



# 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, Sr.  
Chairman

**Subcommittee on Water and Power  
110<sup>th</sup> Congress, 1<sup>st</sup> Sess.  
Hearing on H.R. 2733, the Trinity River Restoration Fund Act  
Testimony of Clifford L. Marshall, Chairman  
Hoopa Valley Tribe  
September 18, 2007**

Good Morning. I am Clifford Lyle Marshall, Chairman of the Hoopa Valley Tribe of California. I am accompanied today by Michael Orcutt, Director of the Hoopa Fisheries Department, and members of the Hoopa Valley Tribal Council. I appreciate the opportunity to testify today in support of enactment of H.R. 2733.

## **The Hoopa Valley Tribe and the Trinity River**

The Trinity River traverses our reservation in the Hoopa Valley where the Hupa people have resided for thousands of years. The Trinity River is the focal point of our culture, religion and economy. We have fishing rights in the river that the United States holds in trust for our Tribe that have been confirmed by federal statute, judicial decree, administrative opinions, and agency regulations.

In its natural course, the Trinity River rises in the Trinity Alps, flows through the heart of our reservation in Humboldt County to its confluence with the Klamath River at the northern boundary of our reservation, and then to the Pacific Ocean. The Trinity is the Klamath River's largest tributary and produces more than 50 percent of the severely depleted anadromous fish stocks in the Klamath basin.

## **Trinity River Division, Central Valley Project--Tribal Impacts**

With the Bureau of Reclamation's (Reclamation) completion of the Trinity River Division of the Central Valley Project (CVP) in 1963, the Trinity River effectively became an artificial tributary of the Sacramento/San Joaquin watershed and the only imported source of Central Valley Project water.

In authorizing the Trinity River Division (69 Stat 719, Act of August 12, 1955), Congress established an area-of-origin priority--recognized in a 1979 opinion of the Interior Department's Solicitor--for the Trinity River basin that prohibited the diversion of any water needed for the preservation and propagation of fish and wildlife, and required that

an additional 50,000 acre-feet of water stored in the Trinity River Division be made available annually at no cost to Humboldt County and downstream water users. The County executed a permanent contract with Reclamation for the latter supply on June 19, 1959.

Notwithstanding the limitations imposed by Congress, Reclamation operated the Trinity River Division to divert up to 90 percent of the annual flow of the Trinity River at Lewiston, California, through a tunnel and hydroelectric generating plants into the Central Valley. The Trinity River Division enables CVP water use as far as 350 miles to the south in the San Joaquin River Valley. For 45 years, that diversion has brought astonishing wealth to water and power beneficiaries in the Central Valley. For example, fully 25 percent of the energy generated by all CVP facilities is produced by the Trinity River Division, and the irrigation of extensive agricultural lands by the Westlands Water District was made possible by the Trinity River Division. Westlands has reported that in the 2001-2002 water year alone “Westlands farmers produced nearly \$900 million worth of food and fiber commodities . . . , generating approximately \$2.7 billion in farm-related economic activity in Fresno and Kings counties.”

The price of that wealth was severe reductions in Trinity River fish populations and economic and cultural devastation to the Hupa people and the north coast communities who rely on the Trinity River. The seriousness and persistence of this situation is evidenced by the Secretary of Commerce’s 2006 declaration of a Fishery Resources Disaster for California’s north coast and southern Oregon, which includes the Trinity River fishery, under section 308(b) of the Interjurisdictional Fisheries Act of 1986

### **The Quest for Trinity River Restoration**

In the 1970s when the impact of the Trinity River Division on the fishery became evident, our Tribe and many others, with bipartisan support from Congress and successive Administrations, worked to produce legislation critical to restoration of our fishery and the natural environments in California that have been severely damaged by the construction and operation of the CVP. The centerpiece of restoration legislation is the Central Valley Project Improvement Act (CVPIA) (Public Law 102-575 Title XXXIV, 106 Stat. 4706 (October 30, 1992)). The CVPIA establishes environmental restoration as a CVP project purpose and requires CVP water and power contractors to pay for environmental restoration costs as a condition to receiving any future water deliveries from the CVP. Section 3406(b)(23) of the CVPIA makes the cost of Trinity restoration an O&M repayment obligation, though Reclamation has not implemented that provision fully. See “CVPIA Expenditures, Credits, and Offsets FY 1993-FY 2006” prepared by Reclamation’s Mid-Pacific Regional Office. In addition, despite an express directive in section 3404(c)(2) of the CVPIA, Reclamation has refused to include explicit environmental restoration cost reimbursement obligations in long-term contract renewals.

