F.2d 564, 568 (9th Cir. 1974) (Treaty rights to hunt and fish are, however,
3 rights of the individual Indians.). Thus, the Modoc Tribe has governmental, jurisdictional, and
4 economic interests in the California Counties of Modoc and Siskiyou, as well as in the Oregon
5 Counties of Lake, Jackson and Klamath.

6 9. The land ceded by the Modoc Tribe under the 1864 treaty includes the area now
7 irrigated by the Klamath Irrigation Project. Water from the Lost River enters the Klamath River
8 basin from natural flows from Clear Lake and man-made flows from the Upper Klamath Lake,
9 which is the water source at issue in this lawsuit. The headwaters of the Klamath River are
10 sourced from the Upper Klamath Lake. Today, Tule Lake and Lost River depend on the
11 irrigation flows and diversions of the Klamath Irrigation Project to sustain water levels in the
12 Lost River and Tule Lake. The Lost River, along with its terminus, Tule Lake, serves as a main
13 water source for the Modoc Tribe's aboriginal territory. It is among these water sources that the
14 Modoc Tribe historically relied upon on for subsistence. Accordingly, the Modoc Tribe has an
15 interest in preserving water flows to its aboriginal territory in the area irrigated by the Klamath
16 Irrigation Project.

17 10. The Modoc Tribe is acquiring land in California for the benefit of the Modoc
18 people and the natural resources under its jurisdiction. Among the needs of the Modoc Tribe is a
19 sustainable supply of water within the Klamath Irrigation Project area. In addition, the Modoc
20 Tribe intends to bring much needed economic development to this area, such as agricultural
21 products and services, which rely on ample water supplies. The inability to receive irrigable
22 water, as would occur if the Tribes' injunction is granted, will irreparably harm the governmental
23 interests of the Modoc Tribe. Moreover, increased retention of water in the Upper Klamath
24 Lake, as would be needed to satisfy the Tribes requested lake levels, will ensure that essentially
25 no water is made available downstream to the Modoc Tribe and its neighbors, including Klamath
26 Project irrigators.

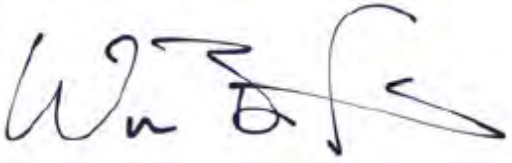
27 11. It is among my duties as Attorney General to monitor litigation, as well as local,
28 state and federal administrative actions concerning the Modoc Tribe's ancestral lands. In doing

1 so, I have become aware of relevant informational material on the Lost River sucker fish
2 published by the California Department of Fish & Wildlife and the United States Fish & Wildlife
3 Service. Attached hereto as **Exhibit A** is a true and correct copy of the informational page on
4 the Lost River Sucker published by the Endangered Species Project of the California Department
5 of Fish & Wildlife. Attached hereto as **Exhibit B** is a true and correct copy of the informational
6 page on the Lost River Sucker by the United States Fish & Wildlife Service and published by the
7 Oregon Fish and Wildlife Office.

8 I declare under penalty of perjury under the laws of the United States of America that the
9 foregoing is true and correct.

10 Executed July 3, 2018, at Miami, Oklahoma.

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Blake Follis

Lost River Sucker (*Deltistes luxatus*)

Status -- Federal: Endangered; **California:** Endangered
Shortnose Sucker (*Chasmistes brevirostris*)

Status -- Federal: Endangered; **California:** Endangered

The Lost River sucker is a large fish, measuring up to 3 feet (1m) in total length, and weighing up to 10 lbs (4.5 kg). Its small mouth is positioned below its elongated snout. Its coloration varies with location. Upper Klamath Lake (Oregon)



Lost River Sucker

fish have dark backs and sides fading to yellow or white on the belly, while Clear Lake Reservoir (California) fish are light brown above and white or tan below. Capable of living for more than 40 years, Lost River suckers usually inhabit deep lakes or river pools. Adult suckers are thought

to feed near the bottom on invertebrates found in the sediments and zooplankton. The Shortnose sucker is smaller than the Lost River sucker, measuring less than 20 inches (50 cm) in length, and weighs 3.5 lbs (1.5 kg) when fully grown. It has a big head and its body is nearly cylindrical. It is recognized by its large, flexible mouth. The fish is also characterized by its blunt, turned-up snouth. Body coloring ranges from dark-to-light brown above and from tan to white below. They are known to live at least 33 years. For most of the year, they live in large, shallow lakes and sluggish rivers, where they feed on zoo-plankton, algae, and benthic (sediments) invertebrates.



