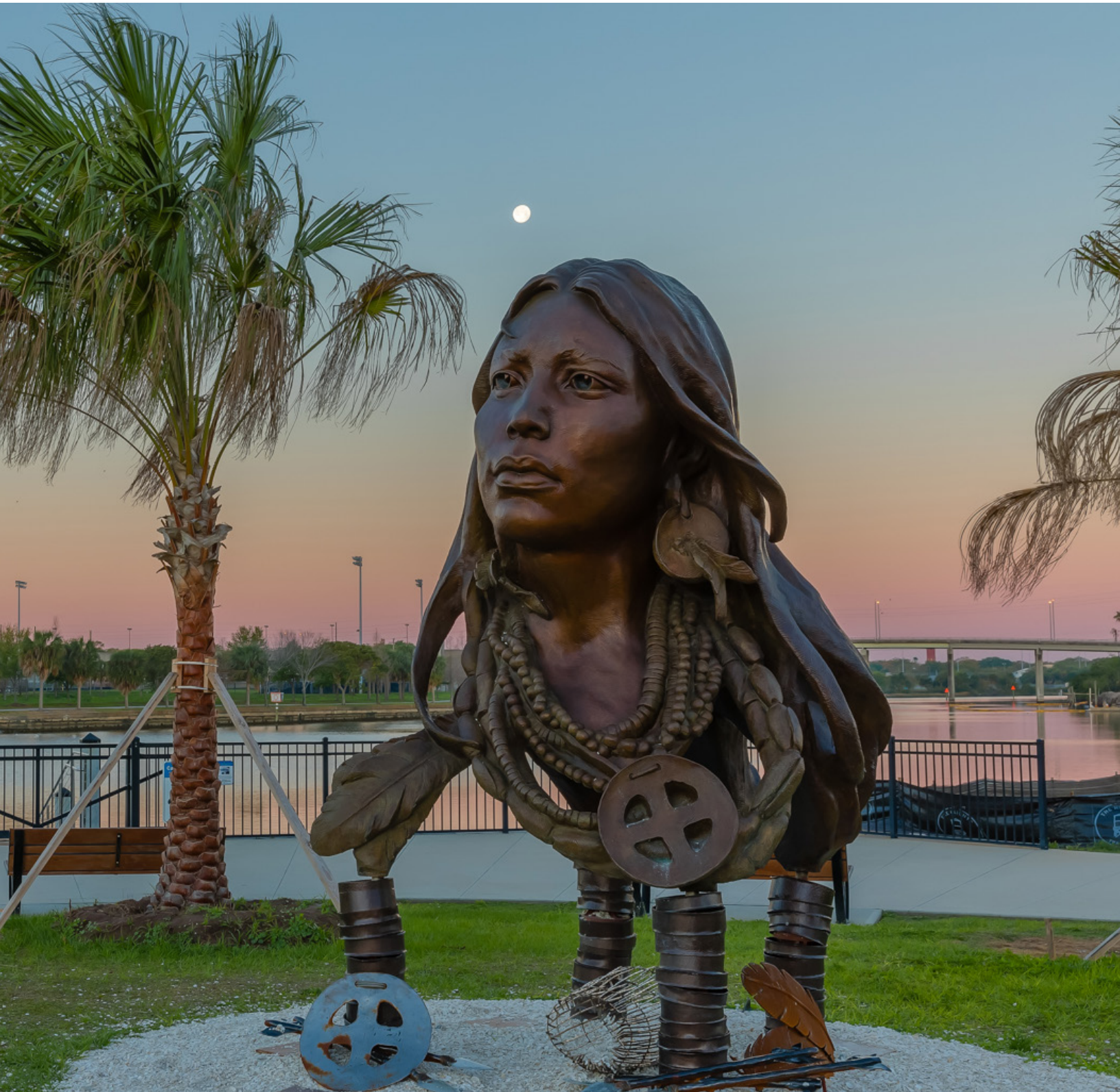
TRIBAL COMPENSATORY MITIGATION

Environmental Policy Innovation Center

NOVEMBER 2022



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ENVIRONMENTAL POLICY INNOVATION CENTER

The mission of EPIC is to build policies that deliver spectacular improvement in the speed and scale of conservation.

EPIC focuses on a narrow set of strategies:

- Improving policies that allow private sector funding or stewardship to expand or supplant public or charitable
- Conservation work
- Transforming government policies to focus on what matters—outcomes
- Eliminating the organizational barriers that prevent public agencies from adapting to 21st century solutions

We believe that innovation and speed are central to broadening efforts to conserve wildlife, to restore special natural places, and to deliver to people and nature the clean water they need to thrive. To achieve those goals, conservation programs must evolve to accommodate our modern understanding of human behavior and incentives and the challenges posed by humanity's expanding footprint. We embrace experimentation with novel ideas in conservation policy, to learn quickly from mistakes and iteratively design effective approaches to be even more successful.

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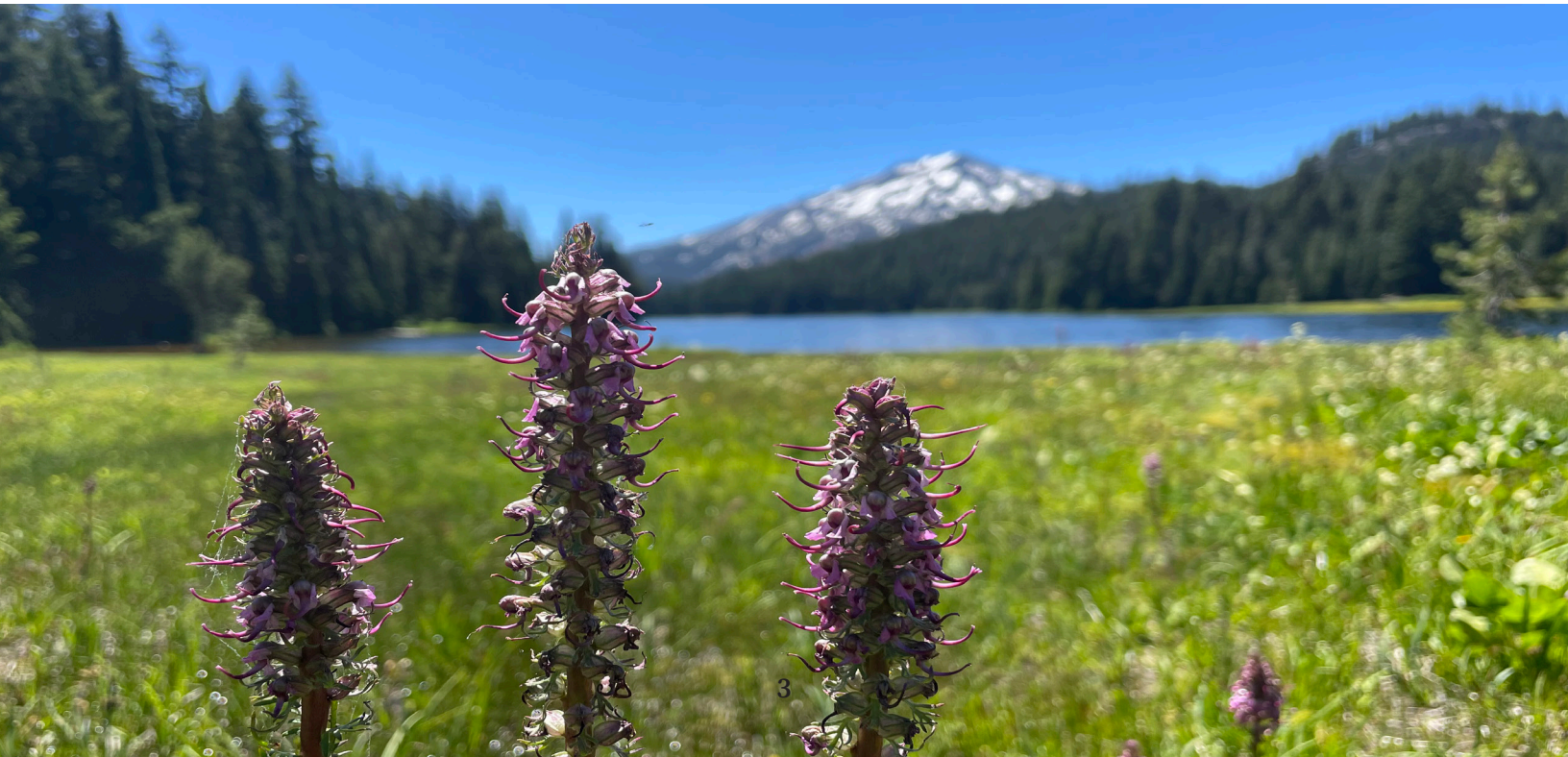
Table of Contents



EXECUTIVE SUMMARY

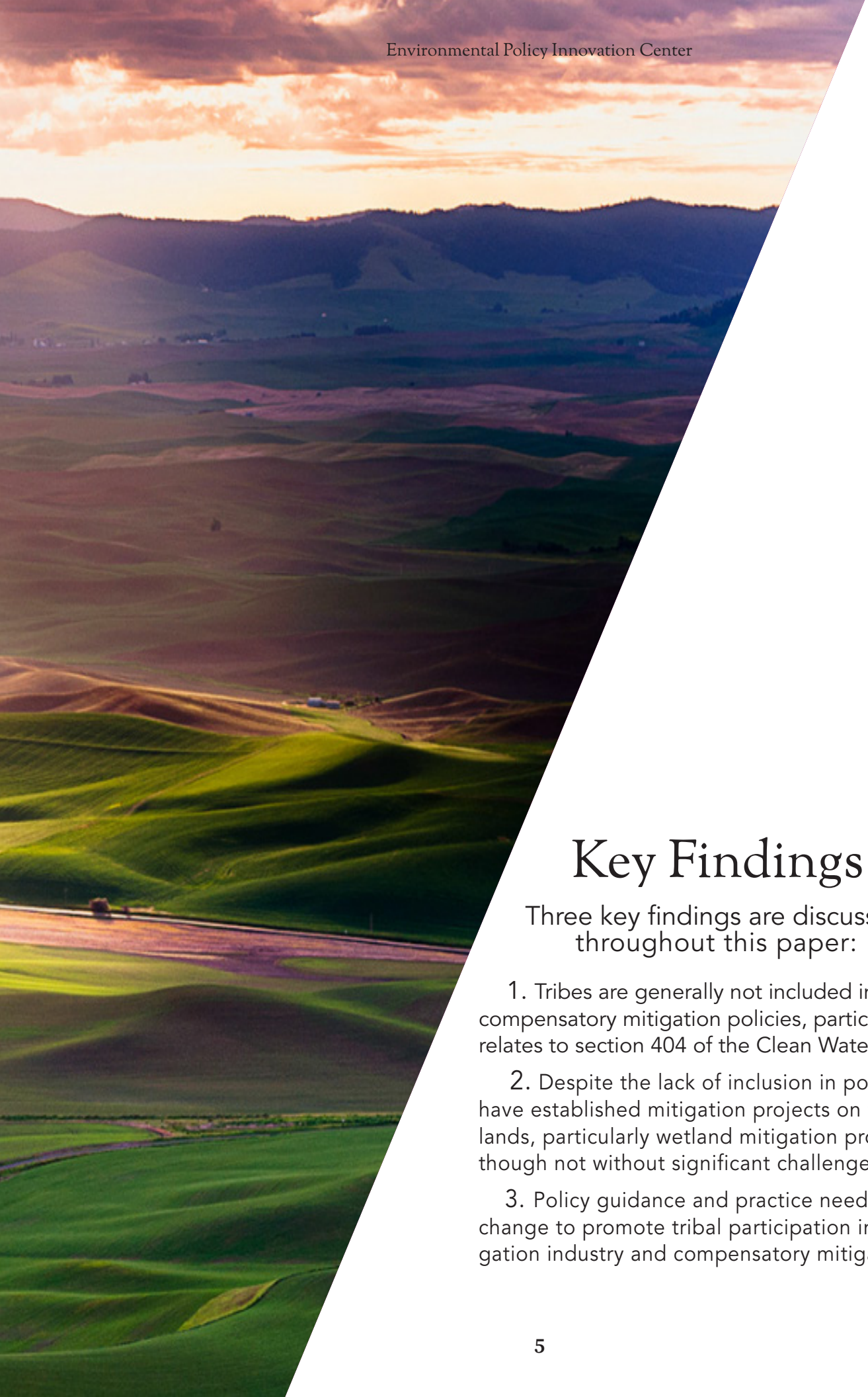
Environmental damage, climate change and the need for restoration does not discriminate against tribal lands. Tribal lands are subject to federal regulations and policies on environmental protections, including compensatory mitigation rules for current or future development impacts to natural resources. More and more, tribes strive to restore their lands and protect them for future generations. One new and valuable option for natural resource restoration on tribal land is compensatory mitigation. Compensatory mitigation is an environmental market that aims to restore and protect natural resources such as streams and wetlands, or endangered and threatened species.

