

Meeting Notes

TRINITY MANAGEMENT COUNCIL

September 21-22, 2022
WebEx Video Conference

Day 1, September 21, 2022 9:00am

TMC Members

Primary	Representative Seat
Justin Ly	NOAA Fisheries, Chair
Don Bader	Bureau of Reclamation, Vice Chair
Tanya Sommer	U.S. Fish and Wildlife Service, Vice Chair
Michael Dixon ¹	Trinity River Restoration Program, Executive Director
Mike Orcutt	Hoopa Valley Tribe
Brett Kormos	California Department of Water Resources/Fish & Wildlife
Tim Hayden	Yurok Tribe
Keli McElroy	U.S. Forest Service
Liam Gogan	Trinity County

Others in attendance: Seth Naman (NOAA), Elizabeth Hadley (Reclamation), Wade Sinnen, Ken Lindke (CDFW), Kyle DeJulio, Chris Laskodi, (Yurok), Patrick Flynn, Liam Gogan (Trinity), James Lee, Chad Abel, Oliver Rogers, Kiana Abel (TRRP), Bill Pinnix (FWS), Roman Pittman (NOAA), Trent Tuthill (public)

Notes: Sabrina Kleinman (EPP)

List of Motions

Tanya Sommer moved to approve the amended agenda.

Keli McElroy seconded the motion.

Motion failed. Two agencies were not present. Two agencies abstained. Four agencies voted in favor.

Welcome and Introductions

Bader opened the meeting serving as Chair. The first day of the meeting was scheduled to take place at the Yurok Tribal Weitchpec Office and second day was scheduled to meet at the Hoopa Valley Tribal Office. Bader served as the meeting Chair due to a schedule conflict for Ly on the first day. A Teams Meeting was also set-up to allow remote attendees to join. Meeting was started with a quorum of 6 representatives out of 8.

Approval of Agenda

Bader reported he just received instructions from the DC Office at Reclamation to table the decision items on the winter flow variability and the TMC bylaws. These items could be included as discussion items, but Bader and Dixon were instructed to table any votes on those items for the time being. Bader apologized for the late notice.

Hayden asked whether the move prevented the TMC from being able to make motions today. Bader clarified that the instruction was to table any motions related to the winter flow variability

and the changes to the TMC bylaws only. However, those were those only two motions proposed for the meeting.

Dixon added that the move came after DOI heard from two different TMC entities who had opposing views on those topics and the DC Office wanted to hear from the other TMC entities before allowing the motions to proceed. Bader explained the TMC could hold a special meeting, which could now be held virtually thanks to previous changes in the bylaws, if DOI provided direction allowing for a motion on those items.

Kormos asked what the time frame would be for DOI to collect the information they were looking for and when they would provide direction to the TMC. Bader clarified that the direction came from the Assistant Secretary of Indian Affairs and Dixon added that the Assistant Secretary was asking the TMC to discuss the topics so they could see where the agencies stood on the topics. Dixon recommended the agencies send letters on their views to the Department of Interior to have their voices heard. Kormos thought it was concerning there were processes that could circumvent the purpose of the TMC and felt it called into question the participation of the agencies and the entities present as well as the purpose of the TMC, which makes it difficult to determine the value of participating.

DeJuilio added the TMC forum was intended as the venue for agencies to provide their opinions and feedback to the DOI, but that has been circumvented. Bader added that DOI is looking for the opinions of the non-tribal entities on these topics.

Given the modifications to the agenda, which converted the decision items on the winter flow variability and the TMC bylaws to discussion items, Bader called for a motion to approve the agenda. Ly expressed disappointment that the TMC could be undermined by the Assistant Secretary and DOI.

Sommer made a motion to approved the agenda with the modifications to the two agenda topics.

McElroi seconded the motion.

The motion failed. Two agencies, Trinity County and the Hoopa Valley Tribe were not present, and Yurok Tribe and California abstained. The remaining four agencies voted in favor.

Hayden noted the Yurok Tribe invited the TMC to their facility in good faith in the process and expressed frustration that the agenda and the intent of the meeting was subverted by agencies looking to work around the TMC. Kormos felt approving the agenda would approve how the agenda was unilaterally manipulated, which was a move the state could not support and thought was out of order. Bader called for break to allow for caucus discussion.

BREAK

Discussion on Agenda

Gogan and Orcutt joined the meeting at approximately 9:50AM and participated in the discussion.

Bader explained that without an agenda, the meeting could not proceed as planned and offered an alternative period for the agencies to discuss their thoughts on the items changed on the agenda.