Shortnose Sucker

Both sucker species shared a similar historical distribution, in Upper Klamath Lake and its tributaries, and the Lost River system. Lost River suckers also occupied the waters of Tule Lake, Lower Klamath Lake, and Sheeple Lake. Large scale water

California Department of Pesticide Regulation
 Endangered Species Project
 California Department of Fish & Game
 www.cdpr.ca.gov

Lost River Sucker and Shortnose Sucker

reclamation projects developed in the early 1900s, resulted in the loss of over 250,000 acres of wetlands in the Upper Klamath Basin. The loss of these wetlands has had large scale impacts to the quality and quantity of suitable sucker habitat. Currently, less than 75,000 acres of wetlands remain in the Basin.

Range: Today, substantial populations of Lost River suckers are only found in Tule Lake, part of the Lost River, and Lower Klamath Lake in Siskiyou County, and in Clear Lake Reservoir in Modoc County. In California, the present distribution of Shortnose suckers is similar to that of the Lost River sucker. Gerber Reservoir in Oregon is the only habitat with a Shortnose sucker population that does not also have a Lost River sucker population.



Breeding: Lost River suckers reach sexual maturity between the ages 6 to 14 years. From early February through May, they begin their runs up tributary streams in order to spawn. Females release their eggs in stretches of stream that flow swiftly over rubble bottoms, depositing 44,000 - 231,000 eggs each. After hatching, larvae move downstream to the lake under cover of darkness. Shortnose suckers reach sexual maturity at age 6 or 7. They begin their runs in March, migrating up tributary rivers to spawn. In stretches of riffles and smooth runs of water, over gravel -or rubble-covered stream bottoms, females broadcast tens of thousands of eggs. Some suckers in both species spawn along the shores of lakes and springs.

Endangerment: The combined effects of damming of rivers, instream flow diversions, draining of marshes, dredging of Upper Klamath Lake, and other water manipulations have threatened both species with extinction. Additionally, water quality degradation in the Klamath Basin watershed has led to large-scale fish kills related to algal bloom cycles. Introduced exotic fishes may reduce recruitment through competition with, or predation upon, suckers and sucker larvae.



U.S. Fish & Wildlife Service

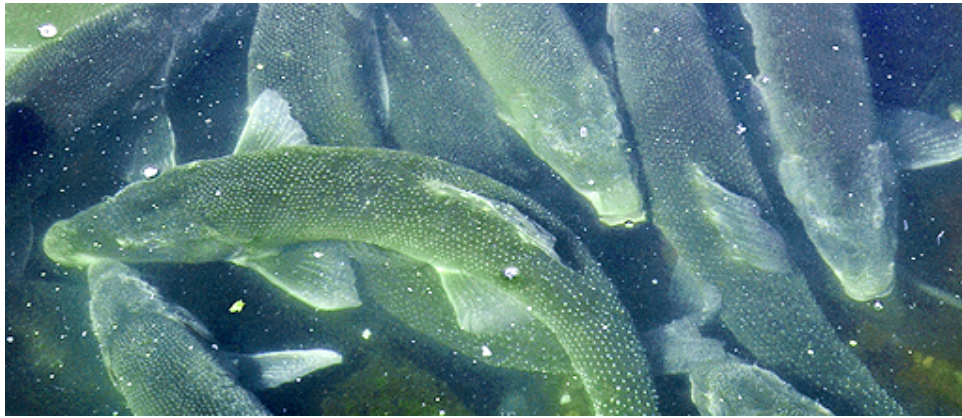
Oregon Fish and Wildlife Office

Working with you to conserve the natural resources of Oregon

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Lost River sucker



Scientific name: Deltistes luxatus

Status: Endangered

Critical Habitat: Proposed

Listing: The Lost River sucker was federally listed as endangered in 1988. A recovery plan was published in 1993. Critical habitat was proposed in 1994, but not designated. A

status review was conducted in 2004, and a five-year review was done in 2007.

Historical Status and Current Trends

Early records indicate that Lost River suckers were once widespread and abundant in the upper Klamath Basin of Oregon and California. This area historically contained over 350,000 acres of wetlands and floodplains. These wetlands protected sucker habitat by controlling erosion, recycling organic and inorganic nutrients, and maintaining water quality. Because suckers were historically very abundant, they were a major food source for Native Americans and local settlers in the late 1800s. Canneries were established along the Lost River to process suckers into oil, dried fish, and other products. However, agricultural development and associated water and land use changes in the basin have contributed to the significant loss of wetland habitat and a significant decline in sucker populations. Although overharvesting and pollution may have played a role in the species decline, it is believed that the combined effects of the construction of dams, the draining or dredging of lakes, and other alterations of natural stream flow have reduced the reproductive success of Lost River suckers by as much as 95 percent through the degradation of suitable breeding habitat. At the time the Lost River sucker was listed as endangered, it was noted that there had been no significant addition of young into the population in 18 years.