Compensatory mitigation means the restoration, establishment, enhancement or preservation of aquatic resources for the purpose of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. Compensatory mitigation is achieved through mitigation projects such as (1) mitigation banks, (2) in-lieu fee programs, or (3) permittee responsible mitigation. Mitigation banks are preferred to deliver the outcome of no-net-loss to natural resources.

For a tribe[1], compensatory mitigation is a new exercise of tribal sovereignty over the restoration of natural resources, especially for the development impacts tribes create. The mitigation industry has not fully realized the potential role and opportunity tribes could have in compensatory mitigation. Tribal participation in compensatory mitigation has the potential to broaden restoration initiatives into tribal lands, launch meaningful partnerships, and engage in government-to-government collaboration on restoration initiatives. It also has the potential to promote implementation of tribal traditional ecological knowledge (TEK) into the techniques of restoration and protection of natural resources, preserving not only the traditional knowledge but the access to that knowledge and natural resources for future generations.

There is currently no specific tribal compensatory mitigation guidance across federal agency policies. This paper aspires to discuss what tribal compensatory mitigation guidance for tribes should look like based on current compensatory mitigation policies and guidance, tribal experiences with those policies (if any) and in consideration of the challenges tribes face due to federal Indian policies. It also aims to recommend federal policy changes to give tribes clear and fair opportunities to make use of compensatory mitigation practices and strategies.

[1] "Tribe" is used broadly in this paper, referring to the 574 federally recognized tribes and Alaska Native Corporations (ANC) in the US. We acknowledge that ANCs are different from the lower 48. The focus of this paper is geared towards the lower 48, as that is where the majority of the tribal mitigation projects exist.



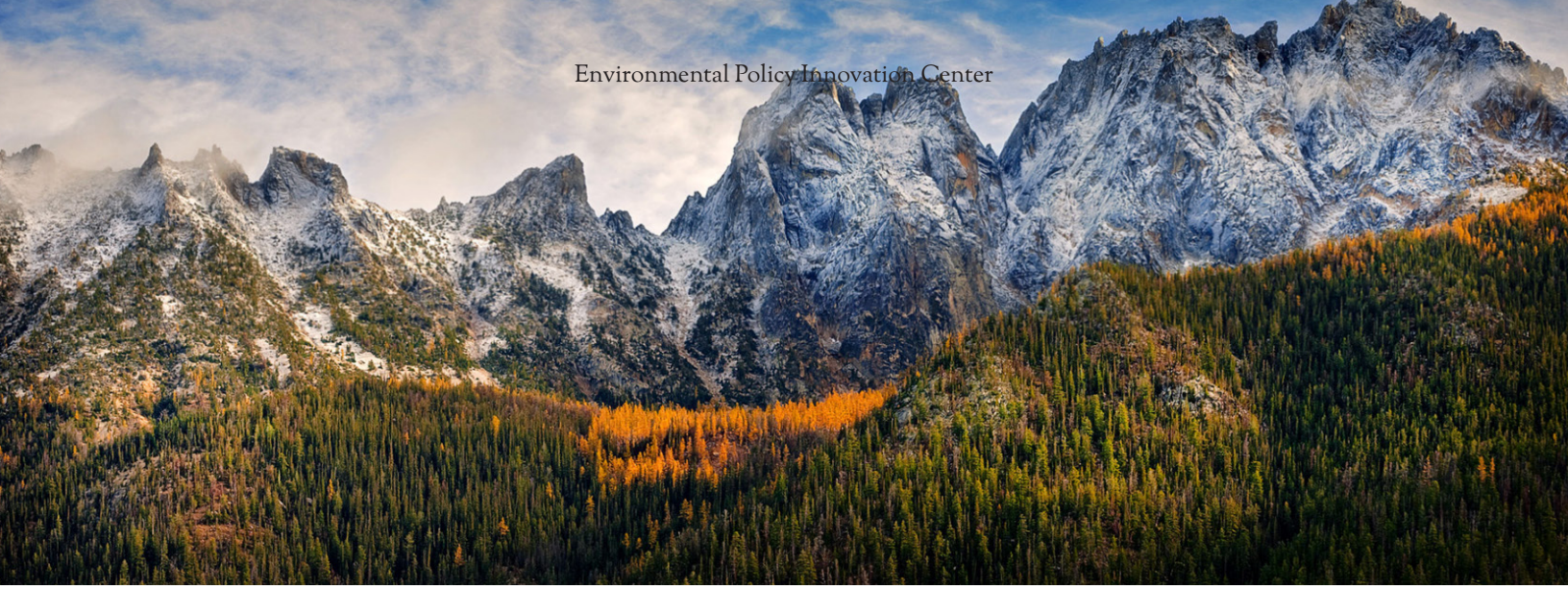
Key Findings

Three key findings are discussed throughout this paper:

1. Tribes are generally not included in federal compensatory mitigation policies, particularly as relates to section 404 of the Clean Water Act.

2. Despite the lack of inclusion in policy, tribes have established mitigation projects on tribal lands, particularly wetland mitigation projects, though not without significant challenges.

3. Policy guidance and practice need to change to promote tribal participation in the mitigation industry and compensatory mitigation.



Introduction

This paper is not intended to create guidance that is applicable to each and every individual tribe, because there no one-size-fits-all for the 574 federally recognized tribes and the state recognized tribes. Nor is the goal of this paper to create hard lines in policy and practice that apply to tribes, as they are sovereign governments and will exercise their sovereignty as they see fit in establishing their compensatory mitigation projects. Rather, the goal of this paper is to raise the visibility of tribal participation in compensatory mitigation and the mitigation industry as a whole.

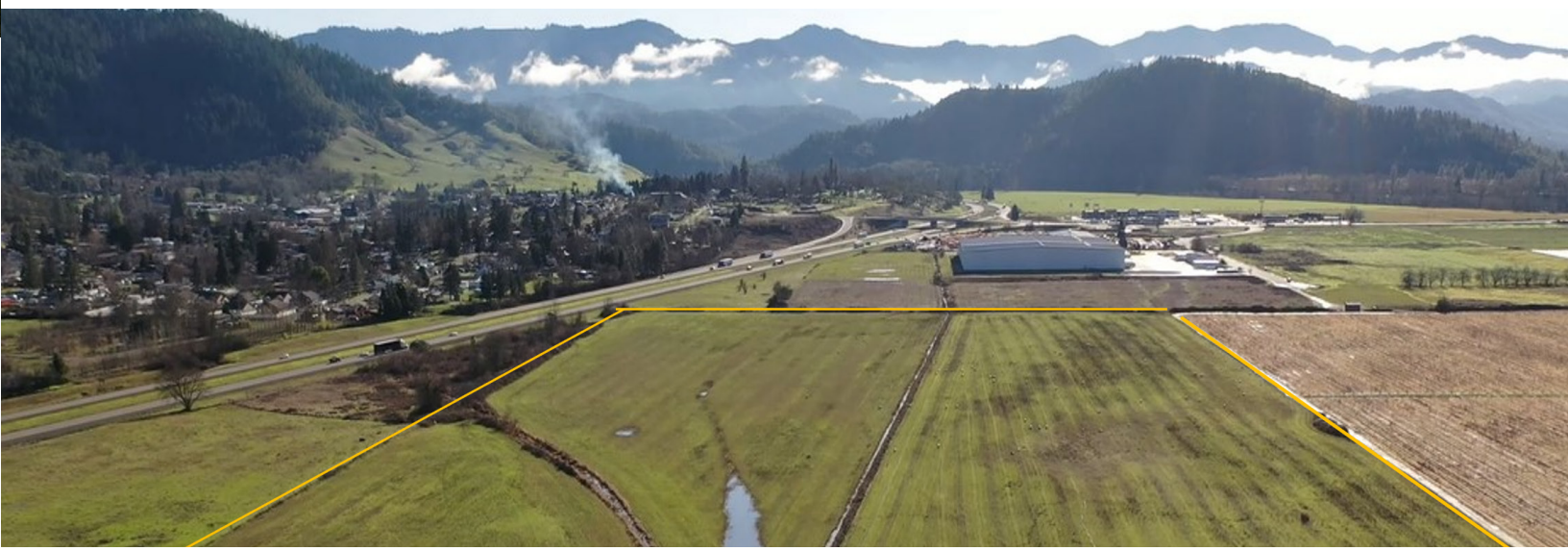
For the past 15 years, there has been very little research or guidance released on tribal mitigation projects or participation. Research specific to tribal participation in compensatory mitigation is important and needed; tribes have established their presence in the environmental market of wetland compensatory mitigation, and there is a lot to be learned from their experiences. Additionally, with proper guidance and treatment of tribes under compensatory mitigation policies across the different environmental markets, tribes could play a big role in the expansion and success of the mitigation industry.

Tribal participation in compensatory mitigation

Up to this point, tribal participation in compensatory mitigation projects has been an act of tribal resiliency. The few tribes who have established or are working towards the establishment of a compensatory mitigation project on tribal land have managed to navigate a regulatory program with policy that is un-inclusive to tribes beyond mere consultation. This paper is primarily concerned with compensatory mitigation under section 404 of the Clean Water Act, which focuses on wetlands, streams and other aquatic resources (i.e., Waters of the United States, or WOTUS).[2] All of the examples of tribal compensatory mitigation we researched concern section 404 of the Clean Water Act. To date, we have not located any tribal conservation (i.e., species) banks, but they may prove a good opportunity for tribes to engage in.

[2] The definition of WOTUS has changed a few times, and yet another shift is likely to happen in 2022 following the Supreme Court's consideration of the case, Sackett v. EPA; the definition of WOTUS affects where compensatory mitigation will be mandated.

The case studies reveal the few tribal compensatory mitigation projects and their purpose for establishment. Many of the projects are solely owned and operated by the tribe, while others are owned and operated in a partnership with a non-tribal entity. All of the compensatory mitigation projects are on tribally owned land, whether the land is in fee, in trust or acquired in some fashion. The majority of the mitigation site land starts out in tribally owned fee land and the decision to transfer the land into trust land status is the tribes. Of course, with tribal land comes complexity. While this paper shares case studies of tribal mitigation projects, we encourage anyone wanting to learn about tribal participation in compensatory mitigation to reach out to the tribes themselves. What the tribes have done is nothing short of phenomenal for the prosperity of their people, natural resources and future generations.