Section 3406(b)(23) of the CVPIA expressly recognized that the United States holds the Trinity River’s fishery resources in trust for our Tribe and directed the Secretary, with the concurrence of the Tribe, to develop and implement a fishery restoration plan that would,

pursuant to earlier enacted legislation, restore the natural fishery to levels approximating those that existed immediately prior to construction of the Trinity River Division and to maintain them in order to enable the resumption of tribal, commercial and sport fishing in the ocean and the river. See Pub. L. 98-541, 98 Stat. 2721 (October 24, 1984); Pub. L. 104-143, 110 Stat. 1338 (May 15, 1996).

The 2000 Trinity River Restoration Record of Decision (ROD) implemented section 3406(b)(23). It identified a suite of actions whose goal is effective restoration of fisheries critical to the Hoopa Valley Tribe that also contribute to the economic stability of the fishery-dependent communities of northern California and southern Oregon. The ROD established an administrative infrastructure including an inter-governmental management council (Trinity Management Council (TMC)), and stakeholder advisory group to assist the Secretary with implementation.

### **A National Model for River Restoration**

The Trinity River restoration program is of national significance as a model for river management throughout the United States. The program is designed to restore an alluvial river's ecosystem, particularly its anadromous fish habitat, below a major federal dam.

The Secretary and our Tribe employed the best available, peer-reviewed, scientific information to develop a program that depends on the use of 47 percent of the Trinity River's average annual flow at the diversion point under a regime of managed releases that restore geomorphic and riparian processes, enable fine and coarse sediment management, promote favorable water temperatures, and facilitate adaptive management and monitoring of the restoration process. To remediate the channel and habitat degradation from decades of over-diverting river flows that nearly eliminated the dynamic alluvial processes of a natural flowing river, the program also provides for mechanical channel and watershed rehabilitation.

Under the program, the remainder, approximately 53 percent of the average annual flow not subject to existing contractual obligations for release to the Trinity River, is available for diversion to the Central Valley for economic development. That is the amount that Reclamation reported would be diverted by the Trinity River Division in planning documents presented to Congress in 1952. This division of the river's water recognizes and reconciles the needs of environmental protection and economic development, both of which are important national policies.

The goal, or outcome, of the Trinity restoration program, as mentioned above, is to restore and maintain natural anadromous fishery production at levels approximating those which existed immediately prior to the construction and operation of the dam, and harvest of the production by tribal, sport, and commercial fishermen.

Section 3406(b)(23) of the CVPIA required and the ROD incorporated the best available scientific data to integrate fishery biology, stream flow, sediment management, and physical river channel processes in the restoration program. The Adaptive Environmental

Assessment and Management (AEAM) component of the program framework was created to ensure that scientifically-based adaptive management would govern program implementation.

### **The Central Valley's Assault on the Trinity River**

To commemorate this extraordinary achievement in fishery restoration planning, the Secretary of the Interior journeyed to the Hoopa Valley in December 2000 to co-sign the ROD with our Tribe in a ceremony on the banks of the Trinity River. To our dismay, the Central Valley's Westlands Water District filed suit in an effort to block the signing even before the Secretary had departed for Hoopa. The Court denied the request for a restraining order but Westlands, along with the San Luis and Delta-Mendota Water Authority, San Benito County Water District, the Sacramento Municipal Utility District, and Northern California Power Agency--a "Who's Who" of CVP beneficiaries--re-filed the suit as soon as the ROD was signed. By the time Westlands was reporting the multi-billion dollar proceeds mentioned above from irrigation enabled by Trinity River water, it was deep into a four-year lawsuit against the Tribe and the Secretary in an effort to block the ROD's restoration plan for the lower Trinity River as decisively as the Trinity Division itself had destroyed forever 109 miles of upstream anadromous fish habitat.