Kormos thought further specificity of what DOI was looking for would be useful as the existing record should be sufficient for understanding each agencies' perspectives based on their initial comments on the process and the topics.

Bader explained Hoopa Valley sent the Assistant Secretary and the Commissioner a letter objecting to the winter flow variability. Yurok sent an opposing letter stating they wanted to see the action taken forward to the TMC for approval or disapproval. As of this morning, the Assistant Secretary for Indian Affairs made a determination that he wanted to pull those discussion items as there were two opposing tribal views on the issue. Dixon added that the Assistant Secretary appreciated feedback and the perspectives from the agencies and that the instruction came just at the start of the meeting. Bader added there had been discussion on these topics for the past few weeks and until this morning the TMC had a green light to decide on them and then report to leadership.

Kormos explained the TMC has a record of votes on the issue from prior meetings that signify broad support across the agencies on the topic. He did not think further discussion was needed on it. Bader asked if the TMC needed a decision on whether to discuss the topic, but Dixon noted that the bylaws were also unclear if a motion was needed for discussion items.

Kormos noted three items to address. Two were related to the agenda items while the third was the ability of the DOI to circumvent the TMC, which he thought was the most important. On many levels it was out of order for DOI to take that approach as it strips the TMC of its ability to fulfill its mission and of the individual agencies of co-equal influence or ability to influence outcomes. It also strips individuals of being empowered and to operate on the TMC. Kormos stated it called into question whether the TMC should exist as it is currently organized. The bylaws do not address a situation where a unilateral decision within the federal government could strip the TMC of their ability to make recommendations. The TMC doesn't have power to do much and specific entities or the federal government should not be able to strip representatives of their power or their ability to address items of great importance.

On winter flow variability, the best available science, in the State's view, clearly demonstrates the utility and benefit of implementing that water management scheme. It doesn't negatively influence water volumes in the ROD or recreation or other needs around the reservoir and it does everything that the TMC and the TRRP was built to do by building habitat and increasing fish productivity. As far as Kormos was concerned, this is the single most important item the TMC has had before it. While the previous vote in December 2021 was for that year's winter flow, he

believes it is necessary to implement and one of the few tools in the toolbox that provides a demonstrative benefit.

Finally, Kormos thought one of the tenets of a healthy and well-functioning council was one that requires and promotes discussion, collaboration, and to the extent possible, unanimity from various entities to engage one another. One of the important things the TMC has is the capacity to make changes with some level of assurance and using a super majority voting structure is not a healthy or functioning way to address that. It makes it easy for motions or decision items to fail and creates a paradigm where there is no incentive to work with everyone on the TMC to come to an understanding. Kormos has participated on other councils and advisory boards and has never encountered a voting structure like the TMC's and believes there is good reason for concern. It is why the best available science failed for reasons that have nothing to do with science. This circles back to the first item in that the voting structure and bylaws are irrelevant if the TMC cannot discuss things that are meaningful and important because of the unilateral authority DOI has to change the form and function of the TMC.

Bader clarified that the bylaws discussion, while it would include a discussion on the voting majority, was also intended to clean up other aspects of the bylaws. However, what got the Assistant Secretary's attention was the voting majority discussion.

Ly fully supported what Kormos said about the winter variability and the bylaws. The move undermines the TMC's purpose and cannot continue. It was not just higher ups at DOI, but a particular entity who petitioned to have those two decision items removed. When the entities signed the bylaws and the ROD, that entity agreed on how the TMC would be set-up and how decisions and recommendations to the Secretary would be made by the TMC as an eight-party unit. Ly was disappointed that the TMC was being undermined on multiple fronts with DOI support.

The bylaws are one of the biggest items impeding the TMC from making progress on restoring fish populations. Scientists have worked hard, and it was disappointing for the TMC to not support the best available science to improve conditions for salmonids. During the Refinements discussions, several team members emphasized the need to change the bylaw voting structure so as not to impede progress and the super-super majority voting structure facilitates the minority being able to dictate what happens in the TRRP, which should not be the case. Ly asked the TMC to make changes to the voting structure and expressed disappointment and uncertainty in how the TMC would be able to move forward after such an egregious undermining of its authority. Ly wanted to talk about the bylaws and deferred to Naman on comments for the winter flow.

