

Restoring Mother Earth:  
Indian Tribes and Alaska Native Natural Resource Damage Trustees

by Thomas P. Schlosser

Morisset, Schlosser, Jozwiak & McGaw  
1115 Norton Building  
801 Second Avenue  
Seattle, WA 98104-1509  
(206) 386-5200  
t.schlosser@msaj.com

THOMAS P. SCHLOSSER. Mr. Schlosser has a B.A. from the University of Washington and a J.D. from the University of Virginia Law School. He is a director in the Seattle office of Morisset, Schlosser, Jozwiak & McGaw, where he concentrates on federal litigation, natural resource and Indian tribal property issues. In 1975-79, Tom represented tribes in treaty fishing rights litigation in Western Washington. Since 1979, Tom has litigated cases concerning timber, water, energy and federal breach of trust. He is also frequently involved in tribal economic development and environmental regulation. Tom is an officer and founding member of the Indian Law Section of the Washington State Bar Association and is a frequent CLE speaker in federal Indian law topics. Tom moderates an American Indian Law discussion group for lawyers, <http://forums.delphiforums.com/IndianLaw/messages>.

November 2004

## **I. Introduction.**

Many federal statutes recognize American Indian tribes' rights in land, water, air and living resources. In the 19th Century, Indian reservations were often located in places where tribes could secure a livelihood by relying upon natural resources. *See, e.g., Winters v. United States*, 207 U.S. 564 (1908) (establishment of reservation impliedly reserved sufficient water to make the land productive). Since the 1970s, general statutes such as CERCLA, the Clean Water Act, the Clean Air Act, and narrower statutes have authorized a role for American Indian tribes or Alaska Native groups in the restoration of damaged natural resources. This paper discusses five recent natural resource damages proceedings involving tribal trustees at sites in California, Washington (two sites), Alaska and Michigan.

## **II. Trinity River Fisheries Restoration.**

The Trinity River of northwest California is the largest tributary of the Klamath River, which originates in Oregon. Indian reservations were set apart on the Klamath and Trinity beginning in 1855 because the sites were ideal for the fish dependent Indian cultures of the Hoopa Valley and Yurok Indian Tribes. *Mattz v. Arnett*, 412 U.S. 481 (1973) (reservation status and fishing rights survive land sale).

In 1955, the Trinity River Division Act, 69 Stat. 719, authorized diversion of about half of the Trinity River flow from Lewiston, California, into the Sacramento River to augment the Central Valley Project. Congress directed the Secretary of Interior to take "appropriate measures to ensure the preservation and propagation of fish" in the Trinity. In 1963, dams were completed and the U.S. Bureau of Reclamation began to divert up to 90% of the flow. Salmon runs in the Trinity declined by approximately the same percentage.

After years of neglect of the duty to preserve fish, Congress grew impatient and enacted § 3406(b)(23) of the Central Valley Project Improvement Act, Pub. L. 102-575, 106 Stat. 4720. That law ordered completion of an ongoing fishery flow evaluation study being performed by the U.S. Fish and Wildlife Service, and directed implementation of its conclusions, "in order to meet federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the Act of October 24, 1984, Pub. L. 98-541." Thus, the restoration of the Trinity River is the result of a specific statute, rather than the general provisions concerning restoration following release of toxic substances.

On December 19, 2000, Interior Secretary Bruce Babbitt and Hoopa Tribal Chairman Duane Sherman signed a Record of Decision ("ROD") setting forth the plan for Trinity River restoration. The heart of that plan is increasing the water left in and that is released to the Trinity River, instead of diverting it. The amount of water releases depends on the water year type (wet, dry, normal, etc.). The ROD also allows more than half of the Trinity's flow at Lewiston to continue to be exported through tunnels into the Sacramento Valley. *See generally* <http://www.schlosserlawfiles.com/TrinityRiver/CVInterests071204.htm>.

Even before the ROD was signed, Westlands Water District, a giant Central Valley irrigation entity, began unsuccessful litigation to block Trinity River restoration. Initially, the district court ruled that Interior had violated NEPA and the Endangered Species Act in the ROD. *Westlands Water Dist. v. U.S. Dep't of the Interior*, 275 F.Supp.2d 1157 (E.D. Cal. 2002), *rev'd*, 376 F.3d 853 (9th Cir. 2004).

The ROD and the Implementation Plan for the Preferred Alternative of the Trinity River EIS/EIR rely on continued participation by the Hoopa Valley Tribe as tribal trustee. Because of the unique statutory provision, this model differs from more familiar trustee councils under CERCLA, etc. ROD implementation will cost approximately \$11.8 million dollars per year after certain bridge and infrastructure modifications are completed.

The Trinity ROD Implementation Plan has three main components: (1) instream water release volumes to the Trinity River; (2) adaptive environmental assessment and management organization; and (3) a mainstem mechanical rehabilitation program. *See* Exhibit 1 (selected pages). By statute, the release volumes are permanent, but within the total annual amounts the adaptive management process provides flexibility. In extremely wet years, release volumes will reach 11,000 cubic feet per second. Gravel will be added to the river below the dams to help establish proper riparian functions.

Mechanical rehabilitation sites are intended to increase the amount of shallow, low velocity areas for salmonid fry rearing, provide stable habitat for salmonids over a wide range of flows, and to allow river dynamics to maintain an alluvial system. Forty-four channel rehabilitation sites and three side channel rehabilitation sites were identified in the proposed action. Twenty four sites were proposed to be completed during the first three years of construction, but they have all been delayed.

The adaptive management approach relies upon teams of scientists, managers and policy makers. A Trinity Management Council ("TMC"), led by an executive director, reports to the Secretary of the Interior. Below the TMC, are several bodies including the Trinity Adaptive Management Working Group, technical advisory committees, a scientific advisory board, and review committees, all of which report to the Adaptive Environmental Assessment and Management Team. *See* Exhibit 1 at C-20. The Hoopa Valley Tribe is a member of the TMC and also furnishes scientific staff to the subordinate groups. A memorandum of understanding establishing a formal trustee council with the Interior Department is being negotiated.

### **III. Whatcom Creek, Washington – Olympic Pipeline Co.**

On June 10, 1999, a pipeline ruptured spilling over 200,000 gallons of gasoline into Whatcom Creek, a short coastal stream which runs through a city park, residential neighborhoods, and urban industrial areas before emptying into Bellingham Bay, in northwest Washington. The gasoline, which ignited, affected a variety of natural resources in approximately 26 acres of the creek and riparian zone. Aquatic life was most heavily affected; benthic macro invertebrate fauna and amphibians were almost completely destroyed. Fish losses included juvenile salmon of four species, three species of trout, lamprey and other species. Approximately twenty-six acres of terrestrial vegetation was burned, mostly mature riparian forest within the park. Ecological services of the riparian forest, including provision of wildlife

habitat, erosion control, pollution reduction, and stream shading were lost for varying durations. Recreational services were also curtailed.

Natural Resource Trustees involved included officials of NOAA, the State of Washington, the Lummi Indian Nation, and the Nooksack Indian Tribe, as designated under 33 U.S.C. § 2706(b) of the Oil Pollution Act (“OPA”). The OPA regulations define an Indian tribe as:

[A]ny Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native, regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe, as defined in section 1001(15) of OPA, 33 U.S.C. § 2701(15).

15 C.F.R. § 990.30.

The Natural Resource Trustees assessed the injuries to natural resources resulting from the gasoline spill and fire, and prepared a Final Restoration Plan and Environmental Assessment for the June 10, 1999, Olympic Pipeline Gasoline Spill into Whatcom Creek, Bellingham, Washington (Aug. 2002). The Natural Resource Trustees contemplated that Olympic would perform most of the actions addressed in the restoration plan, including acquisition of an approximately 9.2 acre parcel along Whatcom Creek, transfer of the parcel to the City, and other matters. However, after the parcel was acquired, Olympic began reorganization proceedings pursuant to Chapter 11 of the Bankruptcy Code.

In light of Olympic’s bankruptcy, the Natural Resource Trustees will carry out the restoration plan themselves. In settlement of the Trustees’ claims for natural resource damages, Olympic’s insurers have agreed to pay the cost calculated by the Natural Resource Trustees to complete implementation, as set forth in a Consent Decree awaiting approval by the United States Bankruptcy Court for the Western District of Washington, in *Re: The Olympic Pipeline Co.*, No. 03-1459.

The Natural Resource Trustees filed proofs of claim for matters addressed in the Consent Decree, totaling about \$15 million dollars in addition to the 9.2 acre parcel to be conveyed.

#### **IV. PM Northwest, Inc. Site, Swinomish Indian Reservation, La Conner, Washington.**

The PM Northwest Site property, inside the Swinomish Indian Reservation, was purchased by Plant Maintenance, Inc., from Indians in about 1957. Between 1959 and 1970, the PM Northwest Site was used to dispose of waste from refinery operations of Shell Oil Company and Texaco, Inc. in Anacortes, Washington. The site comprises approximately seven acres where wastes were placed in four ponds. In 1970, the disposal ponds were covered by wood and soil. To the east of the disposal areas is a bluff with wetlands at the base and surface waters flowing into Puget Sound.

