

NIFRMA Task G - An evaluation of the feasibility and desirability of establishing minimum standards against which the adequacy of forestry programs of the Bureau of Indian Affairs in fulfilling its trust responsibility to Indian tribes can be measured.

"The BIA's mission is to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives...through the delivery of quality services, maintaining government-to-government relationships within the spirit of self-determination."²⁷

Background

Given a long history of prolonged and expensive litigation, it is highly desirable to establish standards with which to ensure that the forestry programs of the BIA fulfill federal trust responsibilities. Some standards are already in existence but may need review in a more systematic and proactive fashion. Prior IFMAT reports have noted that the BIA has an apparent conflict of interest in its mandate to deliver technical services to Indian tribes and oversee trust obligations. IFMAT I and II characterized this situation as that of one individual attempting to serve as both pitcher and umpire simultaneously.

IFMAT proposes standards by which to measure several key elements of BIA programs upon which fulfillment of the federal trust duty depends. For standards to be effective, it is necessary to: (1) apply the standards; (2) oversee their execution; and (3) to have the power to enforce adequate performance. An effective mechanism for enforcing standards does not currently exist and the third party oversight as recommended by past IFMAT reports has never been implemented.

The adequacy of forestry programs can be measured by looking at the following:

1. Accounting for trust asset income from forest resources;
2. Technical Services;
3. BIA Funding;
4. Ability to obtain technical and financial support from other agencies;
5. Meaningful consultation and collaboration with other federal land management agencies;
6. Governance;
7. Tribal vision as "state of the art" forestry.

Findings

G1. It is feasible and desirable to establish standards to measure the adequacy of forestry programs on Indian lands.

²⁷ Office of Indian Services. <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/TribalOperations/index.htm>

- G2. IFMAT has observed that management of timber as a trust asset has increasingly been transferred from the BIA to tribes through compact and contract arrangements.**
- G3. Tribal forestry programs, guided by self-determination policies, are increasingly focused on provision of environmental and cultural values** that are important to tribes. Tribal values subordinate, but not displace market returns from timber as priorities for forest management. Comparisons of tribal programs with those of other landowners with different management objectives may serve to understate the unique combination of benefits provided by investments in tribal stewardship.
- G4. IFMAT notes that the diminished capacity of BIA programs to deliver technical services has caused tribes to depend more on other agencies,** especially USFS and NRCS, and non-profit foundations for short-term financial and technical support.
- G5. IFMAT has observed mixed results from its review of consultation by federal agencies.** Protocols for tribal consultation vary by agency and are not consistently carried out by regional staff.
- G6. There appears to be inconsistent understanding of tribal status and trust responsibility within the host of federal agencies that work with or manage lands adjacent to tribes.** Agencies such as the USFS and the NRCS (both in the USDA) are engaging increasingly with tribes. For example, we observed woodland management activities supported mainly by NRCS. Project partnerships like these can be beneficial, but such engagement is not always coordinated with tribal objectives. The trust obligations of non-BIA agencies to tribes remain ambiguous. The trust duty could be clarified through adoption of interagency agreements with the BIA.
- G7. An increasing number of tribes have used self-governance to create economic opportunity and to customize their forestry programs for best alignment with tribal values and visions.**
- G8. Despite funding and staffing difficulties, many Indian forests are places of experimentation, adaptive management, and innovation.** Indian forest programs have been acknowledged as models of stewardship and sustainability from which other landowners can learn.
- G9. Any standard to be used to measure fulfillment of the trust duty will need to be driven and defined by each tribe's vision for their forests.**
- G10. Tribes have extensive off-reservation treaty rights and reserved non-treaty rights on federal lands managed by the Departments of Interior and Agriculture.**

Discussion of trust standards

1. Accounting for trust asset income from forest resources

Accounting for the income from and management of American Indian trust assets has been an issue in hundreds of court cases, most notably Cobell v Salazar. The BIA's accounting must be held to generally accepted government accounting standards, subject to regular audits by an independent organization such as GAO and Inspectors General. In 2007, the federal government carried out the "Historic Accounting Project" – an attempt to reconstruct trust beneficiary accounts going back to 1887.²⁸ The effort revealed that BIA trust asset accounting during more than 100 years often failed to conform to generally accepted accounting standards.