Currently, the Lost River sucker occupies only a fraction of its former range and is restricted to a few areas in the Upper Klamath Basin, such as the drainages of Upper Klamath Lake, Tule Lake, and Clear Lake. Poor water quality, reduced suitable habitat for all sizes and ages, and the impacts of non-native fishes continue to threaten remaining Lost River sucker populations.

Description and Life History

Locally known as mullet, the Lost River sucker is a large, long-lived sucker that can reach 43 years of age. It has unique triangular-shaped gill structures which are used to strain a diet of detritus (decomposing organic matter), zooplankton (tiny floating aquatic animals), algae, and aquatic insects from the water. Lost River suckers typically begin to reproduce at nine years, when they first participate in spawning migration. Adult suckers migrate from the quiet waters of lakes into fast moving streams from March through May in order to spawn. They may also spawn in lakeshore springs from February to mid-April when the water temperature is a constant 15 C (60 F). Thousands of eggs (from 44,000 for smaller fish to 218,000 for larger suckers) are typically laid near the stream bottom in areas where gravel or cobble is available. Once the eggs hatch, the

larval fish begin their migration back to calmer waters. They generally migrate at night and stay in shallow, shoreline areas and in aquatic vegetation during the day. Upon their return to the lake, larvae may be preyed upon by largemouth bass, yellow perch, or other non-native predatory fish, and larger juveniles may compete for food with non-native fishes such as fathead minnows, yellow perch, and others.

Habitat

The Lost River sucker dwells in the deeper water of lakes and spawns in springs or tributary streams upstream of the home lake. Areas with gravel or close-set stone ("cobble") bottoms at springs or in moderate to fast-flowing springs are preferred for spawning. In addition, the spawning streams have a fairly shallow shoreline with abundant aquatic vegetation; these areas provide a safe haven for the young larvae during their journey back downstream to their home lakes or the deep, quiet waters of rivers.

Reasons for Decline

Although a number of factors have contributed to the decline of the Lost River sucker, habitat degradation is considered the primary cause. Streams, rivers, and lakes have been modified by channelization and dams. Grazing in the riparian zone has eliminated streambank vegetation, and has added nutrients and sediment to river systems. Eggs and larvae, for example, suffocate when the water is cloudy, or dry out or get eaten by other fish when they are not protected by aquatic vegetation. Loss of streambank vegetation due to overgrazing, logging activities, agricultural practices, and road construction has also led to increases in stream temperatures, high levels of nutrients (which encourages the buildup of excess algae and bacteria), and serious erosion and sedimentation problems in streams. Such water quality problems have reduced the availability of suitable Lost River sucker habitat and have resulted in major fish mortality. Entire age classes of young suckers are routinely lost due to poor water quality conditions. As a result, few young suckers survive to sexual maturity, and therefore, do not increase the population size. Other factors affecting the decline of the Lost River sucker include previous overharvesting, chemical pollution from pesticides, herbicides, and forestry practices, and predation and competition from native and non-native fishes such as largemouth bass, blue chub, yellow perch, fathead minnows, and rainbow trout.

Conservation Measures

Conservation efforts for the Lost River sucker focus on the re-establishment of a more naturally functioning ecosystem in the Klamath Basin. Fencing portions of streams to reduce cattle-caused erosion, replanting streambanks with native vegetation, improving forestry and agricultural practices, and assuring adequate water levels in reservoirs will contribute to the recovery of this species. Through coordination of the actions of land use agencies and private landowners, further degradation of sucker habitat can be avoided and steps can be taken to improve current conditions. By minimizing the impacts of future modifications to spawning habitat and restoring waters to a more natural state, recovery of Lost River sucker populations is possible in the Klamath Basin.

References and Links

U.S. Fish and Wildlife Service. 1988. Determination of Endangered Status for the Shortnose Sucker and Lost River Sucker. [FR 53:27130-27134](https://ecos.fws.gov/docs/frdocs/1988/88-16062.pdf). (<https://ecos.fws.gov/docs/frdocs/1988/88-16062.pdf>)

U.S. Fish and Wildlife Service. 1993. Shortnose Sucker (*Chasinistes brevirostris*) and Lost River (*Deltistes luxatus*) Sucker [Recovery Plan](http://ecos.fws.gov/docs/recovery_plans/1993/930317.pdf) (http://ecos.fws.gov/docs/recovery_plans/1993/930317.pdf). Portland, Oregon 108pp.



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