



# Hoopa Valley Tribal Council

HOOPA VALLEY TRIBE

Regular Meetings on the First and Third Thursday of Each Month

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Clifford Lyle Marshall  
Chairman

March 4, 2005

Michael J. Ryan, Area Manager  
Northern California Area Office  
U.S. Bureau of Reclamation  
16349 Shasta Dam Blvd.  
Shasta Lake, California 96019

Re: Trinity Management Council's unauthorized departure from requirements of the Trinity River Restoration Program

Dear Mr. Ryan:

At our December 2, 2004, meeting with the Trinity River Restoration Program (Program) staff, we were advised of positions and actions contemplated or taken by the staff that substantially deviate from the recommendations in the Trinity River Flow Evaluation, Final Report (June 1999) (Report) and that are prohibited by the Central Valley Project Improvement Act (CVPIA), Public Law 102-575, section 3406(b)(23) (1992). The purpose of this letter is to request that you adjust your administration of the Program to conform to the underlying legal and fiduciary requirements that govern Trinity River restoration.

First, as discussed in our January 26<sup>th</sup> letter to Deputy Assistant Secretary-Water and Science Jason Peltier, we are advised that the Trinity Management Council (TMC) had decided to concur in a recommendation by the Bureau of Reclamation to postpone implementation of restoration activities, including completion of mainstem habitat restoration sites, until 2012. As set forth below, neither the TMC nor the Bureau of Reclamation has the authority to order such a postponement.

As you know, the Hoopa Valley Tribe coauthored the Report with the U.S. Fish and Wildlife Service and formally concurred with its recommendations pursuant to the authority established in the CVPIA. The CVPIA mandated that upon the concurrence by the Tribe and the Secretary of the Interior (Secretary) in the flow recommendations, the "increase to the minimum Trinity River instream fishery releases established under this paragraph [section 3406(b)(23)] and the [associated] operating criteria and procedures [OCAP] . . . shall be implemented accordingly." Both the CVPIA and the Secretary's Record of Decision (ROD) on the restoration program are replete with explicit references to the urgency with which restoration is to be implemented.



This urgency was recognized by the court during the recently concluded litigation (Westlands Water District v. United States, Civ. No. F-00-7124 OWW/DLB, E.D. Calif.) brought by Central Valley interests in a failed effort to set aside the flow recommendations and OCAP. During the four years this litigation was pending, the court repeatedly directed the non-flow portions of the restoration program -- including those activities now proposed to be delayed -- to proceed: "The injunction . . . otherwise allows every other physical aspect of the R[ecord] O[f] D[ecision]'s Trinity River restoration to move forward" (Memorandum Decision and Order, March 22, 2001, at 58-59); "all other Trinity River restoration activities specified by the Record of Decision . . . may proceed" (Order, April 19, 2002 at 3); "all other Trinity River restoration activities specified by the Record of Decision . . . may proceed." (Memorandum Decision May 5, 2002 at 42); "All non-flow measures prescribed by the ROD shall proceed and plaintiffs' request for an injunction against such ROD measures is DENIED" (Memorandum Decision and Order, December 10, 2002, at 143); "nothing in this judgment is intended to delay or to affect implementation of any other fishery restoration measure identified in the ROD" (Final Judgment, February 20, 2003, at 4).

The Court's consistent recognition of the urgency of restoration is informed by the Secretary's Record of Decision, which was the subject of the litigation. The ROD includes numerous statements that the Bureau of Reclamation "must comply" with non-flow measures, which "are non-discretionary" and "shall be completed" "in a timely manner," "as soon as possible." Accordingly, the delay in the restoration schedule is neither justifiable nor lawful; it is beyond the authority of the Bureau of Reclamation to propose or the Trinity Management Council to endorse.

In addition, the ROD is based on the statutory premise that in-basin use of Trinity River water to fulfill Indian reserved property rights in the fishery has priority over any other uses of Trinity River Division (TRD), including diversions to the Central Valley. Although Congress and the courts have made it clear that the Indian rights are senior, the Bureau of Reclamation has consistently and wrongfully acted to subordinate the senior Indian and in-basin right to junior interests in the Central Valley. The TRD water identified in the ROD as needed for Trinity fishery restoration is essential to protect the vested property rights of the Hoopa Valley Tribe and contribute to the Tribe's economic well-being. The TMC has an obligation to implement restoration in a timely and effective manner.

