

PROMOTING TRIBAL ROLES IN PROVIDING COMPENSATORY MITIGATION OFFSETS

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SUMMARY

More than 3,110 compensatory mitigation banks, wildlife banks, and in lieu fee programs have been developed across the country to meet the needs of permits or authorizations issued under the Clean Water Act, Endangered Species Act and a diversity of other laws and policies. Hundreds of those are owned and operated by non-profit conservation groups or for-profit restoration businesses. Dozens are run by state agencies or local government. However, to the best of our knowledge, less than 0.5% involve a tribe as the sponsor, owner or operator of those mitigation projects or in any related role.

This is not because tribal lands lack natural resources needing restoration. Environmental damage from past development – or simply lack of management resources - plagues tribal lands and waters as it does non-tribal ones. Nor is it because tribes lack interest in the ecological health of their lands and water. As first stewards of the land and water, tribes inherently possess the interest and the traditional ecological knowledge to aid in innovative natural resource restoration and conservation efforts.

Rather, a major cause of low tribal participation in mitigation banking and the ecological and economic benefits that derive from it is the absence of federal mitigation policies that appropriately consider tribes' status as sovereign nations and various special circumstances derived from that status that need to be addressed. Without a more deliberate effort to address tribal considerations with more specific policy provisions, tribal participation will remain difficult.

For example, consider the Compensatory Mitigation Policy that was finalized by the U.S. Fish and Wildlife Service in 2016 (and then revoked).¹ That policy included three sentences about mitigation on tribal lands including the statement that “site protection is usually a sensitive issue for a tribal nation because a conservation easement entrusts the land to another entity.” Although the policy flagged that critical, limiting issue it failed to offer any alternatives to help address it.² In a move in the right direction, the Department of Interior (DOI) issued requests for input on consultation procedures with tribes in December 2021 and is expected to establish new tribal consultation policies, but this is a more general policy and not specific to issues in mitigation. In the context of the Army Corps and EPA's 2008 mitigation rule under the Clean Water Act, the agencies simply stated, “the final rule does not have tribal implications.”

Tribes can play a leading role in the expansion of America's ecological restoration and mitigation industry, but in order for tribes to have that impact, they need more consideration in the policies that guide development permitting, offsets and mitigation. Tribal engagement in mitigation projects can help to achieve mutual goals shared with administrative agencies: slow climate change, mitigate environmental impacts and restore habitat and aquatic resources.³

¹ <https://www.reginfo.gov/public/do/eoDetails?rrid=234562>

² The Service has published an ANPR for species banking seeking public comments pertaining to six questions, one of which concerns tribal participation (question six). It can be found at <https://www.federalregister.gov/documents/2022/07/27/2022-15708/wildlife-and-fisheries-compensatory-mitigation-mechanisms>

³ See generally <https://www.bia.gov/Tribal-consultation/updates-fois-Tribal-consultation-policy-and-procedure>.



In this report we offer a handful of policy recommendations that could help the Biden Administration expand tribal participation in compensatory mitigation while strengthening Nation-to-Nation relationships. Policy actions like these can add a new economic and ecological asset for tribes who choose to participate.



Introduction

Mitigation policies under laws like the Clean Water Act and Endangered Species Act are among America's most successful natural resource policies in terms of requirements that obligate private and government actors to internalize the costs of damaging public resources. This occurs through requirements that all impacts to certain public resources either be avoided or offset by beneficial actions elsewhere that compensate for the harm caused by a project. Clean Water Act regulations issued in 2008 are especially important because those rules put more emphasis on using offsets that could document ecological success before development impacts even occurred.

However, these policies and regulations have provided too little room for tribes to meaningfully participate in the development of project-specific strategies to avoid impacts or to lead projects to offset them.

Amending compensatory mitigation policies would give tribes more opportunities to lead and engage in mitigation projects on and off tribal land. Doing so could provide tribes with more resources to protect and restore natural resources, while also restoring tribal treaty resources, preserving and sharing traditional ecological knowledge and creating restoration jobs in tribal communities. To do this, federal agencies first need to formalize and expand on the mitigation policies to effectively include tribal nations.