In 1998, a site hazard assessment was completed by EPA's contractor. The assessment indicated that contaminants appeared to be migrating from the site, and that 213 drinking water wells exist within a four mile radius of the site.

In 2000, an Administrative Order on Consent for Removal Action ("AOC") was executed by EPA, Shell Oil Company, Texaco Inc. and the Swinomish Indian Tribal Community, a federally recognized Indian Tribe. *In the matter of: PM Northwest, Inc. Site*, U.S. EPA, Region 10, Docket No. CERCLA-10-2000-0186 (proceeding under sections 104, 106(a), 107, and 122). The AOC provides for performance of response actions by the respondent oil companies and reimbursement of response costs incurred by the United States and the Swinomish Indian Tribal Community. The AOC requires both time-critical and non-time critical removal actions to abate an imminent and substantial endangerment to the public health, welfare, and environment presented by the actual or threatened release of hazardous substances, pollutants, and contaminants from the site.

The AOC recognized that the Swinomish Indian Tribal Community has the right to protect, conserve, and restore the total environment of the lands, air, and other resources. The Tribe and EPA operate under a government-to-government relationship. The Tribe achieved "treatment as a state" status as provided under § 126 of CERCLA, 42 U.S.C. § 1926 and § 515(b) of the National Contingency Plan, 40 C.F.R. § 300.515(b).

Simultaneous with completion of the AOC, the Swinomish Indian Tribal Community and the EPA entered into a Memorandum of Agreement regarding tribal consultation during implementation of the PM Northwest Site clean up action. *See Exhibit 2*. The MOA was intended to provide a framework for good faith government-to-government coordination for the CERCLA response activities conducted at the PM Northwest Site. Under its 1984 Policy for the Administration of Environmental Programs on Indian Reservations, EPA recognized the Tribe as the primary party for setting standards, making environmental decisions and managing programs affecting the reservation, treaty reserved resources, and the health and welfare of the reservation population. EPA agreed to consult the Tribe with respect to all major decision points, issues, and overall results regarding the site, and other matters regarding the site and the Superfund process which the parties may agree are of significance to the Tribe. The MOA defined "consultation" and provided that unresolvable disputes will be resolved pursuant to the "Issue Resolution" process set forth in the Tribal Environmental Agreement between the EPA and the Tribe.

## **V. Oil Spill of the M/V Citrus at St. Paul Island, Alaska.**

On February 16, 1996, a pollution incident occurred near St. Paul Island, Alaska, one of the Pribilof Islands in the Bering Sea, located approximately 450 miles east of Russia and 750 miles west of Anchorage. The M/V Citrus notified the Coast Guard that the vessel was anchored north of St. Paul Island and, following a collision, was taking on water. The Coast Guard responded and made temporary repairs to stabilize the vessel. Within 48 hours, the Coast Guard began receiving reports from local residents of oiled sea birds in the St. Paul area. Over the next several days, over 1,500 oiled birds were reported and over 1000 bird mortalities documented. Oiled birds recovered from the St. Paul and St. George Island beaches were predominantly King Eiders which probably flew or swam to land after being oiled. Petroleum samples gathered from

the birds matched the petroleum onboard the M/V Citrus at the time of the Coast Guard response.<sup>1</sup>

In May 1996, the U.S. Fish and Wildlife Service and a consultant for the responsible party met to discuss pre-assessment studies developed by the trustee agencies. The Alaska Department of Law, Office of the Attorney General, complained that restoration proposals given to the responsible party had not been shared with the state trustee agencies or their attorneys. In June 1996, attorneys for the Aleut Community of St. Paul Island, a federally recognized tribal entity, contacted counsel for the M/V Citrus owners concerning the Tribe's intent to seek redress for damages including injury to natural resources and damages for loss of subsistence use of the resources.

The Interior Department submitted a request for cooperation and oil spill liability trust fund natural resource damage assessment initiation activities. Ultimately, Interior proposed a series of activities including spill patrol and enforcement, spill outreach and education, rodent prevention, local conservation scholarship endorsement, nest habitat management, King Eider genetic identification, and winter bird ecology studies. The estimated cost of the preliminary restoration proposals totaled approximately \$1.3 million dollars.

The Aleut Community of St. Paul Island has played little role in the natural resources damages assessment. The Tribe has not actively participated as a natural resources trustee for lack of funds. Ultimately, the Tribe filed a civil action in state court seeking subsistence damages. Tribal subsistence activities did not include eating King Eiders; however, tribal hunters experienced reduced success due to the presence of oil on beaches and oiled birds. The Tribe's damage claim was resolved for about \$50,000. The Interior Department and the Alaska Office of the Attorney General made little or no effort to include the Aleut Community of St. Paul Island as a tribal natural resource damage trustee. The status of the restoration plan is unknown, but, apparently, it has not yet been completed.

## **VI. Saginaw River/Bay Natural Resource Damages.**

Beginning in the 1940s, operations at various General Motors facilities in Saginaw, Michigan and Bay City, Michigan resulted in the direct discharge to the Saginaw River and Saginaw Bay of PCB compounds and the indirect discharge of PCBs through the Saginaw and Bay City waste water treatment plants. PCBs were banned in the 1970s, but releases from the facilities continued, causing environmental damage to the ecosystem of Saginaw Bay. Saginaw Bay is a prime walleye fishing and waterfowl hunting area of the Great Lakes and also drains into Lake Huron. Thus, contaminants from the river and bay pose far reaching risks if not contained and halted.

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<sup>1</sup> A similar oil spill involving 39,000 gallons of fuel from the M/V Kuroshima in the area of Summer Bay, Unalaska in 1997, involved the Qawalangin Tribe of Unalaska as a consulting party with federal and state Natural Resource Trustees. The Tribe conducted an assessment of the damage to the natural resources in the area and participated in negotiations with the vessel owners concerning remediation. The responsible party entered into a Consent Decree and settled the dispute for approximately \$1 million. The Tribe was able to implement some of the restoration projects.

Part of the Saginaw Chippewa Indian Reservation is adjacent to Saginaw Bay, a few miles north of the confluence with the Saginaw River. General Motors questioned whether the contamination affected natural resources “belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by” the Tribe within the meaning of CERCLA § 101(16). However, the Treaty with the Chippewa, 7 Stat. 203 (Sept. 24, 1819), preserved tribal fishing rights in Saginaw Bay, so that issue was successfully resolved by negotiation.

The State of Michigan sought natural resource damages in state court in 1994. Thereafter, a co-trustee group, consisting of the U.S. Fish and Wildlife Service, the State of Michigan, and the Saginaw Chippewa Tribe, performed a natural resource damage assessment. The co-trustee group reached a negotiated settlement for natural resource damages in 1998 with General Motors and the cities of Bay City and Saginaw. *See* Notice Re: Consent Judgment, 63 Fed. Reg. 65812 (Nov. 30, 1998).

The Consent Judgment called for restoration and replacement of damaged natural resources through dredging and disposal of contaminated sediment from the river, conduct of certain restoration projects, reimbursement for response costs and assessment costs, and funding to carry out the activities, totaling approximately \$30 million dollars. Over 300,000 cubic yards of contaminated material were removed by July 2001. Over 16,000 acres was acquired and placed in public ownership for restoration to coastal wetlands and lakeplain prairie conditions. The Green Point Environmental Learning Center, as well as boat launches, were provided. About \$3 million dollars was provided to the Trustee Council for monitoring and implementation of additional restoration projects. The relationship between the trustees is governed by Consent Judgment Appendix K, the Memorandum of Understanding for Trustee Council. *See* <http://midwest.fws.gov/nrda/saginaw>; *see generally* J. Hand, *Protecting the Seventh Generation* (Mich. Bar Journal July 2004). As provided in 40 C.F.R. § 300.610, the governing body of the Saginaw Chippewa Tribe of Michigan designated staff to serve as trustee for natural resources. However, U.S. Fish and Wildlife Service has the laboring oar for the trustees.

## **VII. Conclusion.**

American Indian tribes and Alaska Native organizations are governmental entities under federal law. Both specific and general federal statutes carve out a role for tribal trustees in natural resource damages. Accordingly, tribes and Alaska Natives play a major role in natural resource damage actions. The involvement of tribes and Alaska Native organizations is often crucial to resolving natural resource damage claims through settlement, providing for direct, on-the-ground restoration activities long before such results could be achieved through litigation. Responsible parties and other trustees proceed at their peril if they disregard the knowledge and authority of tribal trustees in the restoration and rehabilitation of damaged natural resources.