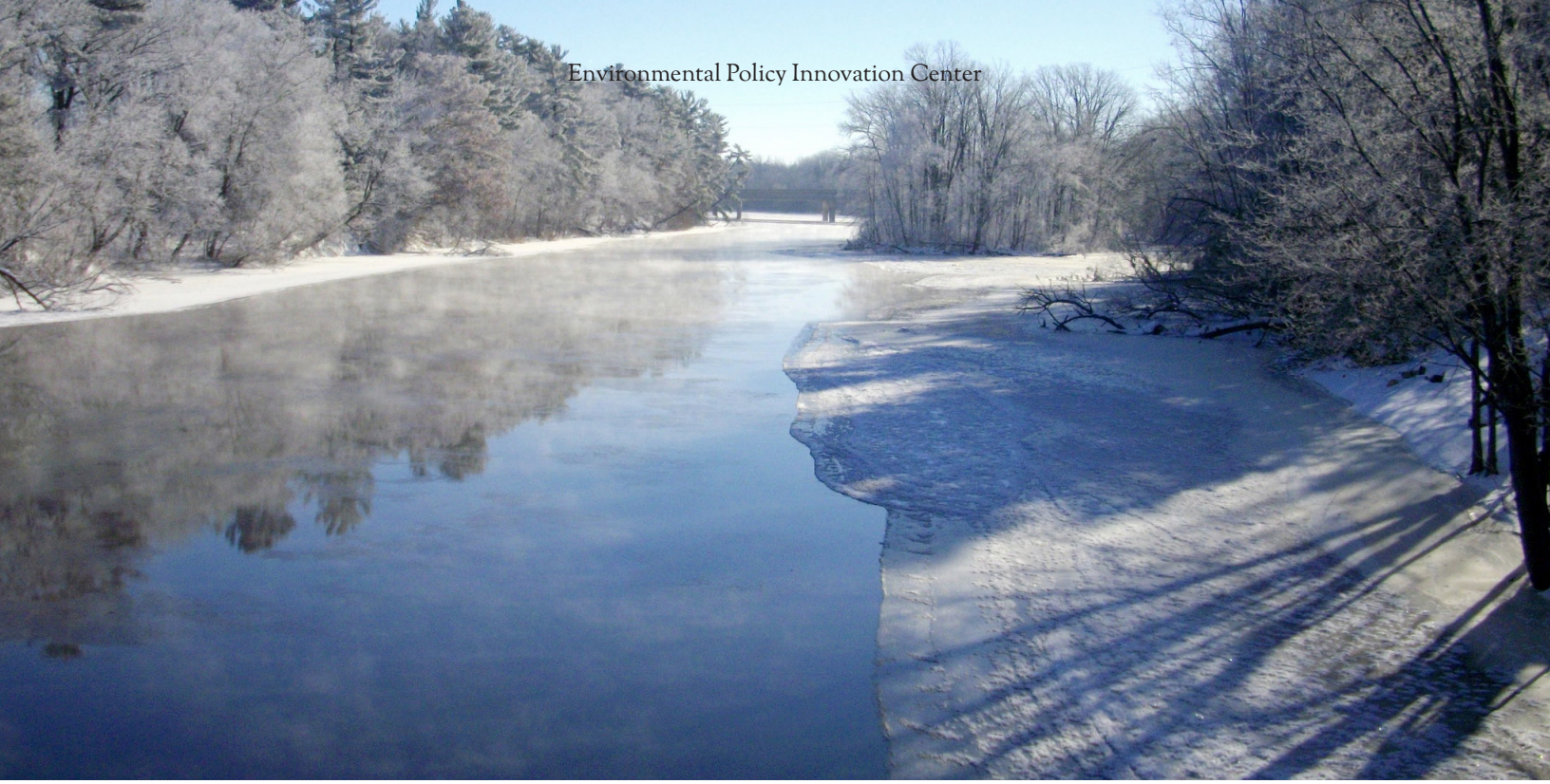
Current compensatory mitigation policy

What is compensatory mitigation?

Compensatory mitigation is a mechanism to offset unavoidable adverse impacts to natural resources protected by various regulations and federal agencies. Tribes have already established compensatory mitigation projects under section 404 of the Clean Water Act, and another market worth exploring is conservation banking under U.S. Fish and Wildlife Service.

What is an environmental market?

An environmental market is an approach to incentivizing conservation by allowing the transfer of responsibility for mitigating the development impacts to natural resources from a developer to a mitigation sponsor through the use of an established mitigation project with mitigation credits available for sale. There are different kinds of environmental markets such as forest carbon, water resources, and endangered species and habitats. These markets are designed to address the conflict between permitting development and remedying the impacts to natural resources.



Clean Water Act Mitigation Policy

Section 404 of the Clean Water Act established a program to regulate discharge, dredged or fill material into Waters of the U.S. (WOTUS), such as wetlands, streams, or other aquatic resources.[3] Impacts to WOTUS are prohibited unless a permit for the discharge is issued by the Army Corps of Engineers (Army Corps). By definition, compensatory mitigation is the restoration, establishment, enhancement or preservation of aquatic resources for the purpose of offsetting losses of aquatic resources resulting from activities authorized by the Army Corps permits.[4] Developers who apply for a permit under the program have to show that steps have been taken to avoid or minimize adverse impacts, and if there are residual adverse impacts, then compensate for all remaining unavoidable impacts from development. The main authority is the 2008 Mitigation rule[5] and additional guidance is offered in white papers or articles, and by the 38 Army Corps districts, or by state mitigation program agencies.[6] The 2008 mitigation rule has potential to be interpreted 38 different ways, owing to the presence of 38 Army Corps districts. There are over 2,400 compensatory mitigation banks that are either pending, approved, sold out, or withdrawn listed on the Regulatory In-Lieu Fee and Bank Information Tracking System (i.e., RIBITS) and 7 of those involve tribes.

[3] Environmental Protection Agency, Background about Compensatory Mitigation Requirements under CWA Section 404, Section 404 of the Clean Water Act (Mar. 17, 2022) https://www.epa.gov/cwa-404/background-about-compensatory-mitigation-requirements-under-cwa-section-404.

[4] US Army Corps of Engineers, Compensatory Mitigation Rule brochure (April 2008) https://www.nae.usace.army.mil/Portals/74/docs/regulatory/Mitigation/MitigationRuleBrochure.pdf.

[5] This rule is the final rule issued by the Department of Defense, Department of the Army, Corps of Engineers and the Environmental Protection Agency. The specific references for this rule by section are 33 C.F.R. § 325 and § 332, Department of the Army, Corps of Engineers; and 40 C.F.R. § 230, Compensatory Mitigation Losses of Aquatic Resources.

[6] US Army Corps of Engineers Headquarters Website, Mitigation Information, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/mitig_info/.

In the 2008 Mitigation rule, tribes are mentioned twice in sections 332.8(f)(ii) and 230.98(f)(ii), with regard to government-to-government consultation with a tribe on a deadline extension for the review process or dispute resolution. The policy is limited to including tribes as a stakeholder, rather than as a participant or provider of mitigation. Current compensatory mitigation policy and guidance for establishing a mitigation project speaks only to private landowners, private mitigation firms or government entities and federal lands.

U.S. Fish and Wildlife Service and Endangered Species Act Mitigation Policies

The US Fish & Wildlife Service (Service) issued mitigation policies in 2016. These policies were rescinded in 2018 and are expected to be re-issued in late 2022. The Service issued two compensatory mitigation policies: a general mitigation policy , and an Endangered and Threatened Species mitigation policy. The Service's second mitigation policy explicitly mentions that tribal lands are eligible for compensatory mitigation[7]. The issue is that the policy articulates potential challenges for tribes on site protection but offers no further guidance for a tribe.

The policy points out that site protection on tribal lands is a sensitive issue for tribes and further articulates tribal concerns of using a conservation easement as site protection (for more on site protection, see "Site protection mechanisms" later in this paper). But it does not provide a solution that would serve tribal sovereignty and participation. Site protection is a core challenge that can make or break tribal participation because tribes may be averse to giving up an interest to their land (conservation easement), giving up title to their land (transfer of title) or granting a restrictive deed (which can become problematic with an access easement). Additionally, the policy and guidance do not consider the history or circumstances of tribes and land ownership.

At the time of this writing, it is hard to speculate whether the new policies or a new rule will adequately consider tribal circumstances in compensatory mitigation. Most of the rescinded policy mitigation requirements echo wetland mitigation policy and guidance with regard to where tribes face heightened challenges. However, the Service could lead the way in providing adequate consideration and appropriate avenues for tribal participation in conservation banking that both protect and restore endangered species, and equally serve tribal sovereignty.

[7] U.S. Fish and Wildlife Service Endangered Species Act Compensatory Mitigation Policy § 6.2.1 Lands Eligible for Use as Compensatory Mitigation and § 6.2.5 Compensatory Mitigation on Tribal Lands.

Federal Indian law and policy timeline

The eight eras of federal Indian policy (detailed below) affect tribal actions, treaty rights, land ownership and interactions with other U.S. policies today. The descriptions in this section illustrate the history of U.S. Federal government discriminatory and genocidal treatment of tribes. We offer this background as a way to put into context the compensatory mitigation policies and tribal approaches discussed throughout the paper. These descriptions were consolidated from several federal Indian policy references[8] but are offered as a simplified overview.

Tribal sovereignty (1400-1789)

Tribal independence prior to the arrival of Christopher Columbus in 1492. Disease introduced by the Europeans devastated tribal nations and violence between tribes and settlers increased. A pattern of invading tribal territory and the European quest for land began.

Early Republic (1789-1828)

Tribes were viewed as separate nations and negotiations were done by treaty. The U.S. Constitution placed Indian Affairs authority with the federal government to regulate commerce and treaty making. Indian affairs was initially placed with the War Department and later moved to the Department of Interior in 1849.

Removal Era (1828-1860)

The European demand for land grew with westward expansion. Tribal sustenance resources were killed off to create tribal dependency on the federal government for rations.[9] Indian removal gradually developed from theory into policy with the Indian Removal Act of 1830.[10] The Trail of Tears is the best-known example of forced removal and ultimate displacement of many eastern tribes. This era saw the creation and applicability of the European laws of conquest and the doctrine of discovery to tribes through the judicial branch. The basis of the Supreme Court's approach to tribes was formed with three foundational cases collectively referred to as the Marshall Trilogy.[11]

[8] Tudith V. Royester et al., Native American Natural Resources Law 71-78 (4th ed. 2018); Indian Land Tenure Foundation, Land tenure history, https://iltf.org/land-issues/history/.

[9] For example, between 1830-1885 an estimated 40 million buffalo were killed, forcing dependance of the Sioux Nation on federal government rations.

[10] President Andrew Jackson signed the act on May 28, 1830, expanding southern frontier in Alabama and Mississippi, pushing Indian land westward into Oklahoma.

[11] Johnson v. McIntosh, 21 U.S. 543 (1823) (tribes only have a right to occupancy); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (tribes are not foreign states but "domestic dependent nations" whose relationship with the United States resembles a ward to his guardian); Worchester v. Georgia, 31 U.S. 515 (1832) (tribes are distinct political communities, having territorial boundaries, within which their authority is exclusive. States do not have authority in Indian Country).

[12] Department of Interior Bureau of Indian Affairs, What is the federal Indian trust responsibility (Nov. 08, 2017), https://www.bia.gov/faqs/what-federal-indian-trust-responsibility

The federal Indian trust responsibility was created with Cherokee Nation v. Georgia in 1831. It is a legally enforceable fiduciary obligation the U.S. has to tribes with "moral obligations of the highest responsibility and trust."[12] This doctrine remains at the center of numerous Supreme Court cases to date. The obligation involves the protections of tribal treaty rights, lands, assets and resources.

Reservation Era (1850-1887)

Federal Indian policy shifted to creating reservations to deal with the "Indian problem". Indian reservations are exclusive land base territories carved out of aboriginal lands (in some cases) for tribes to "exist". Reservations ensured the separatism of tribes with the recognition of autonomy over the reservation territory to this day. The federal government continued its practice of land cession and reservation agreements through federal statute or executive order. Treaty making with tribes officially ended in 1871. The Major Crimes Act was enacted by Congress, creating federal criminal jurisdiction for certain major crimes between Indians occurring in Indian Country.[13]

In addition, in 1869, a federal policy to "kill the Indian, save the man" was adopted by President Grant called the Peace Policy. Under this policy, Native American children were forcibly removed from their homes and taken to Christian and government run Indian boarding schools in an effort to assimilate Native American children and execute cultural genocide.[14]

Allotment and Assimilation (1871-1934)

This was an era of devastation to reservation lands. In 1887, the General allotment Act (Dawes Act)[15] was enacted with the purpose of promoting assimilation of tribes. Allotment replaced communally owned tribal land into individual tribal member ownership.[16] 118 reservations experienced direct allotment and by the end of allotment in 1934, two-thirds of allotted land (27 million acres) passed into the ownership by non-Indians. In addition to allotment of tribal lands, the Dawes Act also authorized the disposal of "surplus" tribal lands that were left over after allotments where made. Of the 118 reservations subject to allotment, 44 reservations had their surplus lands opened to non-Indian settlement. Approximately 60 million acres of tribal trust land was lost to surplus land cession.

[13] Major Crimes Act 18 U.S.C. § 1153, Ex Parte Crow Dog 109 U.S. 556 (1883) (the general laws of the United States extend to Indian Country); Kagama 118 U.S. 375 (1886) (All Indians committing against the person or property of another Indian or other person of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, within any territory and either within or without the Indian reservation, are subject to the exclusive jurisdiction of the United States).

[14] Native American Rights Fund, Boarding School Healing, https://narf.org/cases/boarding-school-healing/.

[15] General Allotment Act 25 U.S.C.A. 331 (1887).