President Biden's "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships," issued on January 26, 2021, is a step in the right direction for ensuring tribes are equitably included in initial steps of mitigation planning processes. It emphasizes that respect for tribal sovereignty and self-governance, fulfilling federal trust and treaty responsibilities to tribal nations, and regular, meaningful and robust consultation with Tribal officials are of the utmost priority for his administration.⁴ However, while executive orders, presidential memorandums, and broad agency commitments to support tribal interests are important, these ambitions eventually run up against the challenge that day-to-day operations in many federal agencies are not set up to account for tribal interests. The institutional memory and work culture of federal agencies is focused on statutes like FLPMA, CWA, ESA, and NEPA. An added challenge is that under each of these statutes, tribes are generally subject to decisions and processes developed without significant tribal member input or by individual tribes.

⁴ Memorandum of January 26, 2021. Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-Tribal-consultation-and-strengthening-nation-to-nation-relationships/>

Tribal representatives need to be engaged from the beginning of a project so that they can have the opportunity to take a leadership role in negotiating the terms of mitigation and natural resource protection, rather than only being approached by a federal agency when tribal sign-off is needed.

When working with federal agencies and other stakeholders that tribes do not hold close relationships with, tribes are also at a disadvantage because there is a lack of proper education on tribal sovereignty and considerations as a part of initial contact and in the planning process. For example, in a planning process regarding dam removal, it is easy for government and private sector stakeholders to understand and appreciate that the role of the owner of the physical dam structure or land. Yet tribal treaty rights and resources in the riparian area impacted by a dam are not always immediately acknowledged or understood by non-tribal stakeholders. In such cases, tribes must expend extra effort educating others to prove their sovereign rights before even achieving enough internal acceptance to engage in negotiations.

This brief paper explores ways that federal agencies can support meaningful, early, and timely engagement with tribal authorities that more effectively take into account tribal participation. And it identifies changes in compensatory mitigation policies that would make it more likely that tribes would participate as providers of compensatory mitigation offsets for water and wildlife impacts caused by others (or the tribes themselves). The recommendations are cross-cutting, with a focus on the Department of the Interior (DOI) and the White House Council on Environmental Quality (CEQ). Some recommendations will add additional steps to mitigation project planning processes by requiring increased and more regular consultation with tribes.

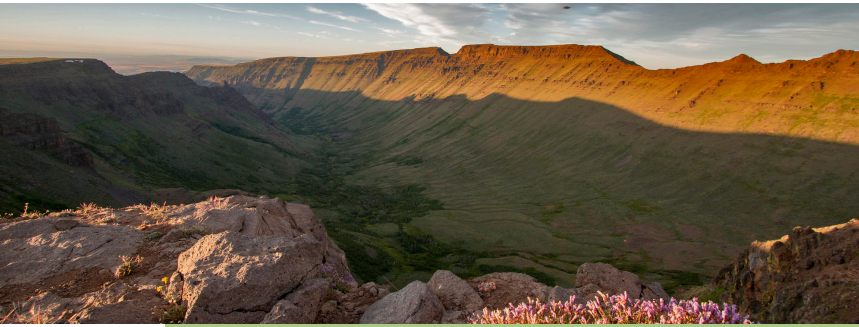
Immediate recommendations focus on the action that the Biden administration could implement within the next 6-9 months. Long-term recommendations discuss processes that can be started in the next several months to a year but will take several years to complete. Recommendations also emphasize the importance of technical assistance for tribes, ensuring tribal resources are more thoroughly protected under existing statutes, and long-term grants and funding specifically for tribes to build capacity to participate in mitigation work.