# Implementation Plan for the Preferred Alternative of the Trinity River EIS/EIR

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The proposed action consists of 6 components: 1) an increased flow regime and associated OCAP for managing releases and reservoir levels; 2) a channel rehabilitation program (mechanical rehabilitation); 3) a coarse and fine sediment management program; 4) infrastructure modifications; 5) upslope watershed restoration; and 6) an Adaptive Environmental Assessment and Management organization.

## 1. Increased Flow Regime and Trinity River Operating Criteria and Procedures

### 1.1 Legal Principles Concerning TRD Operations

In section 3406(b)(23) of the Central Valley Project Improvement Act (CVPIA) (Public Law 102-575, 106 Stat. 4600, 4720), Congress called for the development of operating criteria and procedures (OCAP) for the Trinity River Division (TRD), along with recommendations for necessary instream fishery flow requirements, for the restoration and maintenance of the Trinity River fishery. Accordingly, this document describes the legal principles and scientific recommendations that apply to TRD operations and establishes OCAP required for the proper operation of the TRD consistent with those principles and recommendations.

This section briefly describes the legal principles that apply to the operations of the TRD. A detailed description can also be found in the FEIS/EIR, chapter 1.

In 1955, Congress authorized the construction and operation of the TRD (Public Law 84-386). Although Congress authorized the TRD as an integrated feature of the Central Valley Project, the authorizing legislation also directed the Secretary of the Interior to ensure the preservation and propagation of the Trinity River's fish and wildlife resources. A 1979 Solicitor's Opinion stated that the 1955 Act thus required sufficient in-basin flows determined by the Secretary as necessary for fish and wildlife to take precedence over exports of Trinity River flows to the Central Valley. *Proposed Contract with Grasslands Water District* (Dec. 7, 1979). Following construction and operation of the TRD in the early 1960s, substantial fish populations declines occurred. A 1980 EIS concluded that insufficient stream flows in the Trinity River represented the most critical limiting factor. Therefore, Secretary Andrus initiated the Trinity River flow study in 1981 to determine necessary instream flows in the Trinity River and other measures necessary to restore and maintain the Trinity River fishery consistent with the statutory directives of the 1955 Act and the federal government's trust responsibility to the Hoopa Valley and Yurok Tribes.

Congress reiterated the importance of the Trinity River fishery in subsequent legislation. In 1984, Congress passed the Trinity River Basin Fish and Wildlife Management Act (Public Law 98-541) that established a goal to restore the basin's fish and wildlife populations to



those that existed prior to construction of the TRD and directed the Secretary to implement measures to restore fish and wildlife habitat in the Trinity River. In re-authorizing this legislation in 1996 (Public Law 104-143), Congress further elaborated on the restoration goal, stating that restoration would be measured “not only by returning adult anadromous fish spawners,” but also by the ability of dependent tribal, commercial, sport fishers to enjoy the benefits of restoration through a harvestable fishery resource.

With regard to tribal fishing rights, the Solicitor issued an opinion entitled “Fishing Rights of the Yurok and Hoopa Valley Tribes,” M-36975 (Oct. 4, 1993). The Opinion recognized the historic dependence of the area’s Indians upon the fishery resources of the Klamath River Basin (including the Trinity River) for subsistence, ceremonial, and economic purposes; determined that the Yurok and Hoopa Valley Tribes have federally reserved fishing rights as a result of this dependence and the subsequent establishment of their reservations; and concluded that the Tribes were entitled to an allocation of the Klamath Basin fishery harvest sufficient to support a moderate standard of living, but no more than 50 percent of the annual harvest allocation. However, during times of shortages tribal fisheries may take priority over other fisheries (Solicitors Opinion, footnote 39). The Opinion also stated that protection of these rights could affect off-reservation activities. Under the Magnuson Fishery Conservation and Management Act (16 U.S.C. § 1801 *et seq.*), the Department of Commerce adopted the Solicitor’s determinations in an interpretative rule that restricted ocean harvest. 58 Fed. Reg. 68063 (Dec. 23, 1993). The Solicitor’s Opinion and the subsequent rule were upheld by the United States Court of Appeals for the Ninth Circuit in *Parravano v. Babbitt*, 70 F.3d 539 (9<sup>th</sup> Cir. 1995).

Perhaps most significantly, Congress passed the CVPIA in 1992 that further addressed, *inter alia*, the need to restore the Trinity River and its resources. In section 3406(b)(23), Congress directed the completion of the flow study initiated by Secretary Andrus “in a manner that insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and [TRD OCAP] for the restoration and maintenance of the Trinity River fishery.” Congress also provided for interim minimum flows to be continued in the Trinity River, consistent with a prior administrative decision by Secretary Lujan, pending completion of the flow study. The section further provided that, if the Secretary and the Hoopa Valley Tribe concur in these recommendations, then any increased instream fishery flows and the OCAP “shall be implemented accordingly.” Thus, in meeting the statutory requirements of developing instream fishery flow requirements and TRD OCAP, Congress incorporated the previously recognized goals and rationale for the restoration of the Trinity River fishery, stating that the purposes of these efforts were “to meet the Federal trust responsibilities to protect the fishery resources” and “to meet the fishery restoration goals” of the 1984 Act.

It should also be noted that operations of the TRD must also be consistent with other applicable laws. For example, pursuant to the Endangered Species Act (16 U.S.C. § 1531 *et seq.*), TRD operations must avoid jeopardizing threatened coho salmon and associated critical habitat, as well as affirmatively taking actions to conserve listed species. Under the Clean Water Act, the Trinity River has been listed as an impaired water body by the State of California, and the State’s Water Quality Control Plan for the North Coast Region states that “flow depletion” by TRD diversions to the Central Valley are a major cause of the river’s impaired status in terms of sediment. The State of California’s Water Resources Control

Board has also addressed the needs of the Trinity River, *e.g.*, a 1990 water permit condition specifically states that TRD operations shall not “adversely affect salmonid spawning and egg incubation in the Trinity River.”

These OCAP have been formulated according to the legal principles outlined above. These OCAP are designed to implement the recommendations provided in the Preferred Alternative in the FEIS/EIR in order to restore and maintain the fishery resources of the Trinity River. By determining the fishery flow requirements for the Trinity River pursuant to applicable law, including the CVPIA, the flow requirements and annual hydrology implicitly determine the surplus water available for diversion to the Central Valley. These OCAP amend and supplement those relating to the TRD in the 1992 Long-term Central Valley Project Operations Criteria and Plan (CVP-OCAP). To the extent inconsistent with the CVP-OCAP, these OCAP control.

## 1.2 Purpose and Use of This Document

This document provides supplemental information and guidance to support the implementation of the Record Of Decision (ROD) of the Preferred Alternative of the Trinity River Final EIS/EIR (May 2000). The Preferred Alternative increases dam releases to the Trinity River to restore the anadromous fishery resources. This document supplements and supersedes information on the Trinity River sections of the Long-term Central Valley Project Operations Criteria and Plan (LCVP-OCAP) (USBR 1992). For more detailed information regarding operations of the entire Trinity River Division of the Central Valley Project, refer to the CVP-OCAP (USBR 1992).

## 1.3 Instream Release Volumes to the Trinity River

Under the preferred alternative, releases to the Trinity River for salmon and steelhead restoration will vary with annual basin water runoff for the watershed upstream of Lewiston Dam (Table 1). Historical hydrology was used to delineate five water-year (WY) classes. A water year begins on October 1 and ends on September 30. Pre-dam flow records (WY1912 to 1960) from the USGS gaging station at Lewiston and post dam estimates (WY 1961 to WY 1995) of inflow into Trinity Lake were combined, ranked, and exceedence probabilities calculated. Annual instream fishery flows are based upon five water-year classes that were identified in the Trinity River Flow Evaluation Report (USFWS and Hoopa Valley Tribe, 1999).

TABLE 1  
Annual (April through March) instream fishery flows for Trinity River.