The Tribe was struck a second blow in 2003 when the Secretary of the Interior broke with six of her predecessors from four prior Administrations who had been committed to Trinity restoration and abandoned the defense of all but a few issues in the Westlands litigation, leaving the Tribe practically on its own to defend the ROD against nearly the entire constituency of the Central Valley Project. Ultimately, the Tribe prevailed and the ROD survived the onslaught. The trial and appellate courts stated that the federal government's conduct in addressing the Trinity was "in breach of its general and specific independent federal trust obligation to" our Tribe, that restoration was "unlawfully long overdue," and that "[n]othing remains to prevent the full implementation of the ROD." See Westlands Water District v. U.S. Department of the Interior, 376 F. 3d 853, 878 (9<sup>th</sup> Cir. 2004).

Nonetheless, nearly seven years after the ROD was signed and three years after their losses in court, Central Valley contractors continue to make direct and indirect attacks on the Trinity restoration program by: (1) threatening lawsuits; (2) seeking to reduce, avoid or terminate entirely their financial obligations for environmental restoration that are required by the CVPIA as a result of the development and diversion of water from the Trinity River basin; and (3) opposing H.R. 2733. In an April 24, 2006, letter to Assistant Secretary-Water and Science and the Associate Deputy Secretary of the Interior, the Tribe documented four such incidents in a period of just five months and requested the Secretary of the Interior to take specific action to constrain the contractors.

Moreover, pending special interest legislation and negotiations, from which we have been excluded, under the auspices of members of Congress and the Administration would give CVP contractors and others guaranteed water supplies and funding, while relieving them of the financial obligations for Trinity River restoration established by the CVPIA. See

H.R. 24/S. 27 and <http://www.usbr.gov/mp/>; Regional Highlights--Concepts for Collaboration Drainage Resolution, and subsequent versions of the same.

### **Risks to Restoration from Insufficient Funding**

We know that there is a finite amount of water and funding available for use in California to carry out the Federal Government's legal obligations under the CVPIA and individual CVP mandates, which include the Trinity River. We also know there are conflicts of interest between the Secretary of the Interior's explicit trust obligation to our Tribe and the demands of CVP contractors, which the law requires be resolved in our favor. Unfortunately, our experience is that, when faced with these competing demands, the Department of the Interior has opted to accommodate the political and economic influence of CVP contractors.

The national and local benefits of the Trinity River restoration program, however, are at risk because of arbitrary funding limitations. Presently, channel restoration projects, certain long-term monitoring tasks, and restoration program office administration consume most of the available funds. Consequently, coordinated science activities in the adaptive management program have fallen behind schedule or have not been conducted. The following are some examples:

- Completion of a baseline assessment of fish habitat for the Trinity River, which is needed to evaluate progress in achieving habitat restoration goals.
- Integration of fish habitat benefits predictions with channel reconstruction design activities of fish habitat benefits in order to minimize cost and maximize effectiveness of habitat construction projects.
- Estimation of smolt production for use in measuring restoration program success.
- Monitoring flow releases to determine annually their effects on channel dynamics and fish habitat.
- Confirmation that fish are using the habitat created by the restoration projects.

Without these coordinated scientific activities, the Trinity restoration program is being deprived of essential information for channel restoration design and construction, as well as annual flow release scheduling, thereby jeopardizing fishery restoration program goals.

Accordingly, the funding identified in H.R. 2733 is needed for: (1) effective design and timely completion of construction components of the Program to achieve fish habitat restoration and smolt production goals as soon as possible; (2) comprehensive documentation of program performance; and (3) inauguration and maintenance of monitoring and modeling to secure the best available scientific information to guide management improvements. All three will enable the program to assess performance, conduct hypothesis-based process monitoring and modeling to improve future

management actions, program performance, and restoration goal achievement. They will also facilitate the application of the Office of Management and Budget's Program Assessment and Rating Tool (PART) to the program to evaluate how the program's output of restoration activities is resulting in the desired outcome of salmon and steelhead production for harvest and upstream escapement.