[16] Individual allotments were 80-160 acres and initially held in trust by the federal government for 25 years. At the end of the allotment trust period, the individual allottee was expected to have assimilated and the patents in fee meant the land could be sold, encumbered and taxed. Many individuals unable to meet the financial obligations lost their lands in sale to non-Indians, fraud or sheriffs auctions for nonpayment of taxes.

As a result of the land cession programs implemented in this era, tribal reservations today suffer from checkerboarding and fractionation of land ownership interests. Checkerboarding is when a reservation consists of several types of land tenure on the reservation, including allotted land that is owned by both tribal members and non-Indians.[17] The land ownership status of reservation land resembles a checkerboard. On the other hand, fractionation is when the owned land within a reservation has highly fractionated land interests in a single parcel of land. Fractionation makes development difficult because the consent of each interest owner is needed for sale or development.

The Supreme Court of this era contributed to the development of the reserved rights doctrine, recognizing that tribes retained important property rights in natural resources; these rights were implied and necessary to fulfill express reservations made in signed treaties.[18] Furthermore, in 1924 the Indian Citizenship Act was passed, giving Native Americans official citizenship to the U.S.

Reorganization Era (1928-1950)

In 1928 the Meriam Report was released expressing the impact of the economic, social and cultural devastation to tribes from the allotment policy. In 1934, Congress officially ended the allotment policy in passing the Indian Reorganization Act (IRA). This declared a new era of federal Indian policy for the protection of tribal lands and encouraging tribal self-government. Importantly, Section 5 of the IRA authorized the Secretary of Interior to take lands back into trust status and add lands to existing reservations. However, the IRA did not restore surplus lands to tribal ownership or attempt to return lost allotments to tribes or allottees. The IRA also provided a mechanism for tribes to organize as a constitutional government and obtain business charters.

Termination Era (1945-1970)

This era was a reversal of the reorganization era and focused on immediately making tribal members subject to the same laws of all other citizens. This was an attempt to end the federal trust relationship between tribes and the federal government. A series of termination acts between 1952 and 1962 saw the termination of the federal trust relationship with 109 tribes. In addition, in 1953, Public law 280 was enacted and subjected tribes in six states to full civil and criminal jurisdiction of the state and authorized all other states to take steps to assume jurisdiction. Many tribal governments were disbanded, and many reservations were abolished.

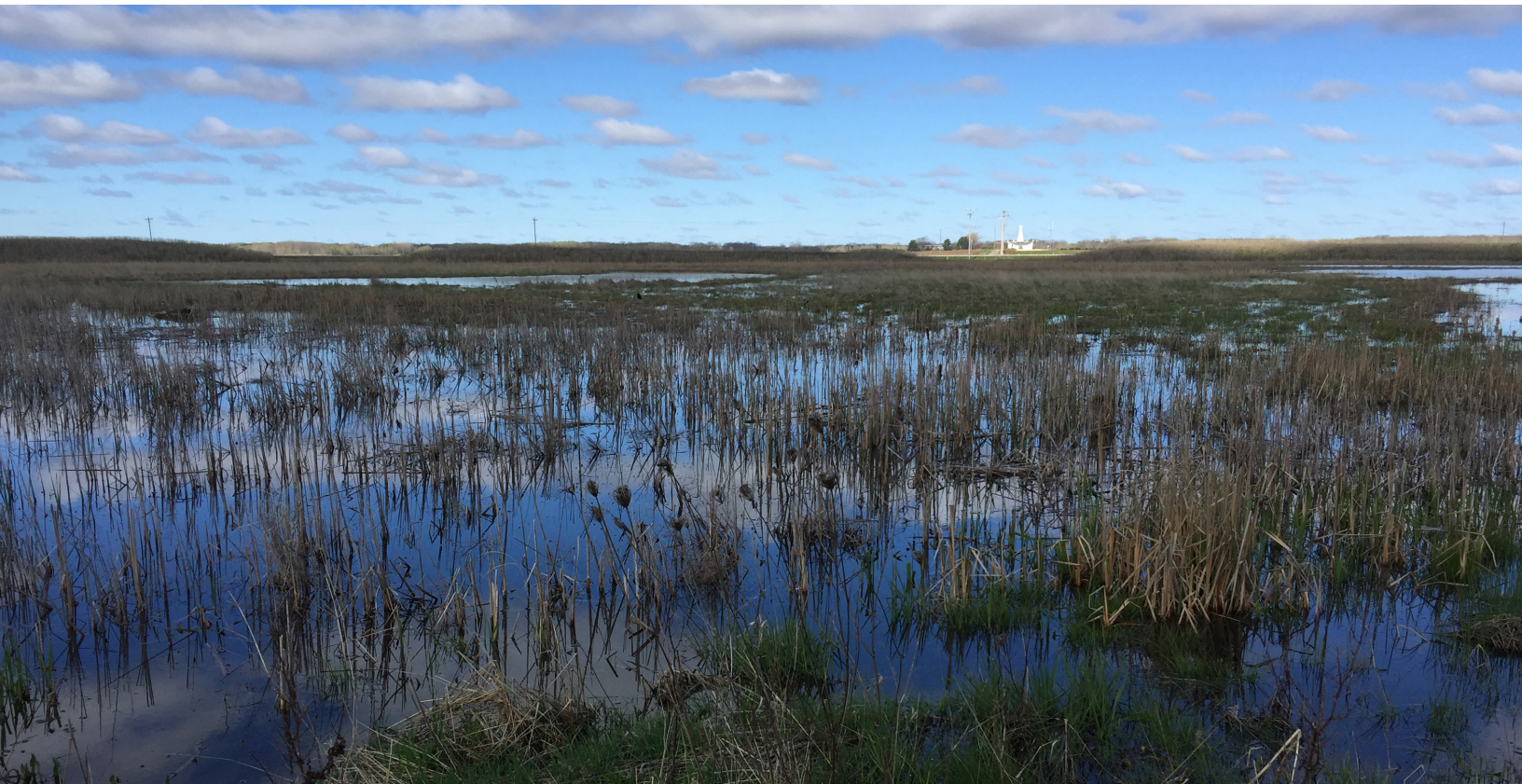
[17] Types of land tenure within a reservation can include tribally owned fee land, individual tribal member owned fee land, tribal trust land, individual tribal member owned trust land, restricted fee lands, and non-Indian owned lands.

[18] United States v. Winans, 198 U.S. 371 (1905) (This case recognized Indian implied rights to water, but not how much. The water right settlements are still taking place to date).

Self-Determination Era (1968 – Present)

When the Civil Rights Movement began to sweep the nation, federal Indian policy took a turn against forcible assimilation of tribes and tribal members. In 1968 Congress enacted the Indian Civil Rights Act (ICRA) providing states could not assume Public Law 280 (assume jurisdiction in Indian Country) without tribal consent. In 1970, President Nixon issued the very first formal presidential policy on Indian affairs, calling for the encouragement of tribal self-determination and management of reservation affairs. In 1974, Congress responded with a series of acts restoring many of the terminated tribes to federal recognition and major legislation including the Indian Financing Act of 1974 and the Indian Self-Determination and Education Assistance Act of 1975. Notably in 1980, the Environmental Protection Agency (EPA) became the first federal agency to implement an official Indian policy that expressed the EPA's commitment to working with tribes. In 1983, President Reagan reaffirmed Nixon's policy and added the concept of "government-to-government" relationship between tribes. U.S. Presidents George H.W. Bush, George W. Bush, and William Clinton reaffirmed this policy. In addition, President Obama issued the "Apology to Native Peoples of the U.S." in 2009.

Between the 1970 and 1990, while the executive branch supported Indian self-determination, the Supreme Court pursued a conflicting approach in a series of cases limiting tribal jurisdiction in different respects. In particular, the Supreme Courts certiorari (review) process has an acute effect in Indian law throughout the self-determination era delivering a variety of opinions that both uphold and diminish tribal sovereignty and jurisdiction. The Supreme Court continues to be, in some cases, contradictory in their holdings on tribal sovereignty, lands and jurisdiction to date.

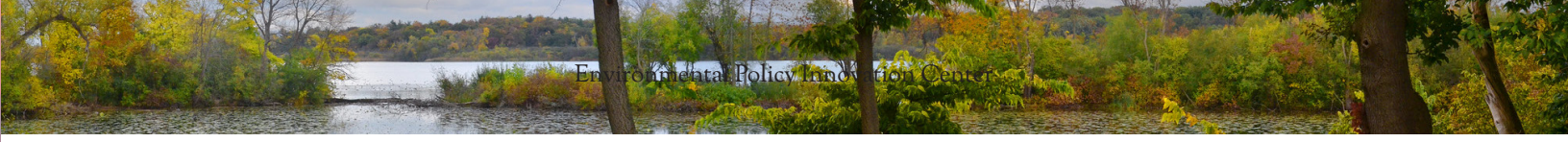


Traditional perspective on impacts to natural resources

The concept of compensatory mitigation may be antithetical to traditional notions of protection and preservation of natural resources, especially for future generations. This perspective may not be representative of all traditional or tribal perspectives on preserving or impacting natural resources, but it comes up when attempting to harmonize tribal participation with compensatory mitigation. Generally, the traditional perspective of preserving and protecting natural resources is conservation or preserving the natural resources in their current condition, even if impacted. Whereas the concept of compensatory mitigation focuses on restoration or attempting to return the natural resources back to their original condition prior to any impact. Put bluntly, the line of thinking may be, if there is no impact to natural resources to begin with or currently, there is no need to restore the natural resources or provide offsets to adverse impacts to natural resources. This proposition in black and white is true, however the reality of today's world is most of our natural resources have been impacted or are threatened to be impacted. More importantly, those natural resources are in need of restoration, even if they were conserved.

It is more than fair for a tribe to have an unfavorable perspective towards the concept of compensatory mitigation. However, as the exercise of tribal sovereignty shifts and grows into new areas of economic development, restoration and tribal prosperity, what about the impacts to natural resources that tribes themselves cannot avoid? Tribes are not exempt from the federal regulations and protections to natural resources including water and endangered species. Due in large part to the reservation era, tribal reservations may be located on an abundance of natural resources subject to federal protections. Some tribes are located on areas with wetlands or streams; others are located in drier climates that may have listed endangered species. Similar to private mitigation, tribes have the option to buy and sell lands, but that takes an immense amount of time and is accompanied by red tape with the Department of Interior.

The general notion is, if a tribe needs to develop on their land and creates an unavoidable adverse impact to natural resources (after avoidance and minimization of those impacts) because of the development (current or future), the tribe may need to buy a mitigation credit(s) from a compensatory mitigation project sponsor (probably off reservation). Mitigation credits are not cheap and if the development impact to natural resources on the tribal land is continuous, it may be a better option for the tribe to develop their own compensatory mitigation project on tribal land. This creates a streamlined process for tribal members seeking mitigation credits. Additionally, the tribe could develop the compensatory mitigation project on tribal land solely to sell credits to themselves (privately) or to anyone in their service area (commercially). Thus, a tribe could reap the ecological and economic benefit from owning and operating a compensatory mitigation project on tribal land. Although compensatory mitigation may be at odds with traditional perspectives of natural resource protection and preservation, it is a viable option.