Naman had been involved at the technical level for the flow management action that the scientists and staff believe are important to restore the river. He thought Kormos, Ly, and other made salient points and wanted to iterate a few more, especially to the hosts who organized the meeting. The bylaws have allowed a few entities to subvert the EIS and ROD, which explicitly include adaptive management, which requires implementation of the best available science,

which currently is the winter flow variability. As Kormos mentioned, the vote to implement failed last year, which undermines the utility of the process when one or two entities for their own interests can subvert the process. The number one goal of the TRRP is to restore the form and function of the Trinity River, which is stated on the website and all the Program's documents. More flow is needed in the winter than is currently available. The river has a current baseline of 300 cfs, which is completely unnatural and no other streams flow at that level. It does not make sense to have that in the watershed when other tributaries are rising in response to rainstorms. The river cannot move sediment and it cannot roll rocks and release insects the fish need to feed on. The entire process of the river is broken by having simple static flows all winter. By that regard, DOI and other powers that be are not allowing more flows in the winter, and in Naman's mind indicates the US government has failed public and tribal trust because winter flows are needed to restore the form and function of the river. Regardless of the voting process, even if it was just a simple voting majority, there would be the possibility that four entities would vote to not implement the best available science.

This means that action relies on a voting process where a number of entities can choose not to implement the best available science, making it likely that an action is not reasonably certain to occur. If an action is not reasonably certain to occur, NMFS cannot consult on it as they would be liable for it. Whatever the future process is, the action needs to be certain of occurring because under NMFS's structure, if an action is not reasonably certain to occur, they cannot consult on it. NMFS needs assurances from Reclamation that their proposals will be implemented. The TMC has made the decision to not implement the science, but in future consultations NMFS may not continue to hold that view.

Orcutt supported the Assistant Secretary's view on the matter. Despite the good intentions of the effort, the discussion has been deferred for a variety of reasons. After winter flow was voted down initially, there were some underhanded things that happened to invalidate the TMC's vote. He emailed Bader about it and Bader rescinded the action. People have strong feelings and much of the discussion during Refinements has been in the aftermath of that action. However, half of the Refinements membership has not been there for those discussions. Orcutt is looking for what he can salvage and thought there were discussions on things outside of the scope for the TMC and the TRRP. He appreciated the BIA weighing in on the discussion and noted that he had looked at the previous TMC votes and noted that if the majority bylaws were changed, it would have changed the outcome six times. He noted that the voting procedure was put together by the USFWS and that the TMC was a heavy-handed program for federal agencies. The TRRP are comprised of scientists, but there are policies and other perspectives that go into a decision. With regards to the NMFS regulatory process, if NMFS wants to weigh in on these matters they can do so though the reconsultation to reorient water diversions to include what the courts have said and the 1955 act. He did read the report provided and had policy concerns, especially when the report notes that cold water is bad, which is something you would never hear fish biologists say. Hoopa Valley has written numerous letters to Reclamation on how the infrastructure could help control the temperature, and how appraisals and feasibility studies were needed and if

Reclamation and NMFS had supported that, it could have been done. But the report states that it would take too long and would be too costly, which are not science concerns but policy ones.

Orcutt added that the winter flow report was also presented as a Reclamation Report and not a product of the TRRP. The report does not consider Indian fisheries, which the Yurok and Hoopa Valley tribes fish in the winter. The tribes were only mentioned three times. I think despite the doom and gloom, there are good things that can still be done. Some of the items are beyond the scope of Refinements that the TMC could look at and attend to.

Gogan calculated that the six votes changes would amount to around 20% of the votes; this was corrected to 2%.

Buxton agreed the winter flow was important but wanted to remind everyone that it was a small step toward meaningful restoration. What concerned him as a restoration scientist was that the TMC could not approve small steps and how they would be able to navigate big steps. There TRRP has spent multiple years on this topic and they cannot decide to approve this one demonstrative thing with unequivocal benefits. They could focus on other things but cannot find ways to do this one thing. If the TRRP looks at temperature, which is a huge issue, but right now they are trying to deal with winter flows. The TRRP and TMC should remember what they are here for, and that's the river and the fish and finding ways to make things happen one thing at a time.

Orcutt commented that he was representing the Hoopa Valley tribe and wondered why after the winter flow was voted down last year, there was an immediate response to change the voting protocols in hopes of changing the outcome. With the motion failing, did that mean the TMC authorized staff to go back and make it a higher priority? It begs the question about protocols and whether the TMC directs staff or if staff is telling the TMC what it should do. He had asked for written information on why Reclamation decided to remove the barriers they did to allow the water. It may be beyond the scope of what TMC can fix, but it needs to be fixed and there are other things killing the effort.

Kormos noted the statistic around the voting changes could be a function of how contentious some issues are and how often there are items that are adamantly opposed by the minority. If the TMC was larger, there would be more people voting on items and harder to get a super majority vote. The statistic would also look different if applied to a different body. He thought the current reaction showed how dysfunctional the TMC was and thought changing the bylaws would make the TMC more functional at applying the best science on the river.