The BIA has a fiduciary duty to manage timber resources on a sustained yield basis and to properly account for monies associated with forest management activity. Federal laws "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities."²⁹

Thirty years after the Mitchell II ruling, the federal government has settled numerous breach of trust claims with Indian tribes. Creation of the OST, a new accounting system (TAAMS), and new security measures are attempts at improvements toward the goal of fulfilling the government's fiduciary duty to protect revenues derived from trust assets. Both OST and TAAMS have required significant government investment which otherwise might be used to provide better support to tribal programs. The DOI invested approximately \$3.9 billion (more than the Cobell settlement) from 1996 to 2008 on "management, reform and improvement of Indian trust programs."³⁰

IFMAT III received comments from forest managers and technical staff about TAAMS. Not all Tribes have easy access to the system. Tribes that are far from regional offices may need to send staff on two-day long travel just to access or enter information into a secure computer terminal. Some interviewees stated that the program is time consuming, but an improvement over past systems. A few interviewees noted that TAAMS was inadequate because it lacks the capacity to link with GIS or other spatially explicit databases. Linkages to geographic information are important for assessing revenue streams from specific allotments. BIA representatives indicate that this issue is being addressed as of the time of writing.

OST appears to be well-equipped to carry out the duty of the federal government to account for the transfer of funds derived from trust assets, such as timber, to individual Indian beneficiaries. OST conducts annual trust evaluations that focus on flows of revenue from trust assets to

²⁸ <http://www.justice.gov/civil/cases/cobell/>

²⁹ United States v. Mitchell, 463 U.S. 206, 224 (1983) (Mitchell II). But see, United States v. Jicarilla Apache Nation, 131 S.Ct. 2213 (2011); United States v. Navajo Nation, 556 U.S. 287 (2009); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003); United States v. Navajo Nation, 537 U.S. 488 (2003)

³⁰ S. Hrg. 110-48, 110th Cong., 1st Sess. at 3-4, 72. Oversight Hearing on the President's Fiscal Year 2008 Budget Request for Tribal Programs, February 15, 2007.

beneficiaries. Such evaluations do not, however, include an evaluation of the forest resource itself, and apparently are not carried out by staff with natural resources training. Interviews with BIA and tribal staff indicate that OST serves only an accounting function, without technical expertise in forestry or natural resources.

Even if OST had technical expertise in natural resources management, IFMAT still believes there is a need for an independent, third-party to oversee trust duties.

2. Technical Services

The BIA is responsible for delivering technical services to tribes to manage forests. The capacity of the BIA to provide adequate support services to Indian forestry programs has declined over the past 20 years, due to cuts in funding, reductions in staff, and expansion of the Indian forest land base. IFMAT has observed that management of timber as a trust asset has increasingly been transferred from the BIA to tribes through self-governance compacts and self-determination contract arrangements. Some tribal and BIA employees interviewed observed that funding of BIA direct service operations prior to self-determination did not increase under new contract and compact arrangements. Distribution and administration of funds to contract and compact tribes, however, require higher administration costs than direct service. For instance, as a result of *Salazar v. Ramah Navajo*³¹ BIA is to pay \$40 million to compensate compact and contract tribes for underpaid indirect costs. Given the shrinking BIA budget, court ordered payments will reduce funds available for technical services. For example, technical services delivery from BOFRP, especially to direct service tribes, are chronically inadequate and continue to decline. This causes delay in forest planning and implementation.

IFMAT finds that few tribes have adequate access to technical services despite the fact that the ability to achieve “state of the art” forestry depends on access to adequate technical services. IFMAT proposes a standard to measure whether individual tribes have access to qualified staff, technical expertise, and technical resources to manage their lands in a manner that achieves the tribal vision for their forests. These criteria need to be measured regularly by an independent third-party entity with technical forest management expertise to evaluate whether technical services are adequate to manage Indian forest lands. Where gaps are identified, the evaluator should be empowered to make authoritative recommendations for improvement.

3. BIA Funding

“State of the art” forestry depends on adequate and predictable funding. IFMAT proposes a standard to measure funding adequacy and stability.

NIFRMA mandated that IFMAT compare the funding of Indian forests to that of other federal and private forest land owners. IFMAT’s comparison (Task A) to other ownerships has now shown three times that Indian forests are chronically underfunded compared to federal, state and private

³¹ <http://www.supremecourt.gov/opinions/11pdf/11-551.pdf>

industry forests on a per acre basis. In real terms tribal forestry programs have less funding today than twenty years ago. Comparisons of tribal programs with those of other landowners may serve to understate the unique combination of benefits provided by investments in tribal stewardship. This is because tribal forestry programs that are increasingly guided by self-determination are now focused on the provision of environmental and cultural values that are important to tribes, in addition to more commonly considered market returns from forest products. IFMAT argues that Indian forestry programs are unique in providing greater benefits and more diverse services to Indian people than any other type of forest land management. These benefits include, among other things, direct and indirect economic benefits from timber revenue, jobs, firewood, grazing, hunting, gathering, water, as well as cultural and spiritual values that cannot be quantified.