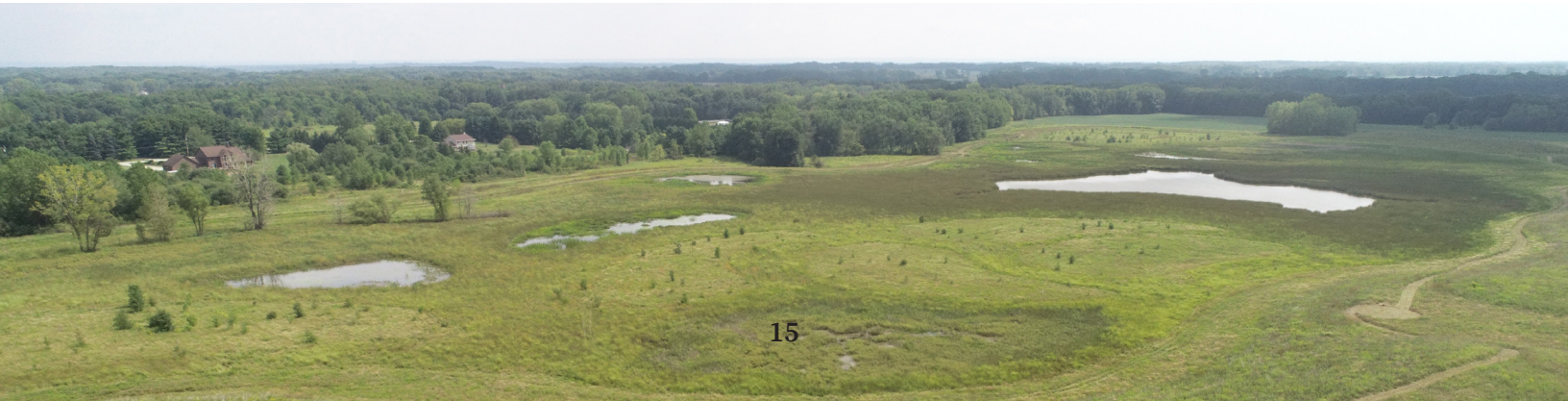


Rationale and legal authority for compensatory mitigation on tribal lands

Generally, the regulations, policies or guidance pertaining to tribes stems from federal Indian policy that was established through legislation or judicially created precedent. Here however, as highlighted throughout this paper, there are no direct policies or guidance pertaining specifically to tribes in either federal Indian policy or in compensatory mitigation policies and guidance. So, if there is no policy for tribes, why consider compensatory mitigation on tribal lands? To exclude a tribe from participation in compensatory mitigation is an overlooked opportunity to carry out valuable restoration of natural resources. Tribes have a role to play in the mitigation industry, whether it is as a developer who is responsible for offsetting unavoidable adverse impacts, or as a compensatory mitigation project sponsor. What we have not seen, which is also an overlooked opportunity, is the tribe being a long-term manager or steward of the mitigation site after the life of the mitigation project.

Despite the overall lack of mitigation policy for tribes, there are pieces of federal Indian law and policy that effect tribal participation. Many of the challenges stem from several eras of federal Indian policy (explained above) that never contemplated tribal restoration efforts. Some examples would include the definitions and nuances of tribal sovereignty, tribal land tenure status and ownership, tribal self-governance, Indian water right settlements, tribal natural resources development or conservation, and economic development. These definitions and nuances will look completely different for each tribe, as each tribe is completely different and that is where tribal compensatory mitigation can become complex.

What is clear is tribes are subject to federal compensatory mitigation regulatory programs for the protection and restoration of natural resources. Tribal establishment of a compensatory mitigation project on tribal land would therefore be established under the applicable federal policy and guidance for compensatory mitigation. Additional authority over the mitigation project on tribal land could come from tribal codes. The tribal right to self-governance includes the right to legislate and enforce enacted law within tribal territories. A tribe could enact codes or laws that relate to the management, maintenance and overall life of the mitigation project on tribal land. Examples of tribal codes that could include mitigation oversight, rules, preferences and approaches include a natural resource code, a cultural resource code, land use and zoning code, and/or a financing code. None of these codes have to be enacted for the ownership or operation of a tribal compensatory mitigation project on tribal land, but it is good practice for a tribe to establish their own authority through their own legislative and judicial exercises of government.



The mitigation project, particularly a bank, will be governed by a mitigation bank instrument (MBI) which is the legal document to which all parties to the interagency review team (IRT) agree. The MBI details the specifics on the 12 fundamental components of a mitigation project, includes appendices and for a tribe, all the uniqueness that accompanies tribal compensatory mitigation. Some examples include express reservations of treaty rights, citations to tribal authorities, justifications on the tribe's ability to handle the mitigation project, unique land ownership or project operation details and sometimes, partial waivers of sovereign immunity.

One question that may be of interest is how does the structure of an IRT look for a tribal mitigation project? The Army Corps establishes an IRT to review and manage proposed mitigation banks or in-lieu fee projects.[19] This can include reviewing and ensuring the 12 fundamental components of a proposed mitigation project meet policy standards. The IRT can consist of the Army Corps district representative, and representatives from the Environmental Protection Agency, Fish and Wildlife Service, National Oceanic and Atmospheric Administration Fisheries and other federal agencies, state regulatory and resource agencies and tribal representatives.[20]

To conclude, to say there is no authority for tribes under current compensatory mitigation policies and guidance is partially true. It is one thing to be subject to federal regulations for compensatory mitigation, and another to have navigable guidance for establishment of a mitigation project as a tribe. The reality is that tribes are subject to federal regulations and will engage in acts of resiliency to establish compensatory mitigation projects on tribal lands. This is not to say the policy won't change and it should. Instead of a tribe navigating the process with policies and guidance that does not include them, they should be navigating a process that does include them.

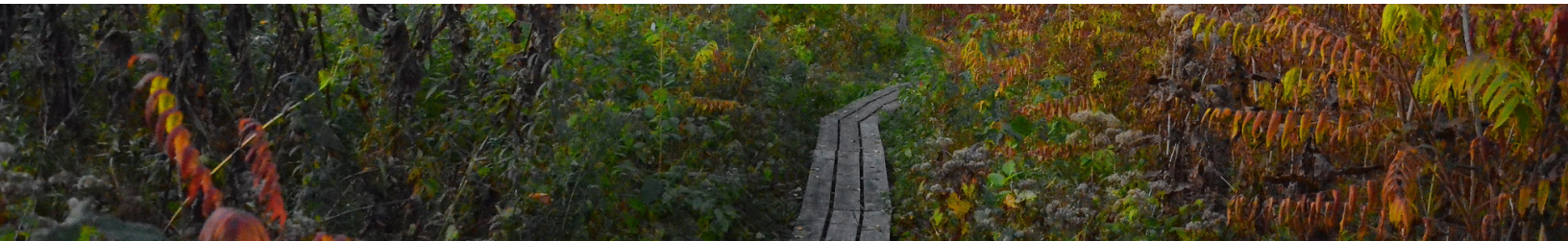
Tribal mitigation projects

Tribal resiliency and compensatory mitigation

Compensatory mitigation has proven to be a modern act of tribal resiliency and adds another definition to the exercise of tribal sovereignty. Despite the lack of inclusion from policy and guidance, tribes have found ways to sponsor and participate in compensatory mitigation projects on tribal lands. Compensatory mitigation can simultaneously do three things for a tribe: (1) expand tribal restoration efforts into an environmental market where the tribe could benefit ecologically and potentially economically; (2) promote and protect tribal sovereignty through developing and implementing cross-cutting strategies for tribal establishment of mitigation projects on tribal lands; and (3) facilitate and strengthen the relationships that tribes have with the natural resources, future generations and outside partners.

[19] Supra note 3.

[20] See Id.



Compensatory mitigation has the potential to serve tribes in unexpected ways:

- Promoting the seventh-generation way of decision making by developing measures to restore and preserve natural resources for future generations while engaging in development for prosperity for current generations.

- Restoring pieces of tribal history,[21] in restoring and preserving cultural ways of life and natural/treaty resources. In some cases, indirectly supporting the "land back" movement through means for tribes to gain interests in their ancestral lands, or to acquire the land title.

- Promoting the revival and implementation of traditional ecological knowledge (TEK) in restoration techniques.

- Supporting the restoration of natural resources that may be significant to tribes on the mitigation sites.

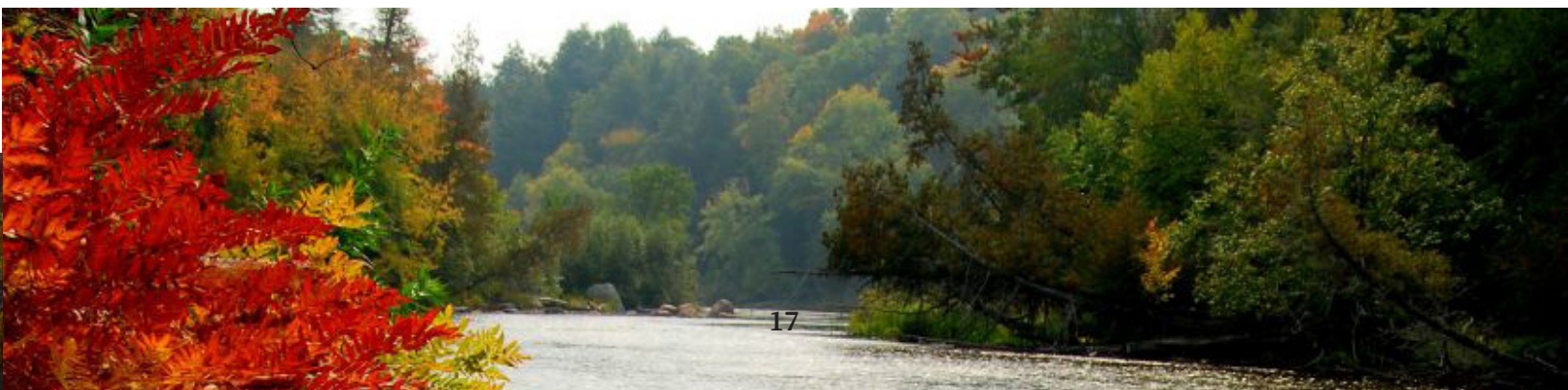
- Supports and strengthens relationships with those people with a common goal to restore natural resources.

- Promoting co-stewardship or co-management of mitigation sites.

It is important to note that concepts and practices of restoration and conservation of natural resources are not new for tribes. Tribes, as the original stewards of natural resources and the lands, have always practiced restoration and conservation within their traditional ways of life for prosperity and sustenance. As a general perspective, natural resources are foundations upon which tribes have thrived. Today, many tribes are in the process of reviving natural resources that have cultural significance, as well as restoration of natural resources generally.

Compensation for mitigation, on the other hand, is not a historical practice, at least not in a monetary sense. Historically, many tribes were seasonal travelers across territories much larger than what is recognized as a tribal reservation or tribal land today. Historical tribal development of buildings, roads or business districts were not as permanent, nor built of materials that are harmful to the environment. However, with modernization and the growing economies of tribes, there is an opportunity emerging for tribes to participate in compensatory mitigation as both a developer and a mitigation sponsor. Compensatory mitigation is an opportunity for tribes to do the restoration needed for natural resources within their own reservations, exercise tribal sovereignty in promoting the development of their own communities and preserve the natural resources for future generations.

[21] Gail Terzi, The Lummi Nation Wetland and Habitat Bank – Restoring a Piece of History, (2012) (discussing her experience in working with the Lummi Nation on establishing the first ever tribal compensatory mitigation bank and highlighting the concept of restoring a piece of history in tribal compensatory mitigation)



Case studies

There are additional considerations for tribes when navigating the compensatory mitigation guidance and rules. Federal Indian policy created constraints on tribal sovereignty, tribal land tenure and development. These additional considerations are best highlighted in a discussion of case studies that reveal where the challenges stem from. To the best of our knowledge, there are currently 7 tribal compensatory mitigation projects; 6 mitigation banks and 1 in-lieu fee program. These mitigation programs are either solely owned by the tribe, or through a partnership between the tribe and a non-tribal entity and they are located on tribally owned fee land and tribal trust land. Some banks have been approved, and others are pending or in the process of establishment.

Each of the tribal mitigation projects (namely banks) were developed under current mitigation policies and guidance, with the exception of Choctaw Tribe, which established their bank prior to the 2008 mitigation rule. Not every mitigation project faced identical challenges because none of the tribes are identical. However, there are similarities among the challenges tribes face in establishing a compensatory mitigation project. It is also important to note, transferring the long-term management of a mitigation site to a tribe is a viable option, but it does not appear to have been done yet.

Name	Tribe/ANC	Type of project	Land ownership	Site protection mechanism	Project purpose
MS Band of Choctaw Indians[1]	Choctaw Tribe of Mississippi	Bank	Tribal	Unknown	Unknown
Lummi Nation Habitat and Wetland Mitigation Bank[2]	Lummi Nation	Bank	Tribal	Conservation easement	Streamline the permitting process for tribal member housing.
Oneida Wetland Mitigation Bank[3]	Oneida Tribe of Wisconsin	Bank	Half Tribal Half WISDoT	Intergovernmental agreement	Offset WisDOT development impacts.
Charles Etok Edwardsen Mitigation Bank[4]	Ukpeagvik Inupiat Corporation	Bank	ANC	Conservation easement	Offset research-related impacts from the National Science Foundation.
Ghost Dike Advance Mitigation Bank[5]	Shoalwater Bay Indian Tribe	Bank	Tribal	Unknown	Offset impacts related to new development
Villines Mitigation Bank	Cow Creek Bank of Umpqua Tribe of Indians	Bank	Tribal	Under negotiation	Meet credit demand from nearby development.
Quil Ceda Village In-Lieu Fee Program[6]	Tulalip Indian Tribe	In-lieu fee	Tribal	Conservation easement	Offset impacts from tribal economic development.