Orcutt responded that he was on the Klamath River Task Force, where one vote could kill an item out of 20 voting bodies. People scoffed at that effort. But it forced people to build relationships with each other with USFWS being tie breaking vote. He was unsure what it meant if one vote had the potential to unravel the whole item but noted he had often been the one opposing vote out of eight on a lot of topics as he votes based on principle and not on pressure or appeasement because that was his job.

Hayden, on behalf of the Yurok Tribe, stated he was disappointed on DOI stepping in to take action to influence the agenda for the TMC. It undermined the role of the TMC. For the Yurok, they wanted to take a vote and vote based on their values and what they think is right. Taking items off the agenda prevents the TMC from doing that. The TMC is an advisory committee, and the action is inappropriate and undermines the TMC and contributes toward its dysfunction. Yurok is also a trustee of the federal government. They wrote a letter too not to overstep their role in the TMC but to express their concern on the issue. Last year, they voted on the winter flow, which captured their position and their recommendation to implement winter flows. It is the best available science and supports adaptive management and the structure of the program. It is fundamental to use the best available science and the Yurok Tribe thinks the action does and considers all the years of analysis supporting the benefits of that action. The Yurok Tribe supports the action and is discouraged that it couldn't be voted on by the TMC. The TMC should still be able to vote on it.

The bylaws are also a concern and Hayden was concerned that the issue was also pulled from the Refinements documents. The whole Refinements report was considered comprehensively with Tribe's intent on improving the adaptive management process. The bylaws issue came up as one of the major impediments toward implementing adaptive management. The TMC has operated under a super majority for many years and it's the one issue driving the need to address the bylaws. Hayden was concerned that it was on the agenda, but to have DOI step in and take it off the agenda was inappropriate.

Orcutt noted there have been several times when DOI or the Secretary have weighed in on actions. In 2019, he noted a similar instance where the TMC wanted to add flows in September but were not able to because of an opinion provided by the Solicitor's office. In response, Dixon put the water back as it was out of the TMC's control. There are other examples of iron-handed actions from the Secretary. That's the level the TMC is operating under and the ramifications of the actions taken depends on where you fall in the pendulum.

Naman noted the winter flow variability did have its own NEPA analysis, which previously impeded implementation of the September flows. But Orcutt noted that the NEPA requirement was also pulled and they have requested an opinion on why.

Abel added that he was not speaking on behalf of the TMC or Reclamation but noted he was disappointed in the Assistant Secretary's move as someone he knew personally in the upper Midwest and had a great deal of respect for as a tribal leader for Bay Mills Indian Community. He was also disappointed in Orcutt because he does not feel that he is acting in the best interest of the tribe and his judgement is clouded on the issue of winter flow. Bader asked that the discussion stay on the two discussion topics.

Gogan circled back to the voting statistics and noted that a 2% failure rate under the super majority structure seemed to show that 98% of the time the TMC made the right decision and was not sure how the TMC would improve that rate to enforce the items wanted. When actions

are prevented by a minority there appears to be large backlash but that is the way the super majority is structured to function.

Bader noted that more than half of those votes are for standard items that are typically slam dunks, like on the agenda or the minutes. However, others are more nuanced votes and the bylaws discussion would change the voting structure based on current needs.

DeJuilio agreed that not all votes were created equal and reporting them with equal weight violates a lot of assumptions on them. It also assumes that votes turned out right when there is no right or wrong value placed on them. It just would have changed the outcome. DeJuilio did not have an opinion on the voting structure, but the analysis on the votes clouds the merits of the discussion. He has worked for the TRRP for 15 years for two different entities and this year has been the hardest. Those difficulties have not been just of the drought or the other problems they are dealing with, but because for the past 14 years there has not been clear evidence on what the TRRP needed to do and why they were not making progress. During the past year, they've had the evidence and they still cannot do it. Staff from many agencies feel the same way. The TRRP needs direction from the TMC because they do not know what to do in the aftermath.

Bader added that he saw the staff, entities, alternates, and representatives who were here to solve problems and did not want the group to lose sight of that. The TRRP is an important program and they need to focus on that and not lose sight of their goals. Hopefully this is a small bump in the road and Bader will take their input back, but he did not see anyone who did not want to do the right thing.

Orcutt asked why the other topics could not be brought forward if the Assistant Secretary only asked to pull the two decision items. Bader explained the agenda was not approved and thus the meeting could not proceed.

Adjourn Meeting at 10:36 am.