Unfortunately, programmatic funding for Indian forests has been in decline and variations from year to year make it difficult to recruit and retain staff, as noted in other sections of this report. Tribal forestry programs are increasingly dependent on temporary grant funding. IFMAT found on site visits that tribes consistently devote a greater amount of staff time to seeking “soft money” than ten years ago. A standard to measure the adequacy of funding must take into account the source, duration, and transaction costs of such funds.

Thus, IFMAT recommends a standard for measuring the federal government’s fulfillment of its trust responsibility by measuring all the benefits that Indian forests provide to American Indian people, which extend beyond what other comparable forests might provide to society as a whole. We repeat prior IFMAT recommendations that third party oversight of the BIA by GAO and/or the Inspector General is needed to determine whether funding and technical support are adequate to fulfill trust responsibility for forest resource management.

4. Ability to obtain technical and financial support from other federal agencies

IFMAT notes that the diminished capacity of BIA programs to deliver technical services has caused tribes to depend more on other agencies and foundations for short-term financial and technical support. This is an unstable situation not conducive to the long-term planning required for sustainable forest management. The fact that tribes seek funding and services outside BIA indicates that BIA funding alone is not adequate to fulfill trust responsibility. IFMAT site visits found technical support/technical services deliveries varied from reservation to reservation, and from agency to agency. Prominent federal agencies that work with tribes on matters related to forestry include the DOI Fish and Wildlife Service, BLM, USFS, USDA National Institute of Food and Agriculture (NIFA), EPA American Indian Environmental Programs, DOE Tribal Energy Program, and NRCS. It appeared to IFMAT that federal funding was not well-coordinated, it resulted in high transaction costs, and in some instances funded work that did not match tribal goals.

During reservation visits, IFMAT observed numerous examples of forest development and infrastructure projects that were funded through NRCS conservation programs. An increase in NRCS involvement with tribes has political support at the national level and is mandated by the

2008 Farm Bill. Woodlands, in particular, have benefited from funds and technical support from NRCS since BIA funding for woodland management is scarce. Tribes visited by IFMAT report that relationships with NRCS are appreciated and that NRCS has provided beneficial and needed funding that otherwise might not have been available. For some tribes visited, departments that are essential to integrated forest management such as wildlife, fisheries, and water quality have become totally dependent for funding support upon grant writing success with NRCS and others. We find these circumstances to be inefficient and potentially unsustainable. Secure long-term program funding rather short-term project funding is needed to recruit and retain qualified staff to plan and implement multi-generational programs for integrated resource management as recommended by NIFRMA.

The USFS has expanded its Office of Tribal Relations (OTR) since IFMAT II. The senior executives of the agency have stated their strong support for assisting tribes with technical service needs. While much has been done, we see a need for an expanded role for OTR to coordinate and assist service deliveries to tribes from within USDA. Specifically, coordination is needed from USFS State and Private Forestry (S&PF), Forest Service Research and Development (R&D), NRCS, and NIFA. NIFA, among other programs important to tribes, provides support to tribal colleges. R&D currently helps tribes with issues such as insects and pathogens, and climate change, that threaten forests. In the case of S&PF, for instance, the ITC has repeatedly requested that agency funds should be distributed directly to tribes, not through state foresters as is currently the case. This is because tribes are to be served and tribes are not to be subordinated to states. ITC has also requested that funding inequities need correction. In addition, the S&PF name should be changed to Tribal, State, and Private Forestry in order to appropriately acknowledge the importance of tribal forestry within Secretary Vilsack's "All Lands" approach to forest management.³²

IFMAT proposes a standard to measure whether funding and technical support from non-BIA agencies meets tribal goals, rather than government agency goals.

5. Meaningful consultation and collaboration with all relevant federal agencies

³² <http://www.fs.fed.us/video/tidwell/vilsack.pdf>



Sitka spruce growth – Makah. Photo by Larry Mason

Executive orders from Presidents Clinton, Bush, and Obama reiterate the requirement for federal agencies to consult with tribes prior to taking certain actions. IFMAT has observed mixed results from review of consultation by agencies. Protocols for tribal consultation vary by agency and are not always carried out by regional staff. Consultation requests from federal agencies to tribes when not accompanied by sufficient resources to underwrite tribal costs of participation can function as unfunded mandates that burden already short-handed tribal staff. Adding further confusion, there appears to be inconsistent understanding of tribal status and trust responsibility within the host of federal agencies that deal with tribes. IFMAT III proposes that the effectiveness of consultation can best be assessed by tribal review of the consultation process, planning, and implementation of programs, policies, and actions undertaken by federal agencies with consequences for tribes. Effectiveness monitoring is particularly important for review of federal actions on lands adjacent to reservations and on ceded lands where tribes retain treaty rights.