[22] Civil Works Business Intelligence, Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS), https://ribits.ops.usace.army.mil/ords/f?p=107:2.

[23] Id.

[24] State of Wisconsin Department of Transportation, Inter-Tribal Task Force, https://wisconsindot.gov/Pages/doing-bus/civil-rights/tribalaffairs/ittf.aspx.

[25] Id. Note 20.

[26] Cascade Environmental Group, Shoalwater Bay Mitigation Bank, https://www.cascadeenv.com/shoalwater-bay-mitigation-bank.html.

[27] Consolidated Borough of Quil Ceda Village, Wetlands Program, Quil Ceda Village In-Lieu Fee Mitigation Program, https://www.quilcedavillage.org/Government/Departments/WetlandsProgram.

Mitigation policy challenges for tribes

Learning about these 7 tribal mitigation projects helped us uncover a range of challenges tribes faced—or might someday face in the future-- when establishing a mitigation project on tribal land.[28]

Recognizing the government status of a tribe

Current mitigation policies address private and public entities without defining what a private and public entity is. This distinction matters to a tribe because tribes are not private entities, nor are they a public entity. Tribes should be treated as a government, upholding the government-to-government relationship.[29] However, that does not always happen in practice. In current mitigation policies, there is ambiguity about what category tribes fit into, public or private? They are not expressly defined as a public or private entity, or something entirely different. This ambiguity produces varying interpretations of how to work with a tribe--from the IRT and all involved. The range of interpretations has led to a mix of approaches to the establishment processes for tribal mitigation projects.

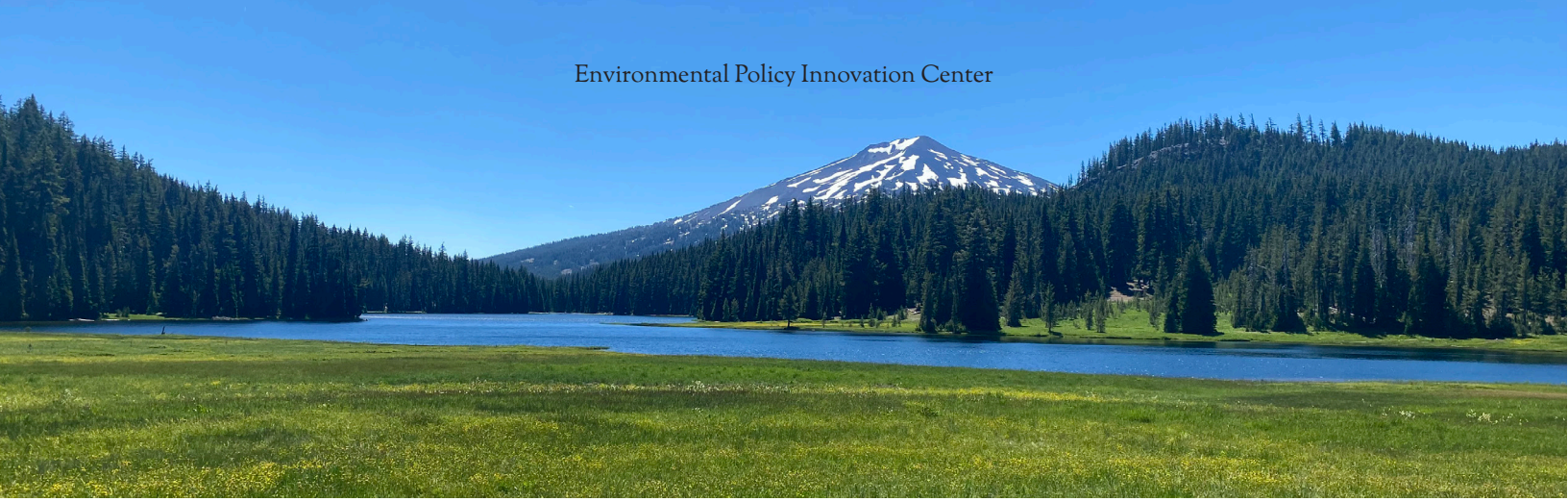
It is not completely evident in every case whether tribes were treated as a government by regulators, the IRT, agencies, attorneys, etc. What the case studies show is that pre-existing working relationships often determined how a tribe was treated. In some cases, recognition of a tribe as a government was verbal/implied; for others it was in written format or completely unclear. It is incorrect to categorize a tribe as a private entity because it undercuts tribal sovereignty. Tribal sovereignty has long been recognized by the executive, legislative and judicial branches of the U.S. government, thus it should be recognized under policy that is not only applicable to tribes but utilized by tribes on tribal land.

Site protection

Site protection is the practice of protecting a mitigation site for a long time or in perpetuity, as a means of ensuring that natural resource preservation and/or restoration on the site will be sustained for appropriately long enough to offset impacts elsewhere. Site protection creates a binding agreement that prevents future natural resource impacts from occurring on that site (e.g., no new development). Site protection mechanisms have varied for each tribe that has pursued a mitigation project on tribal land. One issue with current site protection guidance for a tribe is the lack of guidance that includes tribes and is tribal specific. Tribal specific guidance for site protection is paramount to tribal establishment of a compensatory mitigation project because of the complexity attached to tribal land and federal Indian law. Moreover, certain site protection mechanisms are more appropriate and uphold tribal sovereignty.

[28] In this section, the word "Tribe" is a generalization, and does not specifically to any one tribe who has gone through the process of establishing a compensatory mitigation project.

[29] The Environmental Protection Agency (EPA) was the first federal agency to adopt a formal Indian Policy for working with federally recognized tribes on a government-to-government basis in 1984. EPA continues to uphold the policy and commitment to fair and meaningful involvement of EPA decisions that may affect the federally recognized tribes and indigenous people's health or environment. The policy can be found on the EPA website at https://www.epa.gov/environmentaljustice/epa-policy-environmental-justice-working-federally-recognized-tribes-and.



The Institute for Water Resources in 2016 issued a white paper to provide guidance on site protection mechanisms.[30] Site protection guidance pertains to private entities, and public entities such as the federal government or state land, but tribes are not mentioned. The site protection mechanisms preferred for government use include, for example, conservation land use agreements, and integrated natural resource management plans.[31] The site protection preferred for a private entity includes, for example, conservation easements, transfer of land title, restrictive deed or a multi-party agreement. It is common practice to use a conservation easement for a private entity mitigation project because it provides the highest level of legal protection.

Across the 7 case studies, tribes considered or used three types of site protection mechanisms: intergovernmental agreement, deed restriction, and conservation easement. Conservation easements raise a variety of concerns for tribes with perpetuity, trust and tribal sovereignty. Tribes' deeply rooted historical mistrust of others' attempts to control and take away tribal lands plays a role here. For a tribe to give an interest in their land to a third party is a big consideration, especially if it's perpetual. Lastly, conservation easements can hinder a tribe's exercise of tribal sovereignty over their lands. Easements open the door to enforcement of activities occurring on tribal lands, by non-tribal parties. Granting such enforcement rights could be see as akin to diminishing tribal sovereignty.

As solutions to hesitancy with using conservation easements, some tribes have sought out tribal organizations to be the third-party holder of their conservation easement. This is ideal because it keeps the interest in the land in the hands of a tribal entity. This seems the best-case scenario if a tribe is required to use a conservation easement – finding a tribal organization who is qualified and willing to hold the third party interest on the easement. But this is not a complete solution – it's an example of the types of band-aid solutions tribes have turned to just to participate in compensatory mitigation.

Another issue with the guidance is the lack of regulators' understanding of the federal Indian law historical context on tribal land and tribal sovereignty. In the case studies, not only were tribes having to navigate a regulatory process they are subject to but not included in, but also educate on these areas. Education on federal Indian policy and caselaw and its effects on tribes could spur innovative opportunities for tribes, federal agencies, state agencies and private entities.

[30] US Army Corps of Engineers et al., Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program, (July 2016) https://www.epa.gov/cwa-404/compensatory-mitigation-site-protection-instrument-

[31] Id.

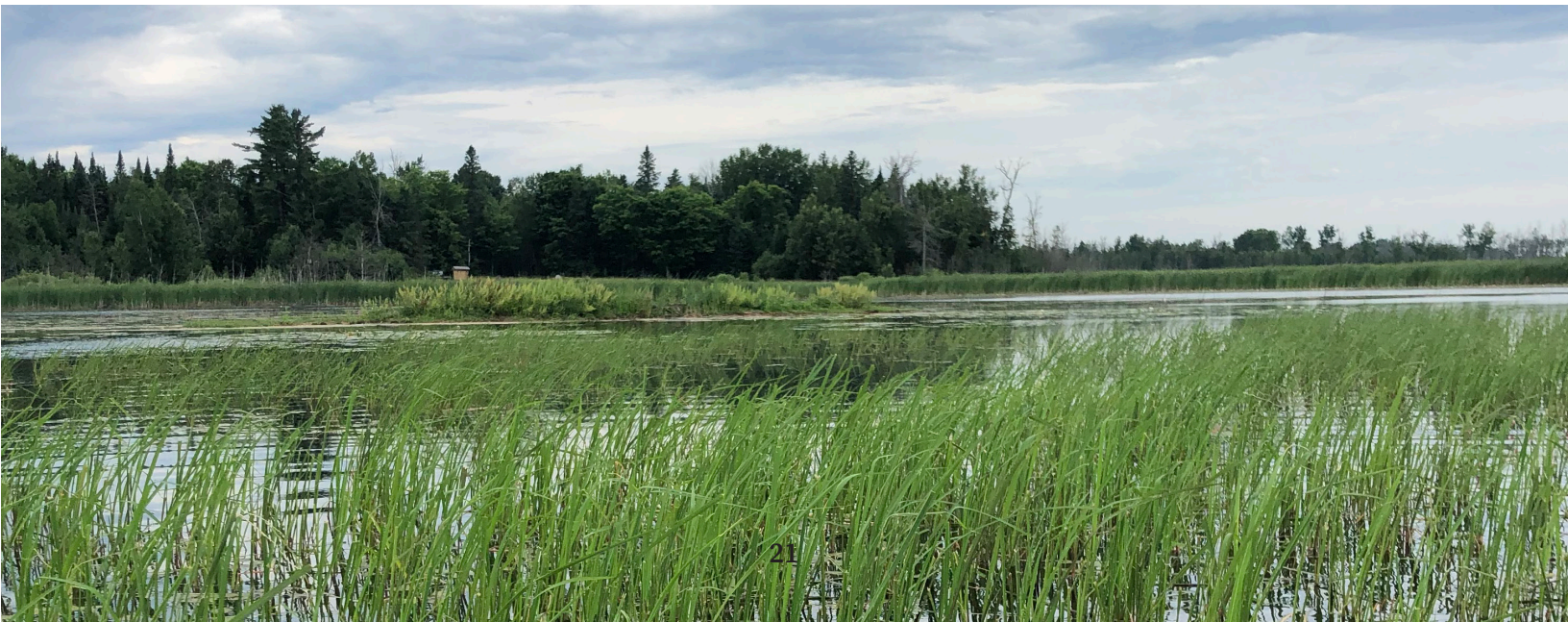
Uniquely tribal issues

There are some issues that are unique to tribes. The first is land fractionation. Land fractionation is an effect of the General Allotment Act, which took the communal tribal land in the reservation and allotted plots of land to individual tribal members (i.e., allottee). Once the allottee died, the land would be passed down to heirs and further divided through generations exponentially. Tribes did not practice land ownership prior to colonization; therefore, tribes did not know about succession of land[32] and its effects at this time. Over time, this practice resulted in highly fractionated land ownership interests.

If a tribe has heavily fractionated land interests, development of a mitigation site gets complex quite quickly. The permission of each individual landowner is needed for any kind of development and sometimes there can be dozens of ownership interests in one parcel of land. This is an issue a few tribes had to deal with upfront, prior to the mitigation site development. Additionally, it is not required that the mitigation site be under one landowner but preferred. Although it is not impossible to establish a mitigation project on a site with more than one owner, it may present unique issues with regard to treaty rights.