Water-Year Class	Trinity River Allocation (TAF)	Annual Basin Water Runoff (TAF) <sup>a</sup>	Probability of Occurrence
Extremely Wet	815.2	2,000	0.12
Wet	701.0	1,350 to 2,000	0.28
Normal	646.9	1,025 to 1,350	0.20
Dry	452.6	650 to 1,025	0.28
Critically Dry	368.6	<650	0.12

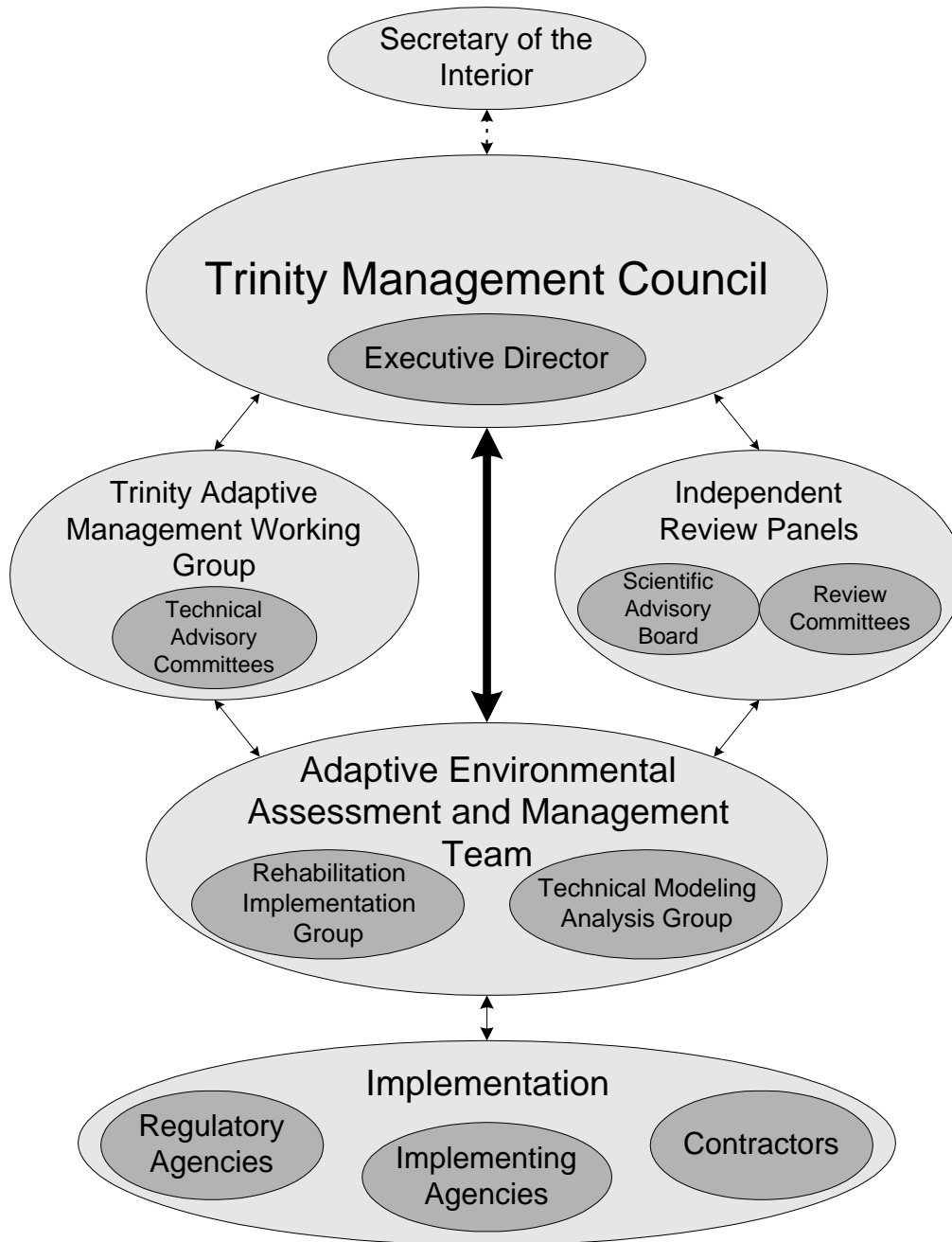
<sup>a</sup>Based on the basin area above Lewiston Dam.

To adequately manage river systems for multiple use and conserve the biotic resources, on going monitoring of flow, sediment, geomorphic, and biological status is essential. With such data and the use of simulation models, river systems can be adaptively managed. Such informed decision-making, utilizing water supply forecasting and predictions of system response, is within the state-of-the art. Establishment of an AEAM organization will create a focused interdisciplinary effort involving physical and biological scientists. Peer review of all analyses, project design, and monitoring are essential to establish and maintain scientific and public credibility.

## 7. Organizing to Implement the Trinity River Restoration Program

The purpose of the Trinity River Restoration Program is to restore the basin's fish and wildlife populations to those that existed prior to construction of the TRD and to implement measures to restore fish and wildlife habitat in the Trinity River. An AEAM organization will implement the restoration program. The purpose of the Trinity River AEAM organization is two-fold. First, the AEAM organization will design and direct monitoring and restoration activities in the Trinity River basin. Second, the AEAM organization will provide recommendations for the flow modifications for the OCAP of the Trinity River Division (TRD) of the Central Valley Project, if necessary. The Rehabilitation Implementation Group will coordinate the federal fisheries restoration effort in the Trinity River watershed. For more information on specific biological and geomorphic objectives, and on the initial working scientific hypotheses of the preferred alternative, please refer to the TRFE, pp. 278-289.

Implementing the Trinity River AEAM organization requires a collaborative and cooperative approach among government agencies, tribes, landowners, and stakeholders. The Implementation Plan establishes a Trinity Management Council (TMC) that is responsible for organization oversight and direction. A Trinity Adaptive Management Working Group (TAMWG) provides policy and technical input (Technical Advisory Committees) on behalf of Trinity basin stakeholders to the TMC. Figure 1 shows the AEAM organization structure. The focus of the AEAM organization is the Trinity Management Council and an AEAM Team consisting of a Technical Modeling and Analysis Group (TMAG) and a Rehabilitation Implementation Group (RIG). The organization includes a support staff (AEAM Team) of engineers and scientists charged with assessing the Trinity River fishery restoration progress. The AEAM Team may recommend management changes based on annual assessments of the evaluation of rehabilitation and flow schedule activities. The AEAM Team coordinates independent scientific reviews of the AEAM organization. The AEAM Team works closely with the resource management agencies that are responsible for implementing specific Trinity River restoration program activities. For instance, the USDA Forest Service or BLM may carry out a channel rehabilitation project on their lands. They would do so in collaboration with the AEAM Team.



**Figure 1 Trinity River Adaptive Environmental Assessment and Management organization structure.**

The AEAM organization will be funded primarily by the U.S. Department of the Interior. The Trinity Management Council (TMC) and Executive Director will be the decision-making body for the organization, operating as a board of directors and advising the Secretary of the Interior. Within the overall AEAM organization structure are Stakeholder Groups, Independent Review Panels, Regulatory Agencies, and the Adaptive Environmental Assessment and Management Team.

The membership and staff specifications presented herein should be considered flexible as funding changes and the organizational scope matures. The AEAM organization staff should be stationed in a single location in northern California. The office should be in close proximity to the Trinity River Division (TRD) with reasonable travel accessibility for visiting managers and scientists.

Implementation of the TREIS/R preferred alternative will be managed by the Trinity Management Council, and Executive Director, and carried out through individual agencies (state, federal, and local) and tribes acting within their existing authorities as well as through contracts awarded through a competitive process. Implementation by federal and state agencies is subject to annual appropriations.

All agencies will retain their existing authorities. However, when the TMC recommends a particular project or program, agencies will be expected to undertake those projects. If agencies do not implement the recommended actions or projects, they must explain to the TMC in writing why they have not done so.

## 7.1 AEAM Organization

The following sections describe the AEAM organization and each element of the structure including:

- Membership
- Roles & Responsibilities
- Staff

Finally, an example of assessment and monitoring based on the scheduling of the peak flow release during an extremely wet water-year follows the description of the organization elements.

### 7.1.1 Trinity Management Council (TMC)

#### *Membership*

Part-time designees from the following organizations:

US Fish & Wildlife Service (Service)

US Bureau of Reclamation (Reclamation)

US Forest Service

Hoopa Valley Tribe (HVT)

Yurok Tribe (YT)

State of California (designee from Secretary of Resources)

Trinity County

NOAA National Marine Fisheries Service

A Chairperson (Federal Agency) selected from the membership

#### *Roles & Responsibilities*

Has decision making authority for their agency/organization

Interprets and recommends policy, stays out of day-to-day operations, similar to board of directors

Coordinates and reviews management actions

Provides organizational budget oversight

When necessary elevates unresolved conflicts within the council to the Secretary  
 Conducts search for and selects a nominee for Executive Director (actual hiring conducted within appropriate agency's personnel rules and regulations)  
 Reviews personnel actions by Executive Director  
 Authorizes and approves Requests-For-Proposals (RFP's) to be developed by Technical Modeling and Analysis Group  
 Ensures policy level consideration of issues submitted through Executive Director by regulatory agencies, stakeholder, and other management groups  
 Coordinates with other management groups and actions through the Executive Director  
 Considers proposed modifications of the annual flow schedule  
 Hires and supervises the Executive Director through a lead Interior agency as determined by the Secretary

***Staff***

Federal, Tribal, State, and local governing agencies - Existing staff  
 Staff 1/10<sup>th</sup>-time  
 Travel and Incidental Expenses

**Executive Director**

Executes policy and management decisions of the Trinity Management Council  
 Is the focus for all and oversees all activities of the Trinity River AEAM Organization.  
 Coordinates with agencies implementing specific program elements