Summary of Recommendations

Tribal Lands and Waters	Policy Change	Implementation	Act of Congress	R&D	Big Asks
Immediate					
1) Issue a DOI Secretary's Order that directs agencies to create staffing, policy and other conditions that support Tribes who want to site compensatory mitigation project on their tribal lands.	X				X
2) Clarify alternative site protection mechanisms for tribes.	X	X			
3) Use rights-of-way authorities under FLPMA to allow tribal co-management of compensatory offset projects on public lands.		X			
4) Create regulatory space for tribal establishment of water resource mitigation banks under the CWA.	X	X			X
5) Expand on the existing regulatory space for Tribes in the FWS mitigation policies.	X	X			
Long-term					
1) Require greater coordination with Tribes during a development project's scoping phase when there is the potential to impact tribal land or treaty resources.	X				
2) Create funding and technical assistance opportunities for Tribes interested in implementing mitigation projects.				X	
3) Ensure cultural tribal resources can be protected as environmental resources under the NEPA process.			X		
4) Define tribal resources that cannot be mitigated.				X	

Immediate Recommendations



I
Issue a DOI Secretarial Order clarifying considerations for mitigation projects on tribal lands and avoidance associated with tribal treaty right natural resources.

While DOI has many policies for working with tribes, agency field staff are not always aware of special considerations needed for tribes where mitigation (avoidance, minimization, and compensatory mitigation) are at issue. The Secretary of the Interior should issue a secretarial order with clear language on 1) customization of avoidance, minimization and offset requirements to appropriately consider tribal treaty natural resources or tribally significant natural resources, and 2) additional flexibility needed to satisfy durability requirements for compensatory mitigation project design on tribal land.

The natural resources that require mitigation do not always include tribal treaty natural resources

or other natural resources that are not explicitly federally protected but are still significant to tribal traditional ways of life. For example, the tribe may choose to restore an area for a tribal traditional purpose that does not host listed species under the ESA or include waters of the United States (WOTUS) but are equally significant to the ecosystem in need of mitigation. Or the tribally significant resources may be deemed invasive for a mitigation purpose but needed for a tribal traditional purpose. Especially under NEPA scoping and related processes, tribes should be offered the opportunity to provide a list of natural resources that are protected by treaty or that are traditionally significant to that specific tribe.

2
Clarify alternative site protection mechanisms for tribes.



Additionally, a Secretarial order should clarify alternatives to conservation easements as site protection mechanisms for compensatory mitigation. Conservation easements are inappropriately narrow as the predominant mechanism for sovereign tribes to achieve long term mitigation of bank and offset sites. Conservation easements require a tribe to grant interest in their land to a third-party entity or another sovereign. Policies do not require such a rights transfer by state governments or federal agencies who establish compensatory mitigation sites. This focus on

easements is problematic for tribes because tribal land is a foundation of tribal existence and the means of tribal economic prosperity. Tribes are far more akin to federal agencies than private landowners. Thus, tribes should be provided alternative site protection mechanisms similar to those used by federal agencies on federal land. Alternative site protection mechanisms that departamental policy should recognize include tribal integrated natural resource management plans, intergovernmental agreements, multi-party agreements or memorandums of understanding.



3 Amend regulations to use rights-of-way authorities under FLPMA to allow Tribal co-management of mitigation sites on public lands.

Allowing tribal co-management of mitigation projects on public lands is an opportunity for the Department of Interior and USDA to further expand ongoing initiatives by both Departments to expand co-management relationships with tribes. If rights-of-way policy clearly allowed such a role for tribes, a tribe could plan projects and deliver needed offset, including for tribally important resources, then receive the funds for implementing the compensatory mitigation work. DOI is already making steady

progress on various co-management projects. This recommendation would simply extend that progress to compensatory mitigation. If BLM used rights-of-way authorities to grant a tribe the right to perform restoration work or a similar agreement,⁵ it would be similar to a long-term lease to a tribe, who could then take the lead on compensatory mitigation activities funded by the agency or private party responsible for the impacts elsewhere on public lands.