Another uniquely tribal issue is a waiver of sovereign immunity. Sovereign immunity grants a tribe immunity from lawsuits in federal, state and tribal courts. Sovereign immunity and enforcement go hand in hand because if an entity has sovereign immunity, they cannot be sued for enforcement. Enforcement generally touches most if not all components of a compensatory mitigation project including aspects of site protection, monitoring and maintenance and long-term stewardship. For a tribe, a waiver of sovereign immunity can be met with hesitancy or unwillingness. Similar to the site protection mechanism used, for a tribe a waiver of sovereign immunity can make or break tribal participation in compensatory mitigation. In the case studies, most tribes waived sovereign immunity to an extent (partial waiver) for enforcement purposes, while one did not. Enforcement tools to ensure the success of mitigation is important but it should not be broadly pushed onto tribes. It is solely the decision of the individual tribe to waive sovereign immunity, to what extent and for what reason.

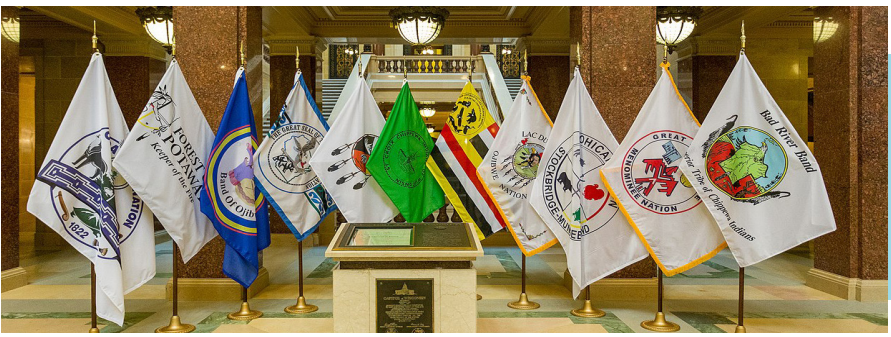
[32] How land would be passed down through generations. Today it is called probate.



Policy and practice recommendations

The Army Corps has 38 districts that oversee the regulatory compensatory mitigation program under section 404 of the Clean Water Act (CWA). None of the districts provide guidance or context for tribal participation for (1) establishing a mitigation project; (2) participating as a partner in a mitigation project or (3) considering a tribe for contributions to restoration techniques or long-term stewardship roles. Below are recommendations that would benefit tribes, federal agencies, state agencies and private entities in the field of compensatory mitigation.

The proposed recommendations would alleviate some of the ambiguity for tribes participating as sponsors or partners—or otherwise—in compensatory mitigation. The opportunity to expand the mitigation market onto tribal lands and welcome more mitigation to benefit no net loss efforts would be recognized. These recommendations do not seek to change the standards of compensatory mitigation, but they do ask that the policy be more inclusive to the sovereign and complex nature of tribes and tribal participation.

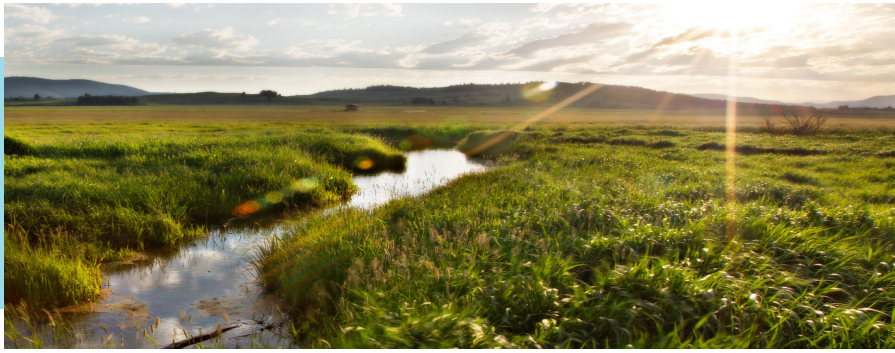


Upholding a tribe's status as a government

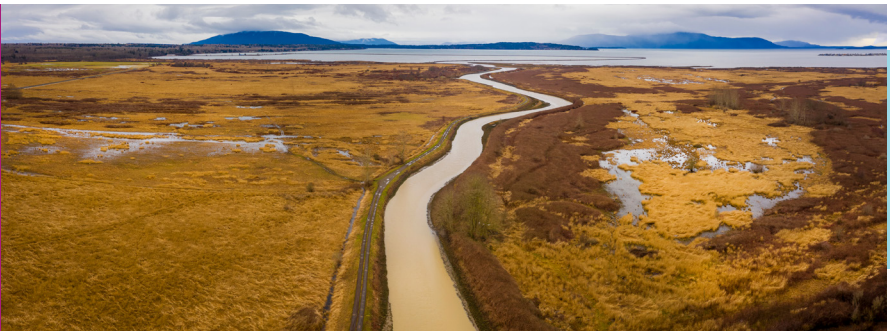
As mentioned in the policy challenges section, there is a need for recognition of the tribe's government status and universal treatment as a sovereign within the 38 Army Corps districts. It is not enough to assume that the definition of a "government entity" or "local government" will include a tribe/tribal government. It is also not enough to assume the government-to-government working relationship will be upheld in compensatory mitigation policy and practice. The recognition of the government status of a tribe is paramount to establishing a compensatory mitigation project either on tribal land or in collaboration with a tribe. Tribes have sovereignty which refers to the right of the tribe to govern themselves. The right of sovereignty includes the right to establish a government, enact and enforce laws within tribal territory and hold the same powers as federal and state governments. Tribes are not private individuals, nor an arm of the federal government, nor are tribes governed under state governments. Tribes are separate sovereign entities, sovereign governments.

Explicit statements should be added to the policy and guidance recognizing tribal participation in compensatory mitigation-whether as a sponsor, partner or long-term manager--should be characterized as that of a government entity.

Recognizing a tribe as a Sponsor



In the 2008 mitigation rule, the definition of a mitigation "Sponsor" includes "any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program."[33] Tribes have been incorrectly categorized as private entities in application of the policy. The policy should explicitly recognize this and include a separate category for "Tribe(s)" or "tribal government" or "tribal nation" as a sponsor. This policy change would benefit tribal participation and address the ambiguity that currently exists about how tribes participate. Additionally, the policy change would recognize that tribes are not private entities, nor public entities, but a form of government entities with additional and unique considerations.



Site protection mechanisms

Site protection for the mitigation site is one of the 12 fundamental components of a mitigation plan.[34] The real estate instrument used for site protection should effectively restrict harmful activities from jeopardizing the purpose of the mitigation bank (i.e., ecological mitigation). It should also ensure the protection of the mitigation site in perpetuity. For a tribe, it should also be capable of addressing tribal concerns of trust, perpetuity and protecting tribal sovereignty, as well as implementing cultural considerations, promoting tribal authority, and reserving tribal treaty rights on the mitigation site.

[33] See Subpart J – Compensatory Mitigation for Losses of Aquatic Resources, § 230.92; and Part 332 – Compensatory Mitigation for Losses of Aquatic Resources, § 332.2.

[34] Compensatory mitigation sites are protected through real estate instruments or other available mechanisms such as conservation easements, deed restrictions, transfer of title, conservation land use agreements, integrated natural resource management plans or federal facility management plans that protect real property on federal, state or local government lands. See US Army Corps of Engineers, Site Protection of Compensatory Mitigation Projects (Feb. 21, 2017), https://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheets-View/Article/1088696/site-protection-of-compensatory-mitigation-projects/.

Site protection of a mitigation site is fundamentally one of the hardest pieces to pull together but for a tribe it is significantly harder because of how tribes view the flexibility of tribal prosperity over time. Flexibility is undesired by compensatory mitigation policies and regulators, but it is fundamental for the tribal sovereignty to be exercised by future generations. Unlike private entities or corporations, tribes do not often get the chance to buy back or be donated ancestral lands. The reservations that exist today are pieces of the reservations that were negotiated in original treaties. Therefore, the lands that tribes possess today, even if heavily fractionated and checkerboarded, are the lands that tribes have to work with; including their future generations.

Below is a hierarchy of recommended use for existing site protection mechanisms in guidance offered by the 2016 Institute for Water Resources (IWR) Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program.[35] Of course, a tribe should be allowed to use the site protection mechanism the tribe deems appropriate for their specific purpose and exercise of tribal sovereignty. Above all, the agencies or policy should really consider issuing separate site protection guidance specific to tribes because of the unique land and sovereignty considerations.

1. Appropriate and preferred site protection mechanisms for a tribe

Three site protection mechanisms uphold the government status of a tribe and do not require the tribe to give a third-party interest to a holder. The first is from an existing case study example and the latter two are from the 2016 IWR paper, which details alternative site protection mechanisms appropriate for government lands (federal/state).

An intergovernmental agreement is a very solid option for tribal site protection. This is an agreement made between governments or government agencies that express commitments to work together on identified objectives or goals. These agreements are legally binding contracts and contain the terms of the agreement including but not limited to identifying the land, responsibilities and roles of each party, authorizations and prohibitions, enforcement, perpetuity aspects and treaty right reservations. These agreements promote the upmost tribal sovereignty because they promote the government status of a tribe and the government-to-government working relationships. This type of site protection also has the benefit of addressing tribal concerns with perpetuity with the option to be periodically updated and renewed based on changing circumstances.

Integrated natural resource management plans are specific resource management plans developed by the tribe's natural resource department to manage natural and often cultural resources. These are strategic and comprehensive plans that allow for the management of a wide latitude of natural resources. A tribe's management of natural resources requires compliance with applicable federal laws and tribal codes. These plans can be reviewed periodically and updated to adequately ensure performance standards and goals of mitigation. Many tribes currently have robust integrated natural resource management plans and the format of these could be structured to fit additional site protection requirements.

[35] Id. Note 32.

Multi-party agreements are agreements between several interested parties to protect the mitigation property; roles, responsibilities and objectives are established in the agreement. The advantage of multi-party agreements is that they involve several entities who ensure the mitigation purpose is protected and properly implemented. These agreements are ideal in a tribal partnership mitigation project, whether the partnership is between tribes or a non-tribal entity, because it can provide for a wide latitude for shared responsibility (mainly financial, performance and monitoring) between the partners. However, these agreements are not perpetual, meaning they are re-endorsed after a designated period of years, which can have pros and cons for a tribe.

2. Acceptable site protection mechanism for a tribe

This category of site protection is acceptable but not a preferred mechanism for tribal site protection. The IWR paper issued in 2016 lists deed restrictions among private entity site protection mechanisms.

A deed restriction is a condition in a land deed that limits or prohibits certain uses of the land (i.e., restrictive covenants). These are enforceable against successive owners of the land and require the owner of the land and permittee to agree to the limitations. Some tribes may have issues with access easements associated with the deed restrictions. The advantage for tribal site protection is that the restriction does not require a third-party holder because the restriction is on the land itself. However, enforcement responsibility falls on the IRT, which sometimes adds unwanted oversight to the tribal mitigation program.

3. Inappropriate and least preferred site protection mechanisms

The following site protection mechanisms may be considered inappropriate for tribes because they ask the tribe to give an interest in their land to a third party. Each tribe is different and will view site protection differently.

A conservation easement is a non-possessory real property interest held by a third party who can enforce limitations or affirmative obligations to protect the land against future development, exploitation and degradation of natural resources. A conservation easement requires the landowner to select a third-party easement holder, typically a non-profit, state, government agency (other than Army Corps) or a tribe.[36] It also permanently limits the use of the land, but it allows for limited use of the site for hunting and fishing purposes as long as it does not conflict with the restoration efforts.

For a tribe, a conservation easement is controversial depending on the context and goals of its use. In a "tribal holder of an easement" context, a tribe could hold a conservation easement, which would represent an interest in the land and natural resources. The land and natural resources under the conservation easement is land that belonged to aboriginal tribes prior to the removal.[37]

[36] Id. Note 32.

[37] Jessica Owley, Tribes as Conservation Easement Holders: A Partial Property Interest is Better than None? (2012); Sarah Krakoff & Ezra Rooser, In Tribes, Land, and the Environment, (2012).