***Membership***

Full-time Executive Director  
 Full-time Administrative Assistant

***Roles & Responsibilities***

Hired and supervised by a lead Interior agency as determined by the Secretary  
 Coordinates execution of all TMC decisions through the Adaptive Environmental and Assessment Management Team  
 Hires Administrative Assistant and AEAM Team members subject to TMC authority  
 Acts as point of contact for public relations  
 Supervises the Adaptive Environmental Assessment and Management Team and coordinates the Independent Review Panels (including the Scientific Advisory Board (SAB)) the TMC, Stakeholder Groups, and Regulatory Agencies.  
 Coordinates flow schedule and rehabilitation activities with other operational agencies  
 Schedules and conducts information exchange workshops with stakeholders & regulatory agencies  
 Submits annual flow schedule to TMC for review and approval  
 Submits annual budget to TMC for review and approval  
 Monitors budget expenditures  
 Secures necessary permits for all program activities  
 Reports progress towards restoration goals to TMC, Stakeholders, Regulatory Agencies, and the public

***Staff***

2 Full Time Equivalent (FTE) employees

### 7.1.2 Trinity Adaptive Management Working Group (TAMWG)

The Trinity Adaptive Management Working (TAMWG) group consists primarily of representatives of stakeholders, with participation from tribes, state, local, and federal agencies on the TMC with a legitimate intent to restoration of the Trinity River. The purpose of the TAMWG is to assure thoughtful involvement in the Trinity River restoration program, particularly the adaptive management process. TAMWG provides an opportunity for stakeholders to give policy and management input about restoration efforts to the TMC. TAMWG will be formally organized, including technical committees. The TAMWG may be chartered under the Federal Advisory Committee Act (FACA). TAMWG will hold at least two meetings per year of the full group, involving the public. The technical advisory committees may hold additional meetings with the TMAG to discuss technical issues, review annual flow schedules, and RFP's for implementation activities.

Stakeholders will have an opportunity to submit alternative hypotheses and/or alternative restoration actions to the TMC for consideration in their capacity as an advisory group. The TMC will seek review of alternatives proposed by the Technical Modeling and Analysis Group (TMAG) and the Rehabilitation Implementation Group (RIG) (see discussions of TMAG and RIG).

#### *Membership*

Members of TAMWG should be senior representatives of their respective constituent groups with a legitimate link to restoration activities on the Trinity River. They should have authority to speak on behalf of their organization(s) and commit to following up TAMWG and TMC discussions with their colleagues. If the Secretary charters TAMWG under FACA, minimum membership qualifications should include at least the following:

Individuals are senior representatives of their organization(s) authorized to speak on their behalf and, where appropriate, commit funds.

Individuals should have extensive knowledge of the Trinity River Restoration Program and the Trinity Adaptive Management Organization.

Members should elect a strong and fair chairperson that recognizes when discussions stray. Technical committee participants must have appropriate technical qualifications to engage in technical discussions.

TAMWG members should expect to commit at least 10 percent of their time to this effort.

Members of TAMWG technical committees should expect to commit at least 25 percent of their time to this effort.

TAMWG should/will replace representatives on the Working Group or technical committees that do not actively participate or attend meetings.

May include representatives from these and other interests:

- Recreation
- Environment
- Landowners
- Commercial fishing
- Sport fishing
- Timber
- Power
- Agriculture

- Water users
- Agencies
- Others

### ***Roles & Responsibilities***

Provide policy and management recommendations on all aspects of the program to TMC via Executive Director

Develop and submit alternative hypotheses for consideration by TMC and potential analysis by TMAG and RIG

Recommend management actions and studies for RFP development and implementation

### ***Staff***

Provided by each stakeholder group

## **7.1.3 Adaptive Environmental Assessment and Management Team**

This team provides expert support to the TMC as relates to both scientific evaluation of restoration progress and managements implementation. However, the team expertise is subdivided into staff focusing their efforts toward either management implementation or analyses and scientific assessment. The AEAM Team office should be in close proximity to the Trinity River Division (TRD) with reasonable travel accessibility for visiting managers and scientists.

### **7.1.3.1 Technical Modeling and Analysis Group (TMAG)**

Interdisciplinary group of scientists, engineers, and technical specialists, responsible for conducting and managing complex technical studies and projects, and integrating the products of those studies and projects into management objectives and recommendations. Supervised by the Team Leader under the Executive Director. The TMAG conducts technical analyses, model projections for achieving restoration objectives, design for comparison with ongoing approaches, planning, peer review, and budgeting. The TMAG makes recommendations to the TMC through the Executive Director for implementation and testing of appropriate hypotheses. The TMAG recommends modifications to the annual flow schedule within the annual water year-type allocation. The TMAG oversees scientific evaluation and design of all rehabilitation projects including: bank rehabilitation, gravel augmentation, riparian re-vegetation, floodplain creation, sediment management, and watershed rehabilitation. The TMAG develops the scope of work for these actions. The TMAG serves as the Contracting Officer's Technical Representative (COTR). The TMAG shares some COTR responsibilities to the RIG.

### ***Membership***

Full-time Group Leader Interdisciplinary experience in water resources management or river restoration/rehabilitation with expertise in biological and geomorphological sciences. Supervised by the Executive Director.

Four full-time, multi-disciplinary scientists/engineers representing these disciplines:

- Fisheries Biology
- Fluvial Geomorphology/Hydraulic Engineering
- Riparian Ecology/Wildlife Ecology
- Water Quality/Temperature



- Hill Slope Geomorphology/Watershed Hydrology
- Information Management/Computer Modeling

A part-time representative from USBR Operations (CVP) serves as a member of this team when formulating the annual flow schedule.

### *Roles & Responsibilities*

Team members collaborate in:

- Habitat modeling and mapping, SALMOD, habitat quality (gravel quality), statistics, population modeling
- Sediment transport, channel response, channel design
- Riparian revegetation, regeneration, and encroachment and removal
- Water temperature and other water quality indicator modeling
- Information Management and GIS
- Flow release recommendations and annual flow schedule formulation
- Integration of appropriate models for describing the response of the stream corridor to management alternatives
- Watershed restoration

Evaluates previous year & historical monitoring results with respect to existing hypotheses

Re-visits scientific hypotheses as appropriate

Conducts sediment transport modeling, habitat modeling, temperature modeling and salmon production modeling

Integrates multidisciplinary information and identifies alternatives to resolve conflicting ecological management needs

Coordinates with operations and presents analyses to TMC for resolving conflicts and assessing management needs

Provides short term research project development and oversight

Conducts long-term trend monitoring development and oversight

Sets standards and protocols for monitoring information (datum, coordinate systems, reporting techniques and formats, etc)

Ensures effective data management, storage, analysis, and distribution

Solicits technical input review from stakeholder groups and regulatory agencies

Analyzes and submits implementation plans for scientific peer review

Coordinates review from Scientific Advisory Board and Review Committees

Submits designs in collaboration with the RIG for Rehabilitation Activities and Objective Specific Monitoring

Is responsible for RFP development and preparation of statements of work in cooperation with the RIG Contracting Officer

Contracting Officer's Technical Representative - assist in Objective Specific Monitoring and Rehabilitation Activities contracting

Provides program reporting

Completes special duties as requested by Executive Director

***Staff***

Six FTE's

Group Leader/Scientist

Secretary

Four full-time technical staff (May include agency staff detailed under the Inter-Governmental Personnel Act)

Travel and Incidental Expenses - Computers, software, hardware, supplies

Technical support resources including modeling, data analysis, etc

**7.1.3.2 Rehabilitation Implementation Group (RIG)**

A group of engineers, technicians, and contract specialists responsible for implementing the on-the-ground design and construction activities associated with the AEAM organization. The group is supervised by a Group Leader who is under the supervision of the Executive Director. The Rehabilitation Implementation Group (RIG) collects design data, prepares designs, awards contracts, and manages construction for bridge replacements, rehabilitation projects, gravel augmentation, riparian revegetation, flood plain creation, objective specific monitoring, and sediment management projects. The RIG performs all necessary realty actions and environmental permit requirements including environmental compliance. Contacts the public to address implementation issues such as obtaining borrow and waste sites, access agreements, and maintenance agreements. The RIG works closely with the TMAG to achieve a common understanding of desired design concepts and coordinates construction activities to insure any rehabilitation activity modifications are implemented with full approval of the TMC.

***Membership***

Full time Group Leader with background in engineering and experience in management of river restoration programs. Directly supervised by the TMC Executive Director.