The trust duty has generally been enforceable only when an agency has elaborate control over

assets or has a clearly expressed duty to act.³³

The BIA needs to consistently work with, and

have the ability to guide the actions of other agencies causing them to act in a manner that enhances Indian trust assets. Interagency agreements would provide a mechanism for such work.

IFMAT III has observed increased engagement between tribes and the Forest Service since 2003. The TFPA is a notable example of the potential for Forest Service to work with tribes on collaboration. TFPA was intended to protect tribal assets by allowing tribes to contract with the USFS to carry out hazardous fuel and forest health silvicultural treatments on federal lands.

³³ United States v. Mitchell, 463 U.S. 206, 225 (1983)

Stewardship contracting represents similar opportunities and can be undertaken on a multi-year basis extending to ten years. The effectiveness of tribal fuels reductions has been proven by wildfire behavior on the Wallow fire and others (Jackson et al. 2011). Tribal stewardship is both effective and trusted, as IFMAT heard on one National Forest, hazardous fuels reduction projects if not undertaken by the tribe would have been stalled by lawsuits from environmental groups. IFMAT III concludes that TFPA and stewardship contracting offer great potential to create economic opportunities for tribal members, protect tribal resources and treaty rights on and off the reservation, and accomplish needed fuel hazard reductions that otherwise might not be accomplished on federal lands. Several small projects have been undertaken but as yet longer-term contracts have not been initiated.

Federal failure to act results in forest declines that under changing climate conditions become increasingly vulnerable to destructive disturbance events such as wildfire. IFMAT observed numerous hazardous fuels conditions on National Forests of the inland west that are adjacent to reservations. It is worthy of note that 60 tribes retain treaty rights that extend to ceded areas of National Forests that without proper care are placed in jeopardy. USFS Chief Tidwell reports that 80 million acres of National Forest are in need of treatment. Not counting loss of facilities and natural resources, US forest fire suppression costs surpassed \$2 billion in 2011 yet the USFS's inability to launch aggressive fuels reductions frustrates neighboring Indian land managers. Tribal foresters report obstacles to progress include burdensome processes and inability to form lasting relationships with frequently changing Forest Service personnel. The TFPA was intended to give tribes access to adjacent federal lands to treat fire and forest health risks. TFPA could be improved by Congressional mandate simply by changing "may" to "shall" in the statute.

IFMAT proposes a standard to measure the outcomes of federal actions that impact Indian lands. This would require extensive monitoring and reporting by individual tribes that is not now financially feasible. However, one measure available would be the number of acres treated under TFPA.



Oak regeneration – Lac du Flambeau.
Photo by Larry Mason

6. Governance (are self-determination and self-governance policies and contracts fully supported; do Councils have access to information and expertise to make informed decisions)

Following recommendations from President Nixon in 1970, Congress affirmed the right of tribes to have a greater say over the development and implementation of federal programs and policies that directly impact tribal members. It did so by enacting major pieces of legislation that together embody the important concepts of tribal self-determination and self-governance: The Indian Self-determination and Education Assistance Act of 1975 (P.L. 93-638), as amended in 1988, 1991, and the Tribal Self-Governance Act of 1994 (P.L. 103-413).

Through these laws, Congress accorded tribal governments the authority to contract for the administration of programs and services that previously were administered by the BIA. Congress established the Office of Self-Governance within DOI to develop and implement regulations,



Loaded log truck – Yakama. Photo by Larry Mason

policies, and guidance in support of self-governance initiatives. It also upheld the principle of tribal consultation, whereby the federal government consults with tribes on federal actions, policies, rules or regulations that will directly affect them. Some tribes have chosen to contract with the federal government to deliver specific services, such as timber sales preparation. Under such circumstances tribes may take on greater program responsibilities when they are ready while, for the present, BIA and tribal professionals work together to accomplish tribal program objectives. These tribes are commonly referred to as “638” tribes. Under self-governance, tribes may contract for the entire suite of services included in BIA programs such as forestry. Under self-governance, the tribe has flexibility to decide how it allocates its funds to specific services whereas under 638 contracts specific amounts of funding are allocated for specific activities on a line item basis. Under both arrangements, tribal actions require BIA agreements that trust responsibility is not being compromised.

It is not clear to IFMAT III how the funding allocations for contracts and compacts are determined and whether allowance for upward adjustment is available to accommodate inflation, expansion of tribal resource objectives, additions to tribal land holdings through re-acquisition and consolidation, and ecosystem adaptations in response to climate change. Many of the contract and compact tribes that we visited reported little to no funding increases over the last two decades.