4 Create regulatory space for Tribal establishment of water resource mitigation banks under the CWA



Tribes can and have established compensatory mitigation banks under the Clean Water Act, but current EPA, Army Corps and Department of Interior mitigation regulations and policies make it difficult to do so and lack any focused consideration of tribal needs to play that role. For example, the 2008 Mitigation Rule states, “the final rule does not have tribal implications.”

Creating more regulatory clarity for tribes would help avoid confusion surrounding tribal jurisdiction and tribes’ ability to establish banks. Issues around tribal feasibility assessments, site protection mechanisms, overall understanding of tribal governments, and distinct consideration

of tribal needs by Interagency Review Teams (IRTs) should all be addressed. Additionally, there is ambiguity about whether tribes are considered a government entity, a private entity, or a different category entirely, in the mitigation rules and guidance. This distinction is important because of different ways that governments and private entities are treated under the 2008 rule. By definition, tribes are sovereign nations with the right to self-govern within their own territories. This should clearly extend to how a tribe is treated when it chooses to establish a mitigation bank to offset either tribal and non-tribal development impacts to wildlife, wetlands, or streams.

⁵ For more information, see Title V, FLPMA https://www.blm.gov/sites/blm.gov/files/AboutUs_LawsandRegs_FLPMA.pdf

⁶ See <https://www.lummi-nsn.gov/Website.php?PageID=66> (Lummi Nation Wetland and Habitat Mitigation Bank); <https://ecosystempartners.com/project/charles-etok-edwardson/> (Ukpeagvik Inupiat Corporation and Ecosystem Investment Partners partnership mitigation bank); <https://ecology.wa.gov/Water-Shorelines/Wetlands/Mitigation/Wetland-mitigation-banking/Mitigation-bank-projects/Shoalwater-Bay> (Shoalwater Bay Indian Tribe developing mitigation bank).

The Army Corps and EPA should add tribes to the mitigation rules and guidance, and clearly define that they are to be treated as government entities when sponsoring mitigation banks. Additionally, the agencies should provide training to IRTs on specific policy considerations that apply to tribes, including land ownership issues, tribal governments, and treaty right and culturally significant natural resource identification. Agencies and IRTs should also understand that tribes may have reasons for establishing mitigation banks that differ from private sector banks.

In addition to education and training, the agencies should consider encouraging tribal stewardship options for non-tribal banks. For example, encouraging bank owners to fund long-term maintenance and transfer responsibility for it to tribes who were either (1) traditionally in the territory prior to federal Indian removal policies, (2) currently reside in the area of the mitigation site, or (3) tribes who want to be the long-term stewards of the mitigation site. Tribes possess traditional ecological knowledge⁷ to help restore the water and land resources upon which their reservation resides and could use that knowledge to aid in wetland and habitat restoration overall.



5 Expand the existing regulatory space for Tribes in Fish and Wildlife Service mitigation policies.

The Services' recent policies mention tribes in meaningful contexts, as Bank sponsor/Mitigation sponsor; noting tribal land eligibility to provide offsets; recognizing that specific fish and wildlife resources have cultural significance to tribes; and including tribal governments as authorities along with Federal, state and local governments.

One significant mention is the Service's rescinded 2016 mitigation policy relating to the Endangered Species Act (ESA), mentions the challenge tribes face with durability requirements, specifically site protection, when it states: "Ensuring durability, particularly site protection, is usually a sensitive issue for a tribal nation because a conservation easement entrusts the land to another entity (Terzi 2012), but acceptable entities may be available to hold easements." (emphasis added).