Civil Engineer

Engineering Technician/Surveyor

Contracting Officer

Part-time support from:

Construction Inspector

Construction contract specialist

Realty Specialist

Field Engineer

***Roles & Responsibilities***

Preparing and implementing contracting for objective specific monitoring and rehabilitation activities upon approval of the TMC

Collaborates with TMAG and Executive Director on program implementation

Submits annual report to Executive Director on accomplishments, expenditures, and budget needs

**Channel Rehabilitation**

Collaborates with TMAG to develop design concept for each site and environmental review

Contacts property owners to explain concept and obtain right of entry

Collects design data, prepares location maps, performs field explorations

Coordinates with TMAG to obtain pre- and post-project monitoring

Prepares designs, cost estimates, and information on local contractors

Awards construction contracts

Performs management during construction including quality control and contractor payments

#### Bridge Replacements

Prepare design concept for each site

Contacts property owners to explain concept and obtain right of entry and maintenance agreements

Collects design data, prepares location maps, performs field explorations

Prepares designs and cost estimates

Awards construction contracts

Performs construction management

#### Flood Plain Creation

Collaborates with TMAG to develop design concept for each site and environmental review

In concert with gravel augmentation and fine sediment management and revegetation

Obtains/Identifies inundation zones

Locates impacted flood plain improvements

Performs property surveys

Negotiates easements including structure removal/relocation agreements

Remove/Relocate existing structures

#### Gravel Augmentation and Fine Sediment Management

Collaborates with TMAG to develop design concept for each site and environmental review

Prepares designs and cost estimates

Awards augmentation contracts

Performs gravel placement activities

#### Objective Specific Monitoring

In concert with TMAG, select objective specific monitoring and rehabilitation activity contractors

Provide contract management for all monitoring activities

#### Watershed Rehabilitation

Coordinates with land management agencies

#### ***Staff***

Four FTE's including:

Group Leader

Civil Engineer

Contracting Officer

Engineering Technician/Surveyor

Travel and Incidental Expenses

Computers

#### **7.1.4 Independent Review Panels**

To assure scientific credibility all monitoring and studies will be awarded through a competitive process using RFP's and independent outside review panels. A Scientific Advisory Board will provide overall review and recommendations to the TMC relative to the science aspects of the AEAM organization. Specific Review Committees will be organized as needed to review rehabilitation, monitoring and study designs as well as proposals and reports.

#### **7.1.4.1 Scientific Advisory Board**

Five scientists, recognized as experts in the disciplines of fisheries biology, fluvial geomorphology, hydraulic engineering, hydrology, riparian ecology, wildlife biology, or aquatic ecology, form a Scientific Advisory Board (SAB). It is important that members serve a reasonably long term to reduce “get up to speed” expenses, but short enough that the organization periodically gets new ideas and perspectives. Members must be objective in keeping the science separate from policy. Each member serves a four-year rotating term. The Executive Director appoints the members of the Board from candidates nominated by the TMC, TMAG Team Leader, TAMWG, and Regulatory Agencies, based upon technical capability. They would meet at least once each year with the TMAG.

##### ***Membership***

Part-time. Five recognized scientists in various disciplines. Time commitment roughly 5% – 10%/yr that may come in periodic bursts of effort such as when the TMAG develops alternative hypotheses, study plans, flow recommendations, rehabilitation activities, and special data collection activities for the coming year.

##### ***Roles & Responsibilities***

Scientific peer review of hypothesis testing, proposed annual flow schedules, short and long-term monitoring plans, research priorities.

Periodic review (roughly every 5 years) of the overall AEAM Organization

Review reports & recommendations produced by the Technical Modeling and Analysis Group.

Review suggestions for new or alternative hypotheses & methods of testing of existing hypotheses.

##### ***Staff***

No additional staff. The TMAG will provide support. SAB members will be reimbursed for their time and travel at their current organizational or industry rates

Total Five FTE's

#### **7.1.4.2 Review Committees**

Outside review committees will be formed to review specific proposals and study designs. For each proposed Objective Specific activity a review committee of subject area experts, not directly involved with the proposed project or otherwise having a conflict of interest, will be solicited to provide recommendations on specific proposed activities. These peer reviews will provide recommendations on proposals submitted in response to RFP's.

##### ***Membership***

Review Committee members will be selected from nominations by the SAB, AEAMT and TAMWG.

When no conflict of interest exists TAC members of TAMWG having appropriate expertise will serve on individual reviews.

### *Roles and Responsibilities*

For each Trinity Restoration Program funded activity a specific Review Committee will be formed to provide input and recommendations relative to personnel qualifications and experience, study approach, statistical design, adequacy of proposed budget, etc.

## **7.2 Objective Specific Monitoring**

Long-term monitoring evaluates the overall restoration effort, and also provides baseline and subsequent data for trend analyses. Long-term data include gaging data, sediment transport data, water temperature data, smolt outmigration data, adult escapement estimates, redd mapping, monitoring index reaches, and rehabilitation sites. Restoration program funded long-term monitoring will be awarded by contract or self-governance agreements if applicable to agencies, tribes, and contractors in response to RFP's authorized by the TMC.

Short-term monitoring seeks to evaluate cause and effect in the context of specific hypotheses, and competing hypotheses for specific calendar years given the water year runoff forecast, sediment input, and level of salmon escapement. Short-term monitoring may include studies such as water temperature-salmonid growth rates, delta maintenance needs, and riparian regeneration processes. Short-term monitoring may be needed simply to fill information gaps. To assure scientific credibility all monitoring and studies will be awarded through a competitive process using RFP's and independent review panels.

### *Membership*

Personnel of successful applications from:

- Agencies
- Tribes
- Contractors

### *Roles & Responsibilities*

Short-term specialized monitoring such as annual site specific data collection for hypothesis testing, would be contracted through annual solicitations from agencies, tribes, universities, and consulting firms by issuing Requests For Proposals (RFP's) and awarding annual or multiple year contracts

Long-term trend monitoring needs would be contracted with local Agencies and Tribes having technical expertise. The local agency and/or tribe will prepare work plans and data collection designs based upon scopes of work developed by the TMAG. They will submit the work plans for scientific peer review and after appropriate review and modification the agencies and/or tribes will be funded.

Implement monitoring projects as specified in contracts

## **7.3 Funding for ROD Implementation**

Table 6 presents costs for implementation of the Record of Decision over a period of three years. The majority of funds are expected to come through the Department of Interior agencies. Additional program funding however may be obtained from the State of California, other federal agencies, and other sources (See section 5.4).

itemizes a further breakout of the objective specific monitoring costs for long and short-term monitoring and GIS maintenance and public information.

TABLE 6  
Funding for ROD Implementation<sup>a,b</sup> (Amounts in Thousands of Dollars)

Activity	Year 1 (\$)	Year 2 (\$)	Year 3 (\$)	Total 3 yrs (\$)
Bridge Construction <sup>c</sup>	350	5,700	0	6,050
Houses/outbuildings <sup>c</sup>	125	225	0	350
Channel Rehab projects <sup>c</sup>	2,150	2,400	2,400	6,950
Watershed Restoration	2,000	2,000	2,000	6,000
Coarse and Fine sediments <sup>c</sup>	50	50	355	455
Objective Specific Monitoring <sup>d</sup>	5,640	5,176	5,176	15,992
AEAM Team (Staffing) <sup>d</sup>	2,025	2,025	2,025	6,075
<b>TOTAL</b>	<b>12,340</b>	<b>17,576</b>	<b>11,956</b>	<b>41,712</b>

<sup>a</sup>Estimated out-year costs. During the first 3 years, half of the channel rehabilitation projects will be constructed. Additional out-year funds will be necessary to complete the second half. Costs are assumed to be the same as the first half. For watershed restoration, \$2 million annually for roughly 20 years is necessary. Annual coarse and fine sediment costs are expected to average \$260,00 per year but will vary depending on needs identified through adaptive management. Adaptive management costs are approximated at \$5.2 million per year indefinitely.

<sup>b</sup>Bridge and Infrastructure modifications are phased in (included in years 1 and 2) with the bulk reflected in year 2. Therefore, a true estimate for an "annual" budget would be best represented by year 3 at \$11.8 million.

<sup>c</sup>Costs taken from USBR Mainstem Trinity Habitat and Floodplain Modifications Report (2/2000).

<sup>d</sup>Costs taken from Stalnaker and Wittler AEAM report (4/2000).

TABLE 7  
Break Out Costs for Objective Specific Monitoring (1,000s of \$)

<i>Long term monitoring:</i>	
Fish monitoring (escapement, smolt production, etc)	2,247
Fish monitoring and modeling (habitat, temp, SALMOD)	914
Channel morphology and riparian monitoring	330
Gaging stations	175
Hydraulic and sediment transport monitoring/modeling	160
GIS maintenance and public info	145
<b>Subtotal</b>	<b>3,971</b>
<i>Short term directed monitoring</i>	1205
<b>TOTAL</b>	<b>5,176</b>
Additional first year only cost (GIS system and gaging stations)	464
<b>TOTAL FIRST YEAR COSTS</b>	<b>5,640</b>

## 7.4 Peak Flow Release Example for Extremely Wet Water Year

The theory, objectives, and structure of the proposed adaptive environmental assessment and management (AEAM) organization are broadly described in the Trinity River Flow Evaluation Report (USFWS and HVT, 1999). The material presented in previous sections of this report provides more detail on roles, responsibilities, and budgetary needs of the organization. However, to date, there has not been a detailed example of how adaptive

**MEMORANDUM OF AGREEMENT**  
**BETWEEN**  
**THE SWINOMISH INDIAN TRIBAL COMMUNITY**  
**AND**  
**THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGARDING TRIBAL CONSULTATION DURING IMPLEMENTATION OF**  
**THE PM NORTHWEST SITE CLEANUP ACTION**

**I. Parties**

The parties to this Memorandum of Agreement (“MOA”) are the Swinomish Indian Tribal Community (“the Tribe”) and the U.S. Environmental Protection Agency (“EPA”) (collectively the “Parties”).