### **Determining the Cost of Trinity Restoration**

Federal officials may represent to this Subcommittee that they are satisfied with the posture of the Trinity restoration program, but the facts presented above belie this. In addition to the information provided above, the Subcommittee is asked to consider the following funding background.

Reclamation did not make *any* request that CVP Restoration Funds be appropriated to the Trinity program during its planning and design between the CVPIA's enactment in 1992 and the issuance of the ROD in 2000. In fact, Reclamation notified the Tribe that Reclamation did not intend to consider the Trinity program for an allocation of any CVP Restoration Funds by the Restoration Roundtable. After repeated requests to members of Congress by the Tribe and others, CVP Restoration Funds were appropriated in 2001 and 2004. Reclamation itself did not request funds until FY 2005, and then only at levels far below what was needed. Even in certain cases where Congress has advised the Department in appropriations act reports to allocate additional funds to Trinity restoration, Reclamation has declined to follow the instructions, which it concluded were not legally binding.

Immediately after the ROD was signed, Reclamation announced that it would only request \$7.0 million each year to implement the ROD. Reclamation took this position notwithstanding that the ROD's implementation plan identified *twice* that amount would be needed in the first three years of the program. See Table 6, Appendix C, Final Environmental Impact Statement/Report Trinity River Mainstem Fishery Restoration (October 2000). The funds in Table 6 have not been adjusted for inflation or to account for the extraordinary increase in construction costs generally from 2000 to date.

Earlier this year, the full cost of implementing the ROD was determined in a collaborative process by the Tribe and the Office of the Secretary in response to a request for that information by Senator Dianne Feinstein. The cost is compiled in a Table (copy attached) dated February 26, 2007. The Table is the basis for the funding levels identified in H.R. 2733, beginning in FY 2008: \$16.4 million annually during the construction phase of the program, and \$11.0 million in succeeding years. The same month these costs were determined, the Administration submitted its budget requesting less than half that amount--\$8.005 million--for the Trinity River.

### **Tribal fishery economics**

The Trinity ROD refers to studies that demonstrated that the Hoopa and Yurok fisheries historically harvested over 2 million pounds of fish annually. Two million pounds of

salmon would be produced by 200,000 10-pound fish. During the process of the ongoing development of the CVPIA Program Activity Report being prepared under Reclamation's auspices, analyses were conducted that indicated that contemporary harvest management would produce an annual tribal harvest of 200,000 fish. This would yield approximately \$2 million from the harvest itself and up to \$34 million annually given the multiplier benefits of processing, marketing and related activities.

Unfortunately, notwithstanding Congress' express instruction, see Pub. L. 104-143 above, Reclamation continues to reject harvest goals used as criteria for evaluating performance in restoring the Trinity River fishery. The 2000 ROD contains non-discretionary mandates that all habitat improvements be completed by 2007. Implementation of these mandates could have produced the fish that could have generated millions of dollars to our local Indian economies. Instead, we are suffering from severe economic situations in Northern California while special interest legislation for CVP water contractors in the Central Valley advances and preferential treatment for them by the Federal agencies continues.

The Tribe is persuaded that it will need to focus on preventing more damage to the Trinity fishery as long as special interest legislation and administrative decision making does not include guaranteed protections for the Trinity River. The law of the Trinity River and the federal trust responsibility require that Trinity restoration needs be given priority in CVP administration. Instead they are being subordinated. H.R. 2733 provides a means to fulfill these legal mandates. Without enactment of H.R. 2733, our Tribe will have to continue to fight in the Central Valley to protect the Trinity River fishery and the future of our fishing rights.

### **CVPIA and the Office of Management and Budget's Program Assessment Rating Tool**

Before concluding, we make one further observation. In 2006, the Office of Management and Budget (OMB) reviewed the CVPIA using its Program Assessment Rating Tool (PART). The Tribe submitted extensive information to OMB about the CVPIA, generally, and the Trinity program, specifically. OMB's Assessment was completed in 2006 and it set out seven tasks for Reclamation to take to improve CVPIA's performance.