However, as discussed above, the policy doesn't currently provide an alternative on this sensitive issue. Tribal use of conservation easements is inappropriate as a regulatory

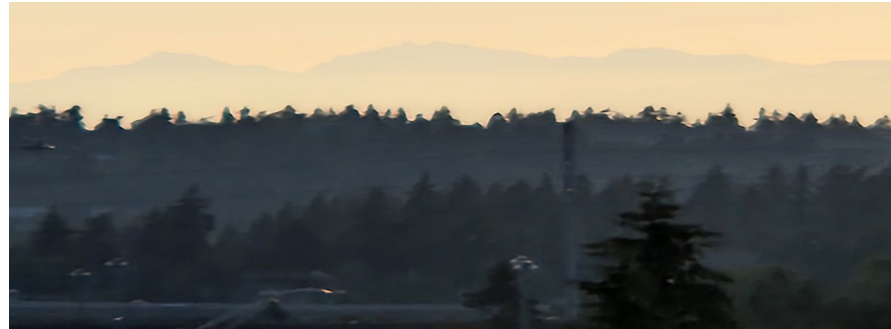
standard because it requires the tribe to give away an interest in their lands. There are more appropriate forms of site protection that would better serve a tribe pursuing a mitigation project on tribal land. Therefore, the Service should incorporate into forthcoming revised mitigation policies an expanded list of tribal site protection mechanisms that align with inherent tribal sovereignty. Such site protection mechanisms should include: intergovernmental agreements, integrated natural resource management plans, designation agreements, or memorandums of understanding.

The Service should also provide specific tribal guidance, opening up the opportunity for other agencies and the private sector to partner with tribes under the Service's compensatory mitigation policies. Moreover, the Service should include and highlight the potential for partnerships between the Service and tribes for compensatory mitigation on tribal lands that compensates for impacts to Service lands from development projects; this is an overlooked opportunity.

⁷ See <https://www.fws.gov/nativeamerican/pdf/tek-fact-sheet.pdf> (on the definition of traditional ecological knowledge).



Long-term Recommendations



I

Require greater coordination with Tribes during a project's scoping phase when there is the potential to impact tribal land or treaty resources.

Recently restored Bureau of Land Management policies are a good example of the need for development of more policy elements that are specific to tribes. BLM's policy and handbook chapter (first developed during the Obama administration) mentions tribal considerations and consultation approximately two dozen times. However, in almost every case, it is simply as part of a pro formalist that reads: "Federal agencies, Tribal, State, and/or local governments." This is not enough.

Specific tribal consultation should be incorporated into the standard processes of agency staff when planning projects, particularly in the scoping phase. This allows tribes to be directly involved as decision makers in project development, rather than being consulted or asked for a decision only as the project is being finalized.

Agencies should carry out intentional outreach to tribes during project and program scoping to encourage or understand tribal interest in providing compensatory offsets for future projects. President Biden's January 26, 2021 "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships" requested that all agencies submit action plans within 90 days and report on their progress within 270 days. While most action plans included minimal details and commitments, they are a step in the right direction. DOI's action plan⁸ includes strategies for hosting a consultation website, using technology to notify tribes, training for personnel on tribes and consultation, and updating the agency's consultation policy. CEQ's action plan⁹ establishes a goal on NEPA consultations, saying they will offer tribes "meaningful opportunities for input, including through formal consultation."

⁸ <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf>

⁹ <https://www.whitehouse.gov/wp-content/uploads/2022/01/CEQ-Tribal-Consultation-Plan-04.26.2021.pdf>

NEPA requires that tribes be treated as stakeholders similar to state and local governments. The challenge is that this guidance is often left up to interpretation by field staff, which can lead to inconsistencies in how staff engage with tribes. While CEQ’s action plan underscores principles of tribal sovereignty and recognizes the need for Nation-to-Nation engagement with tribes, it could do more to put in place standards for tribal engagement. The CEQ has commendably led roundtables that include opportunities for tribes to offer perspectives on NEPA and to generate specific recommendations. As outlined in the January 2021 memorandum, CEQ should follow up on this effort with a review every year to track how recommendations are being implemented and if they are improving outcomes for tribes around the NEPA process.

While DOI’s action plan highlights the need to engage with tribes early and often, these approaches will require effort to institutionalize at the field staff level. There should be personnel evaluation procedures, standards for performance, and monitoring and evaluation metrics based on the effectiveness of the procedure. This should also include an institutional commitment written in personnel manuals. Engaging with tribes in a project’s scoping phase not only allows tribes to engage in decision making

rather than being subject to agency decisions. It also gives tribes the opportunity to proactively identify and plan for restoration projects that could serve as advanced mitigation or a mitigation bank for the proposed project.