Therefore, a tribe as a holder of a conservation easement can be positive and there are examples of private landowners approaching tribes to hold conservation easements.[38] In a "tribe as the owner of a conservation easement" context, the decision for a tribe to give up a third party interest in their land is huge and often met with great hesitancy. To put it into perspective, for a tribe to give up an interest in their land is giving up pieces of tribal sovereignty and it is inappropriate to force a tribe to do so for the lack of creativity in working with tribes. It is understandable why conservation easements are used and the common practice, for enforcement and perpetual protection of the mitigation site. However, tribes are not common sponsors of mitigation projects, in fact they are quite unique because they are inherently sovereign nations. Tribes should be free to choose an appropriate site protection mechanism from the alternatives available to governments or something entirely different that suits the sovereignty of the tribe.

Transfer of title as a site protection mechanism involves transferring ownership of the mitigation property to a natural-resource management or governmental agency, land management entity or other non-profit acceptable to the Army Corps. This is inappropriate for tribal use. Tribes have spent the last century fighting for their land and the protection of the natural resources on it. Outside of transferring the land into trust status with the federal government, which is viewed by many tribes as unfavorable and generally out of the question. Transferring the land title to another party is generally not something a tribe would consider. Second, the receiving party of the transfer must be appropriate to the Army Corps, and a tribe may have different opinions of what is appropriate. Thus, this is not a good option for tribal mitigation site protection.

4. Additional site protection mechanism theories

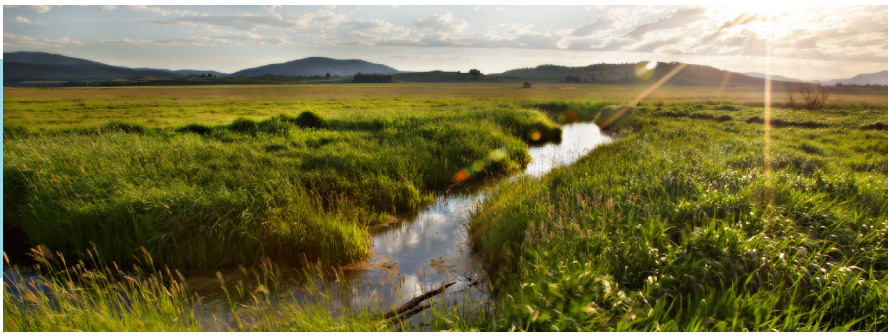
There are a few additional theories surrounding site protection appropriate for tribes. Neither of these theories have been used but they do get at fundamental concerns for tribes in site protection. Because neither of these theories has ever been tested or pursued to our knowledge, there are many open questions about them. First, if a tribe chooses to transfer their land into trust with the federal government through the fee to trust process, could the act of transferring their land into trust status to the federal government be an acceptable form of site protection? Would the transfer need to be paired with additional documentation such as an intergovernmental agreement laying out the terms of the mitigation project (because the fee-to-trust process is not inherently linked to compensatory mitigation)? Currently, the fee-to-trust process does not have a mitigation or conservation transfer purpose. However, in December of 2021, the America the Beautiful Challenge released its one-year report with ambitions to amend the fee-to-trust process to include conservation purposes.[39] Thus, it could be a viable site protection option for a tribe in the future.

[38] A cooperative agreement on the Yainix ranch at http://www.cooperativeconservation.org/story.aspx.This not an example of tribes holding the conservation easements for mitigation banks, it is just tribes holding conservation easements.

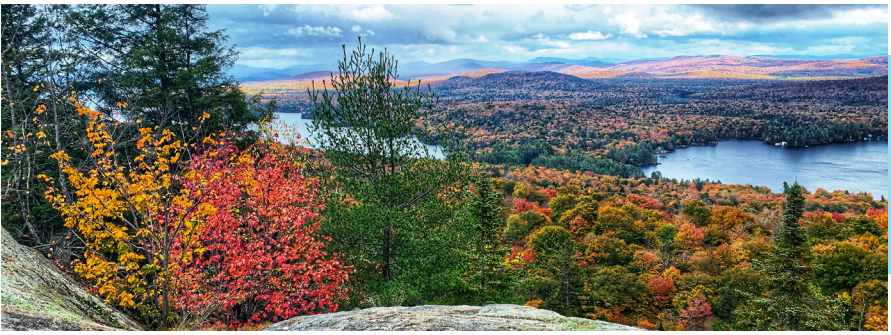
[39] Haaland et al., Year One Report - America the Beautiful, 13 (2021)

The second theory rests on the question of whether a land lease would be an appropriate site protection mechanism for a tribe. That question goes back to the core of the "why" of compensatory mitigation: perpetually restored natural resources. Although perpetually restored and abundant natural resources is the goal, perpetually undevelopable tribal lands may not be. This form of site protection addresses the perpetual concern that tribes may have. While also cutting against a core element of compensatory mitigation: perpetuity. Currently, many tribal land leases are reviewed on a periodic basis depending on what they are for. Depending on the circumstances for the tribe, it might make more sense to enter into a land lease for the mitigation site with an accompanying agreement for periodic update and renewal.

Developing site protection guidance for tribes



The Army Corps should develop separate specific tribal compensatory mitigation guidance on site protection. This guidance can be an addendum or addition to current compensatory mitigation policies, guidance and articles. The guidance should be developed through soliciting tribal input, especially from the tribes who have gone through the process of establishing compensatory mitigation projects on tribal lands. Guidance that is specific to tribes and appropriately contemplates tribal sovereignty would better accommodate tribal participation.



Long-term management opportunities

Tribes and indigenous peoples are the first stewards of the land and natural resources. Public and private entities with existing or upcoming mitigation projects should consider their long-term management opportunities with tribes. Mitigation projects face questions of what to do with the mitigation site after the life of the project ends. The mitigation site remains undevelopable due to conservation easements placed on the lands and thus, unfavorable to many prospective buyers. But for a tribe, this is an opportunity. A restored mitigation site, even with an existing conservation easement, may be favorable to a tribe because tribes have a real interest in restoring the ownership and health of their ancestral lands. Tribes are a valuable option for long-term management of a mitigation site and its permanent financial endowment to fund the perpetual mitigation.

What tribes should consider when planning mitigation projects

There are a few things for a tribe to consider prior to starting the process of establishing a compensatory mitigation project. These considerations should help a tribe decide whether a mitigation project on their land is beneficial.

Cultural alignment

A tribe should consider how cultural and other interests align with owning or partnering in a mitigation project. As discussed in the tribal perspectives section above, compensatory mitigation does not align with traditional tribal perspectives on natural resource preservation and protection. But picking a mitigation site on tribal land could have cultural benefits such a higher chance of restoring cultural resources in the process of mitigation. Compensatory mitigation is an environmental market that has both ecological and economic benefits. Asking how well an environmental market aligns with culture of a tribe is an important question.

Tribal land tenure on the mitigation site

The tribe should consider the status of tribal land tenure on the would-be mitigation site. As mentioned above, many tribes are impacted by fractionation of ownership interests, and checkerboarding. A tribe prefers to own the land in fee, and it is preferable under the mitigation rules to have one landowner. To address this, some tribes buy their land back from their members through federal funding initiatives or tribal revenue. Some tribes also sell their existing land to raise money to buy land in their aboriginal territory. Other tribes may have off-reservation land with mitigation potential. A tribe, like a private mitigation entity, can buy land and develop a mitigation project for the sale of credits. This may be a viable option to consider but it raises important considerations for land acquisition for a tribe.

Tribes are cautious about tribal land matters due to a painful history. There are also a few rules that apply to encumbrances of tribal lands.[40] Something to watch for is the fee-to-trust process policy change discussed in the Year One Report - America the Beautiful released December 2021: "in the coming months, BIA will initiate a process to revise land-into-trust regulations to enable Tribes to acquire and lease trust land for conservation purposes".[41] This is important because it may affect tribal site protection mechanisms.

[40] Encumber means to claim, lien, charge, right of entry or liability to real property and can include leasehold mortgages, easements and other contracts or agreements that give a third party an exclusive interest in control over the tribal land.

[41] Supra Note 37 at 9 (discussing how tribes are central to the America the Beautiful initiative and actions taken on tribal Co-Stewardship of public lands and waters, tribal consultation, protection of treaty rights, the tribal Fee-to-Trust policy, traditional ecological knowledge, and Native American Lands Environmental Mitigation program, among many others).

Feasibility study

Perhaps most importantly, a tribe should conduct a mitigation project feasibility study. A feasibility study is not required prior to establishing a mitigation project, but because the project can potentially cost a lot of money upfront, employ many resources and is "perpetual", a feasibility study is a good idea. This feasibility study should be conclusive about the feasibility and benefits of sponsoring or partnering in a mitigation project on tribal land. The feasibility study should evaluate several components in depth through the lens of the tribe and tribal sovereignty, the regulatory program and future generations way of thinking.

Seventh generation way of thinking

The seventh-generation way of thinking is a philosophical pattern of decision making within tribal communities. The general notion behind it is the decisions we make today affect the seven generations down the line. Compensatory mitigation is no exception to this way of thinking. Particularly, how would a compensatory mitigation project on tribal land benefit and hinder the prosperity of future generations? Generally, this way of thinking can be considered in every aspect of the feasibility study and establishment process of the mitigation project.

Reason for establishment

Compensatory mitigation is designed to provide restoration to offset unavoidable impacts to natural resources, including tribal impacts. Sometimes, tribes' reasons for establishment go beyond the typical mitigation purposes. Important considerations here would be to assess the type and abundance of natural resources (including cultural and treaty resources) located within reservation land, the demand for credits to offset unavoidable impacts and where that demand is coming from.

Cost of establishment

The feasibility study should also assess the cost of a compensatory mitigation project, particularly a mitigation bank. Mitigation banks require the project mitigation to be done up front (advance mitigation), at the sponsor's own cost. As with any large upfront cost, there are associated risks. The risks for individual tribes are going to be different but this is something that should be assessed in the feasibility study along with the overall economic benefit of a mitigation project. With in-lieu fee projects, the mitigation is funded as credits are sold, so upfront costs—prior to revenue--are lower. A question to ask is, what are the cost recovery projections and what is the timeline?

Human capital

Compensatory mitigation projects are restoration projects that require professionals to design, oversee and perform the project. Does the tribe have the personnel resources in-house? For instance, natural resource experts, attorneys, and a restoration team? Ideally, the tribe would provide all services in-house but this does not always happen.

Watershed credit need

Beyond the tribe's own need for offsets, some tribes pursue compensatory mitigation projects on tribal land to offset non-tribal development impacts, while reaping the ecological and economic benefits. If the tribe identifies a need for credit sales in their watershed, would developing a mitigation bank on tribal land service that watershed and how much (are there other mitigation projects in the area providing credits)?

Different approaches to compensatory mitigation

The tribe should consider all its options for compensatory mitigation, especially if the tribe is approached with a partnership opportunity. There are different ways tribes can participate, each with its own benefits for the tribe and for purposes of ecological restoration.

1. A tribally owned and operated compensatory mitigation project, such as a mitigation bank or in-lieu fee project on tribal land. In this option, the tribe is the owner and sponsor of the mitigation project, meaning the tribe is fully responsible for the establishment and operation of the project, and the cost.

2. In partnership with another tribe or non-tribal partner. In a partnership arrangement, the tribe would likely share the responsibility for establishment and operation of the mitigation project. A partnership also presents unique opportunities for the tribe to own the land after the life of the mitigation project.

3. The long-term manager of the mitigation site and/or holder of the conservation easements for private entities. This option is interesting because it gives tribes an interest in the natural resources and land.

4. The fourth option is to develop the relationships between tribes and existing tribal or federal mitigation programs to promote co-management and stewardship and possibly the implementation of tribal traditional ecological knowledge in mitigation efforts.

Sovereignty and waivers

Tribal sovereignty assertions and waivers of sovereign immunity need to be considered upfront. Waivers of sovereign immunity may be required for enforcement purposes and the tribe needs to assess whether the waiver of sovereignty outweighs the purpose of establishment.

This list is not an exhaustive list of feasibility study considerations, but a place for a tribe to start.

Conclusion

Compensatory mitigation offers valuable opportunities for tribes to serve tribal sovereignty and prosperity in a new way. However, in order to promote tribal participation in the compensatory mitigation industry, policy and practice needs to better accommodate the uniqueness of tribal lands and decision-making structures, and to preserve and respect tribal sovereignty. There is no need to change mitigation standards, but the rules and guidance should be inclusive to tribes. Any policy change efforts must include tribes in decision-making, recognizing the long history of mistrust between tribes and the federal government due to decades of mistreatment.