The Swinomish Indian Tribal Community (SITC) is a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. 476 *et seq.*, and derives its organization and authority from its Constitution and Bylaws, as amended, originally approved by the Secretary of Interior on January 27, 1936, which is the successor in interest to the groups known as Lower Skagit, Kikiallus, Swinamish, and Samish signatories to the Point Elliot Indian Treaty of 1855. Members of the Swinomish Indian Tribal Community are descendants of the indigenous peoples who used and occupied territories along the Skagit River and its tributaries, on the mainland north and south of the Skagit River system, and on the adjacent islands, such as Whidbey, Camano, Fidalgo, Guemes, Samish, and Cypress.

The Swinomish Indian Reservation is the permanent homeland of the Swinomish Indian Tribal Community, hereinafter referred to as the "Reservation." The Tribe has governing powers over those Reservation lands and resources reserved to themselves and the Tribal members residing thereon and their descendants and successors in interest, and has the right to full recognition of their laws, traditions and customs, for development and management of the resources. The Swinomish Indian Tribal Community has the right to protect, conserve and restore the total environment of the lands, air, waters, flora and fauna, and other resources traditional to their culture and by treaty reserved whether on the Swinomish Indian Reservation or in tribal ceded areas or usual and accustomed sites. The Tribe is also a natural resource trustee under applicable federal law.

The U.S. Environmental Protection Agency was created to provide coordinated and effective governmental action to assure the protection of the protection of the environment by abating and controlling pollution on a systematic basis. Environmental Protection Agency,

Region 10, is responsible for the execution of the Agency's programs within the boundaries of Alaska, Idaho, Oregon, and Washington.

Tribal Operations Office, Region 10, is responsible for assisting the Region in meeting its commitment to work with the federally recognized Tribes of the Pacific Northwest and Alaska, on a government-to-government basis, to protect, restore and preserve the environment for present and future generations.

## **II. Purpose**

EPA recognizes its unique legal relationship with Tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. Federal policies instruct EPA to have regular and meaningful consultation with Indian Tribal governments when developing policies and regulatory decisions on matters affecting their communities and resources.

This MOA is intended to provide a framework for good faith government-to-government coordination for the CERCLA response activities conducted at PM Northwest Site (the "Site"), and to ensure that EPA fulfills its responsibility to consult with the Tribe prior to taking action at the Site that may impact their reservation or treaty resources. This MOA also will establish how EPA will consult with the Tribe under the provisions of the Administrative Order on Consent, EPA Docket No. CERCLA-10-2000-0186. It is acknowledged that additional agreements, or amendments to this MOA, may be executed between the Tribe and EPA to further meet the above described purposes. This MOA identifies the respective roles and governmental responsibilities of the Tribe and EPA related to all response actions at the Site.

The Tribe is afforded substantially the same treatment as a state in accordance with Section 126 of CERCLA, 42 U.S.C. Section 9626, and 40 C.F.R. Section 300.515 of the National Contingency Plan (NCP). In entering into this MOA and consulting with the Tribe on the CERCLA activities at the Site, EPA is acting on its own behalf in accordance with its trust responsibility. EPA views this MOA as creating a consulting relationship between EPA and the Tribe for the benefit of the United States and its efforts to fulfill its trust responsibility to the Tribe while conducting CERCLA activities at the Site in a manner not inconsistent with the NCP.

EPA, under its 1984 Policy for the Administration of Environmental Programs on Indian Reservations, recognizes the Tribe as the primary party for setting standards, making environmental decisions and managing programs affecting the Reservation, treaty reserved resources, and the health and welfare of the Reservation population, pursuant to express federal law and inherent sovereignty. Under these authorities, the Tribe has an inherent right to take enforcement action here but has, instead, determined that EPA will be the lead agency for undertaking Superfund response activities at the Site.



### **III. Objectives**

The Parties agree on the following specific objectives for this MOA:

1. Support and satisfy the nine principles of the EPA policy for the Administration of Environmental Programs on Indian Reservations;
2. Enhance the relationship between the parties as set forth in the Tribal Environmental Agreement entered into between the Tribe and EPA on January 21, 1997;
3. Further establish and define a working “government-to-government” relationship between the Tribe and EPA and clarify such relationship with respect to all Superfund response activities and other issues concerning the Site;
4. Identify “single points of contact” for all communication between the Tribe and EPA related to the Site;
5. Establish specific procedures to enhance communication and coordination during the removal activities being conducted at the Site;
6. Establish specific communication procedures to ensure the substantial and meaningful involvement of the Tribe in discussions related to natural resource issues as they arise in the course of EPA investigations of site-related activities at the Site;
7. Facilitate the development of the Tribe’s technical capabilities to participate in Superfund response activities at the Site;
8. Establish specific goals, procedures, and reasonable time frames for the efficient exchange of technical information, reports, studies, comments on draft technical deliverables or decision documents, or other pertinent materials and documents, including the timely identification of Applicable or Relevant and Appropriate Requirements (ARARs);
9. Provide an effective means for the Tribe to participate in negotiations with potentially responsible parties (PRPs) concerning this Site.

#### **IV. General Terms of Agreement**

1. The Parties agree that the Site is located in a wooded area on Fidalgo Island near Anacortes, Washington in Skagit County approximately 5 miles south-southeast of the petroleum refineries at March Point. This approximately seven acre site, which encompasses former disposal pond locations and surrounding properties are located within the Swinomish Indian Reservation. The Swinomish Indian Tribal Community reservation is the permanent homeland of the Swinomish Indian Tribal Community, a federally recognized sovereign Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended.
  
2. EPA will consult with the Tribe with respect to (1) all major decision points, broad issues, and overall results regarding the Site and (2) other matters regarding the Superfund process concerning the Site which the parties may agree are of significance to the Tribe as discussed during their periodic meetings or other communications. As used herein, "consult" means the process of seeking, discussing, and considering the views of the Tribe at the earliest time in EPA Regions 10's decision-making. Consultation generally means more than simply providing information about what the agency is planning to do and allowing comment. Rather, consultation means two-way communication that works toward a consensus reflecting the concerns of the Tribe. Unresolvable disputes will be resolved pursuant to the "issue resolution" process set forth in the Tribal Environmental Agreement between the EPA and the Tribe. EPA, as the lead agency for the Site, will ensure that the Tribe has an adequate opportunity to be substantially and meaningfully involved in the development of all major documents and major decisions. In particular, the Tribe will be given an opportunity to review and propose revisions to draft EPA documents prior to release to the public or the press. The consultation requirement shall specifically apply to:
  - a. TCR Work Plan and SAP;
  - b. TCR Waste Removal Report;
  - c. NTCR Site Investigation Work Plan and SAP;
  - d. NTCR Site Investigation Report;
  - e. Agreement on ARARs, RAOs;
  - f. Identification of Potential Alternatives;
  - g. Selection and Evaluation of Response Alternatives;
  - h. NTCR Response Action, Work Plan, and SAP;
  - I. Site Completion Report;
  - j. Modifications to any plan or schedule (XIX in AOC); and
  - k. Additional Removal Actions (XX in AOC).

3. Tribes and CERCLA. Federally recognized Tribes are afforded substantially the same treatment as a State in accordance with section 126 of CERCLA, 42 U.S.C. Section 9626, and 40 C.F.R. Section 300. 515.
4. ARARs. EPA, as the lead agency, will determine ARARs and TBCs for the Site in consultation with the Tribe. EPA's goal is for the the Time Critical Removal and the Non-Time Critical Removal to attain ARARs under federal, state, and tribal environmental laws in a manner not inconsistent with NCP. EPA shall consult with the Tribe regarding any determination whether compliance with ARARs is practicable.