Finally, while there is existing EPA policy on consultation and coordination with Indian tribes¹⁰, the standards for the consultation process are implemented across each region (1-10) differently. Particularly, some regions have more procedures than others, which leads to inconsistent tribal consultation expectations across the board. There should be a uniform consultation procedure within the EPA that better identifies when meaningful consultation will take place. There should also be consideration for what a tribe would consider an appropriate time frame for consultation. For example, the EPA guidance on When consultation occurs advises that consultation should occur “early enough” to allow the tribes to provide meaningful input. However, lack of exact time frames on when an “early enough” time is appropriate leads to inconsistent consultation time frames throughout the regions and the appropriateness of a time frame is defined by non-tribal personnel without consideration of the challenges tribes may face in providing meaningful input.

2 Create funding and technical assistance opportunities for Tribes interested in implementing compensatory mitigation projects.



The Secretary of the Interior should develop or secure technical assistance resources to be able to enable more hands-on assistance for tribes interested in establishing their own restoration crews to implement compensatory mitigation projects on and off tribal lands. This would create jobs in tribal communities and give tribes the capacity to have more control over how projects are implemented on tribal land. Grants would need to be long-term with

a focus on capacity-building, rather than one-off funding opportunities. Tribal officials and representatives often have many competing priorities, so such a program should include staff that are dedicated to tribal outreach and technical assistance to prepare funding applications or proposals. Staff should also be knowledgeable of complementary federal grant and funding opportunities that tribes can access.

¹⁰ <https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>



3

Ensure cultural Tribal resources can be protected as environmental resources under the NEPA process.

Existing environmental laws can be limited for protecting tribal cultural resources, such as willow shoots in riparian areas or fish species that are not covered under the ESA. Historic preservation laws often do not apply easily to these resources either. The NEPA process should protect tribal resources at an ecosystem level, including considerations of how tribal resources can be offset if they are impacted. California state law AB52, which amends the California Environmental Quality Act, provides

a potential model. AB52 specifies that any project that may cause “a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment,”¹¹ and the lead agency must then consider measures to mitigate the impact.¹² This law has proved to be a powerful tool for protecting tribal cultural resources in California. CEQ should explore how to create a similar amendment to NEPA, which would likely take an act of Congress.

4

Define Tribal resources that cannot be mitigated.



Tribal codes and federal laws may have different standards on how much compensatory mitigation is enough to offset impacts, or if mitigation is even able to fully offset impacts. Federal agencies should ensure these standards are reconciled when implementing projects that impact tribal lands or treaty resources. The rescinded 2015 Presidential Memorandum, “Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment,” required federal agencies to recognize

some natural resources as irreplaceable, and therefore unable to be offset if they are damaged.¹³ CEQ should provide additional direction to federal agencies to hold consultations with tribes to determine the scope of resources to which damage cannot be offset and begin to identify standards. If a project may impact a resource that tribes claim cannot be mitigated the issue should be elevated to the Secretary’s office for consideration and give deference to the tribe on the determination.

¹¹ Pub. Res. Code § 21084.2 https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52

¹² Pub. Res. Code § 20184.3 https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52

¹³ Memorandum of November 3, 2015. Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment. <https://www.federalregister.gov/documents/2015/11/06/2015-28466/mitigating-impacts-on-natural-resources-from-development-and-encouraging-related-private-investment>

Conclusion

Tribes can play a leading role in the expansion of America's ecological restoration and mitigation industry, but in order for tribes to have that impact, they need more consideration in the policies that guide development permitting, offsets and mitigation. Tribes must be consulted by federal agencies on an appropriate timeline and given more pathways to develop compensatory mitigation projects on tribal lands. New efforts to clarify federal agencies' roles in tribal consultation are helpful, but more is needed to support tribal engagement and compensatory mitigation on tribal lands.