1. "Developing options to adjust program goals and allow for greater flexibility to focus budgetary resources on achieving those goals . . . [in order to] address the imbalance between funding and program goals."
2. "Developing a more robust justification for Reclamation's annual CVPRF funding request, with clear links between funding levels and progress toward meeting goals . . . [in order to] address the inadequate budgetary oversight of the CVP R[estoration] F[und]."
3. "Developing a CVPIA programmatic cost estimate."

4. “Developing and implementing a plan to conduct an independent evaluation.”
5. “Developing an efficiency performance measure to demonstrate effective program management.”
6. “Developing and implementing a long-term action plan to achieve the performance goals.”
7. “Improving internal Administration oversight of the CVPRF, especially with respect to the budget development process . . . [in order] to address the inadequate oversight of the CVPRF.”

See: <http://www.whitehouse.gov/omb/expectmore/detail/10003726.2006.html>.

As of today, OMB’s website reports that Reclamation has taken *no action on any* of the PART improvement plans. Moreover, Reclamation’s CPAR process, which was supposed to inform the OMB PART exercise, still has not been completed. If the seven PART improvement plans were implemented they would reveal a number of deficiencies in CVPIA implementation, including the failure of Reclamation to implement the contract renewal mandates of section 3404(c)(2) of the CVPIA. It would also invite reconsideration of Reclamation’s decision to withhold at least \$7.5 million from its FY 2008 appropriations request for CVP Restoration Fund disbursements to Trinity River restoration and other CVPIA authorized environmental restoration activities in favor of holding that money for the as yet unauthorized San Joaquin restoration program, which by its terms would not be authorized to use any CVP Restoration Funds until at the earliest, FY 2009. See FY 2008 Bureau of Reclamation Budget Justification at General Statement - 2.

### **Summary and Conclusion**

Our people cannot wait decades longer for our fishery to be restored. Accordingly, in the interest of environmental justice, we urge Congress to enact H.R. 2733 and exercise its oversight powers to ensure that Interior agencies fully implement the Trinity program, fulfill the Federal trust responsibility, and honor the government-to-government partnership Congress created in the CVPIA between our Tribe and the Department of the Interior regarding Trinity River restoration.

Thank you for your attention to our concerns.



**Trinity River Restoration Program**  
**Projected Costs for Construction and O&M: FY2008 to FY2030<sup>1</sup>**  
 (all dollars in millions)

	FY2008	FY2009	FY2010	FY2011	FY2012	FY2013	FY2014	Average Annual FY2015-FY2030
<b>Construction</b>	6.6-6.8 <sup>2</sup>	6.6-9.8	5.9-6.6	6.2-7.8	3.1-4.3	0.0-0.2	0.0-0.2	0.0-0.2
First 5-Year Construction Average <sup>3</sup>	6.4							
<b>Operations and Maintenance<sup>4</sup></b>	9.5-10.2	10.1-10.3	9.5-9.5	9.6-9.9	10.4-10.8	11.7-11.8	11.0-11.6	10.8-11.0
First 5-Year O&M Average	10.0							
<b>Total Costs</b>	16.1-17.0	16.8-20.2	15.3-16.1	15.7-17.6	13.6-15.0	11.8-11.9	11.2-11.6	10.8-11.2
First 5-Year Average All Costs	16.4							

<sup>1</sup>These cost estimates are companion to a drafting service provided by the Department of the Interior in response to a request from Senator Feinstein's office, regarding legislation proposed by the Hoopa Valley Tribe. As such, the estimates they are unconstrained by the typical limitations on the Program's appropriation requests.

<sup>2</sup>These ranges in cost estimates reflect different assumptions and/or methodologies used by the Hoopa Valley Tribe and DOI/Reclamation. Initial differences in projected costs were largely resolved during several review sessions. Each entity has figures at the upper and lower end of the ranges, depending on the fiscal year in question.

<sup>3</sup>A five-year average was developed for use in the draft legislation, which would specify a construction component and an operations and maintenance component. FY2012 represents the last year when major construction activities would be expected to occur.

<sup>4</sup>Amounts for Construction and Operations and Maintenance would be reviewed annually according to provisions in the proposed legislation.