In accordance with 40 CFR 300.515(d)(2) and 300.515(h)(2), EPA will request that the Tribe identify potential ARARs and TBCs no later than the time that the site characterization data are available. Identifying ARARs and TBCs is dependent upon available site characterization data, consultations and interactions between Respondents, EPA and the Tribe. The Tribe will provide written identification of Tribal ARARs and TBCs at two separate stages, for the TCR and the NTCR. The Tribe will identify its potential ARARs and TBCs within thirty working days of receipt of EPA's request. The written identification should include a citation to each ARAR or TBC, including any substantive requirement of any applicable permit, a reference to whether the requirement is applicable or relevant and appropriate, and a description of how the ARAR or TBC affects the Site. Each ARAR and TBC will be identified in as detailed and comprehensive manner as possible. If the Tribe finds that there is insufficient information about the Site to identify an ARAR or TBC at an appropriate level, it will indicate what additional information is needed and how this information will be utilized in identifying ARARs and TBCs. EPA will thereafter consult with the Tribe to ensure that identified ARARs and TBCs are updated as appropriate. EPA and the Tribe acknowledge that it is EPA policy that Tribal requirements are subject to the same criteria as states as described in 40 C.F.R. § 300.400(g)(4). See 55 Fed. Reg. 8741-8742 (Thursday, March 8, 1990). EPA will consult with the Tribe prior to any waiver of an ARAR under section 121(d)(4) of CERCLA.

5. Work Schedule. EPA will inform the Tribe of significant actions pertaining to Superfund response activities and related issues concerning the Site. Additionally, EPA will consult with the Tribe regarding any proposed modifications to the Scope of Work (SOW) appended to the Administrative Order on Consent, or to any workplans or other deliverables that have been approved by EPA, in consultation with the Tribe, under the AOC.

6. Samples. EPA and the Tribe shall coordinate all requests to the Respondents to take split or duplicate samples of any samples collected by the Respondents while performing the work required under the Order. Generally, EPA and the Tribe will decide which government will take the split or duplicate sample with the goal of minimizing Respondents' costs.
7. Tribe as a Trustee. CERCLA provides that Tribes have been designated as trustees for natural resources belonging to, managed, or controlled by such Tribes.
8. Access. The Tribe acknowledges that EPA has a right of access to the Site under federal laws for CERCLA response activities. In order to facilitate Superfund response activities at any portions of the Site that are under Tribal jurisdiction, the Tribe, in recognition of federal law and not by way of permit, license, agreement, lease or other form of authorization, and solely to the extent of the Tribe's trust beneficiary or other interest in a portion of the site, agree to provide access to those portions of the Site to EPA, and to its authorized representatives and contractors, to perform CERCLA response activities authorized by EPA and to the extent required by federal law. The Tribe will be given early notice of EPA visits to the Site, and will be afforded the opportunity to accompany all visits to those portions of the Site that are under Tribal jurisdiction.
9. NPL Listing. EPA is considering whether to include the PM Northwest Site on the National Priorities List (NPL) pursuant to sec.105 of CERCLA. The Tribe has a specific interest in promoting tribal self-governance and in achieving a level of environmental protection at this Site that will enhance and support vital Tribal programs. EPA and the Tribe will consult on the effectiveness of the response actions taken under the Order to address environmental hazards posed by the Site before EPA makes any NPL decisions for the Site.

The Tribe and EPA recognize that each has and reserves all rights, powers, and remedies now or hereafter existing at law or in equity, or by statute, treaty or otherwise. This MOA does not modify, diminish, or alter the rights and entitlements of the Parties. The Tribe's joinder to this Agreement and its participation in the Superfund process shall not constitute a waiver of sovereign immunity by the Tribe. The MOA is intended solely to facilitate inter-governmental coordination between the Parties, and neither creates any rights in third parties nor gives rise to any right of judicial review.

## **V. Communication**

### 1. General

EPA and the Tribe agree that Superfund program communication regarding the Site will be accomplished in accordance with the following procedures:

a. Designated key contacts. The key Tribal contact for all Tribe/EPA Superfund coordination, program communication and planning activities is:

*Lauren Rich  
Swinomish Indian Tribal Community  
11430 Moorage Way, P. O. Box 817  
LaConner, WA 98257  
Phone: (360) 466-7299  
Fax: (360) 466-1615  
E-mail: lrich@swinomish.nsn.us*

The key EPA contact for all Tribe/EPA Superfund coordination, program communication, and planning activities is:

*Lynda Priddy (ECL-112)  
1200 6th Avenue  
Seattle, WA 98101  
Phone: (206) 553-1987  
Fax: (206) 553-0124  
E-mail: priddy.lynda@epa.gov*

Copies of correspondence to additional parties can be arranged by verbal agreement of the key contacts. The Tribe and EPA will exchange current organizational charts to facilitate communication and coordination regarding the Site. Each party will inform the other in the event that a different key contact is designated.

b. Meetings. Key contact persons from the Tribe and EPA will meet at least quarterly to keep each agency informed of ongoing and future activities, to discuss and plan for mutual goals, and to develop effective coordination between the agencies. More frequent meetings may be held as needed at the request of either party. Key contact persons from the Tribe and EPA will confer by telephone at least monthly to determine the need for a meeting. Meetings will generally be held at alternately at EPA and the SITC Headquarters in La Connor, Washington.

c. Briefing the Tribal Council. EPA will brief the Tribal Senate, at the request of the Tribe, prior to finalizing the Engineering Evaluation and Cost Analysis.

d. Conference Calls. Key contact persons from the Tribe and EPA will participate in telephone conference calls as needed. The purpose of such calls is to keep each party informed and involved regarding ongoing and planned activities, to discuss and resolve problems between the agencies, and to facilitate effective communication.

e. Major documents and decisions. EPA and the Tribe agree that communications concerning major documents and major decisions should be in writing. Verbal communications on important matters will be immediately brought to the attention of key contact persons at EPA and the Tribe and will be followed by written notification within five days.

f. EPA documents. EPA will provide, upon the Tribe's request, copies of EPA regulations, policies, laws, and guidance directives that are relevant to Superfund activities at the Site.

g. Tribal documents. The Tribe is responsible for timely providing EPA with copies of all Tribal ordinances, regulations, policies, and guidance materials that are relevant to Superfund activities at the Site.

2. Coordination on releasing documents. EPA will notify the Tribe of significant actions in advance, to the extent practicable, and provide copies of significant documents to the Tribe prior to or at the time such documents are released to the public or to the PRPs; provided, however, EPA may decide to not provide a document to the Tribe that EPA determines is protected by a privilege claim. Further, EPA reserves the right to have privileged internal discussions and to meet with third parties on a confidential basis without the direct participation of the Tribe.

3. Training. EPA will notify the Tribe of EPA-sponsored training events relevant to the Site. Whenever possible, Tribal attendance is encouraged and such attendance will be eligible for EPA funding to the extent provided under any Cooperative Agreement between EPA and the Tribe.

4. Community Relations. EPA is responsible for undertaking community relations activities that relate to the Superfund response at the Site, in accordance with CERCLA, the NCP, and EPA policy and guidance. EPA will work closely with the Tribe in the development of a Community Relations Plan prior to the release to the public and in conducting a community relations program, and will place a special emphasis on working with the Tribal community.

5. Confidentiality. The Parties agree that sharing information related to Site will best enable EPA to satisfy its trust and legal obligations and responsibilities to the Tribe while

conducting the PA. The Parties intend to exchange information as part of the process of government-to-government consultation concerning response actions at the Site and during the potential development of enforcement actions against potentially responsible parties.

In order to promote meaningful consultation, the parties intend to keep certain information shared under this Agreement confidential and will seek to protect such information from disclosure and discovery through the use of various privileges and exceptions, including but not limited, the attorney-client, deliberative process, and attorney work product privileges. To avoid interference with a potential enforcement proceeding in which the parties have a common interest, the parties will protect from disclosure any law enforcement records exchanged in anticipation of litigation. The parties agree to maintain any and all rights and privileges, to the extent permitted by law, including the Freedom of Information Act, 5 U.S.C. § 552, that may pertain to any shared information.

Whenever sharing information deemed confidential, the party shall clearly mark any information to which it asserts a privilege as "Privileged and Confidential Information Do Not Release Without Authorization." The party receiving information so marked agrees not to release, or allow to be released, such information to a non-party, to the extent permitted by law. The parties agree that failure to so mark information developed or shared under this Agreement does not preclude the parties from asserting the protections under the Freedom of Information Act or from asserting privileges and exceptions in seeking to protect the information from discovery.

## **VI. Removal Alternative Selection and Implementation**

EPA and the Tribe agree to negotiate provisions to supplement this MOA with respect to risk assessment issues, timing of work, and review and comment time frames that will compliment provisions in the Scope of Work and this MOA.

## **VII. Effect and Duration of Agreement**

1. This MOA shall take effect upon signature by EPA and the SITC.
2. This MOA will remain in effect for the duration of the Superfund response activities at the Site or until terminated by mutual agreement of the Parties; provided, however, that either Party to this MOA may terminate it by providing thirty (30) days written notice to the other Party.
3. This MOA may be amended, in writing by agreement of the parties, from time to time as necessary to facilitate the goals and purposes of the MOA.