To the extent that the delay in restoration is associated with the Bureau's refusal to provide sufficient funding, please be advised that the restoration mandate described above constrains the Secretary's discretion to set funding priorities. The Secretary is obligated to allocate funding in the Bureau of Reclamation's annual appropriation for the Central Valley Project first and fully to meet the needs of the Program. The Bureau of



Reclamation may not limit its funding request for the Program when it knows that in doing so it is frustrating the restoration mandate that governs the Secretary's management of the CVP.

We request that you take prompt action to reinstate the implementation schedule as set forth in the Flow Recommendations and ROD, affirmed by the courts, and mandated by the CVPIA.

Second, it was suggested that the TMC consider reserving a portion of the water dedicated to Trinity mainstem restoration by the ROD and release it instead in the late summer for the benefit of lower Klamath River fish habitat. The TMC has no authority to reallocate ROD water to that use. The volume, timing, purpose, and place of use in the Trinity mainstem of the ROD releases were developed by the Hoopa Valley Tribe and the Secretary in consultation with an interdisciplinary group of scientists and policy officials using the best available scientific information pursuant to section 3406(b)(23) of the CVPIA. They are set forth in ROD Appendix B. The Tribe has not, and will not, concur in any change in the flow release schedule or use of the ROD water supply to serve any other purpose than mainstem Trinity fishery restoration. The flow releases were quantified with the expectation that full funding for mechanical improvements to the riverbed and monitoring of the habitat and fish populations would be forthcoming. The TMC is at risk of dealing a triple blow to restoration, first by postponing implementation of restoration, second by under funding the Program, and third by withholding water from the Program. Each of these actions is unlawful and potentially jeopardizes the fishery that the United States holds in trust for our Tribe.

The Department has a readily available source of water to release for the benefit of the lower Klamath fish habitat during late summer and early fall. The second proviso in section 2 of the Act of August 12, 1955, which authorized construction of the TRD, requires that the Secretary release annually from the TRD 50,000 acre-feet of water and make it available to Humboldt County and downstream water users, including the Hoopa Valley Tribe. In 1959, the Bureau of Reclamation executed a permanent contract with Humboldt County for that amount of water and the State of California established conditions on the permits to operate the TRD that required the provision of that water. Humboldt County, on behalf of all who depend on the Klamath/Trinity fishery, has requested the Secretary to release TRD water pursuant to its contract for fishery protection in the lower Klamath during the late summer and early fall. Under California law, release of water for that purpose is a beneficial use. The Secretary and the State have questioned the nature and the extent of the obligation of the Bureau to release the 50,000 acre feet. The Tribe and Humboldt County insist that the obligation is clear in the 1955 Act and state permits, is binding on the Bureau, and has priority over diversion of water to the Central Valley.



In summary, the TMC is subject to the mandate of the Trinity ROD and the CVPIA Trinity River provision. It has no authority to depart from either.

Your attention to this is appreciated.

Sincerely,

Clifford Lyle Marshall, Chairman  
Hoopa Valley Tribal Council

cc: Kirk Rodgers, Mid-Pacific Regional Director, Bureau of Reclamation  
Douglas Schleusner, Executive Director, Trinity River Restoration Program  
Steve Thompson, U.S. Fish and Wildlife Service, Sacramento  
Jason Peltier, Deputy Assistant Secretary—Water and Science  
Amy Dutschke, Deputy Director, Bureau of Indian Affairs Pacific Region  
Michael Olsen, Acting Principal Deputy Assistant Secretary—Indian Affairs  
Christopher Chaney, Associate Solicitor—Indian Affairs  
F. Patrick Ragsdale, Deputy Assistant Secretary—Indian Affairs  
Jill Geist, Humboldt County Board of Supervisors, District 5  
The Honorable Mike Thompson  
The Honorable Dianne Feinstein  
The Honorable Barbara Boxer