The funding situation appears worse for the tribes that remain as direct service recipients of BIA support. Generally these tribes are smaller and lack the resources and capabilities needed to take on contract responsibilities. Many of these tribes require only occasional technical support so that if they were to enter into self-determination contracts the funding available for the contract would be insufficient hire full time staff. Historically, BOFRP or BIA regional professionals have provided such technical services to multiple tribes. As was observed in IFMAT II, with the growth of tribal contracts and compacts, the funding and staffing levels at BIA to support technical services have suffered. Greater technical expertise needs to be available to all tribes, particularly to small reservations with limited forestry and natural resources staff. In addition to support for integrated resource planning, tribes require assistance with GIS, economic analysis, marketing, fish and wildlife biology, forest and woodland ecology, cultural anthropology, and climate change. We suggest three options for possible remedy.

1. Rebuild BIA technical capabilities at BOFRP and at regional offices. The more sophisticated and occasional services such as inventory analysis and integrated resource planning should be handled by BOFRP. However, technical services that apply to daily activities such as marketing and GIS support will be better supported at the regional or tribal level.
2. BIA could coordinate with other federal agencies such as NRCS and USFS to assure shared delivery of technical support.
3. Sufficient funding to contract occasional technical services from private consulting companies could be provided to tribes.

IFMAT finds that American Indian people and their governments now have greater control over their natural resources than 20 years ago. Today, contract and compact tribes represent nearly 40 percent of all federally recognized tribes. Self-governance creates tribal employment and empowers tribes to customize their forestry programs for best alignment with tribal values and vision. IFMAT observed, however, examples of contracting and compacting of program administration that complicated the trust oversight function of BIA because the trustee is further removed from day to day trust asset management. Administrative redundancies, such as occur when BIA and tribes are required to maintain parallel accounting, are inefficient and costly. Development of projects and timber sales have been slowed by NEPA compliance and the need to get a sometimes distant BIA to sign off on project acceptability. Self-governance should not diminish the federal trust responsibility, but inadvertently may weaken federal accountability. For example, the trustee may not be liable for breach of fiduciary duties if losses arise from failure of

the tribe to comply with the agreed-upon management plan; or for actions by tribal governments or tribal organization employees for which the trustee was not informed, or for which the trustee refused consent.

7. Tribal Vision as the standard of “state-of-the-art” forestry. Courts apply a fiduciary standard to determine whether the federal government fulfills its responsibility to manage Indian trust resources and revenue. IFMAT I stated that the standard is not clear with respect to forest management. That is, what is the measure of adequate forestry and forest management? NIFRMA refers to “state-of-the-art” forestry. This term must be defined and applied as a standard for measuring the adequacy of forest management.



Western red cedar is a culturally and commercially important tree – Quinault. Photo by Larry Mason.

IFMAT has long advocated for Indian people to make key decisions about their forest assets. A first step is to encourage each tribe to articulate a vision for forest and woodland management. Further steps include technical support for planning, endorsements from tribal and federal governments and adequate resources for implementation. We are in agreement with findings of IFMAT I and II; Indians live closer to the natural world and, therefore, directly experience the consequences of their forest management decisions more than other members of American society. Eighty percent of Americans live in urban and suburban environments. Indian communities on reservations depend heavily on their forests to sustain tribal values, employment, and income. Indians must make the best of the available resources. Despite funding and staffing difficulties, many Indian forests are places of experimentation, adaptive management, and innovation. Indian forest programs can serve as models of stewardship and sustainability from which other landowners can learn.

The condition of forests and tribal goals vary from one reservation to the next, and any standard for evaluating the adequacy of Indian forest management must take this diversity into account.

Criteria for consideration by an independent auditor should include:

1. whether the tribe has articulated a vision for its forests;
2. whether the vision is integrated into the management plan; and
3. whether actions on the ground are adequate to carry out the plan.

IFMAT II considered the applicability of third-party certification systems to verify the environmental responsibility of Indian forestry programs but found a poor match. Although a few larger tribal forest product enterprises have enrolled in certification programs for market reasons, discussion with tribal foresters indicate distaste for the intrusion and expense imposed by certification companies. Fulfillment of trust duties instead requires acknowledgement by the Secretary that Indian forests are managed under the laws of the United States. Such acknowledgement should leave little doubt that Indian forest resources are managed sustainably and in concert with the integrated objectives of the tribe.

Recommendations

G1. Adopt IFMAT I's recommendation to define the trust standard as compliance with a forest management plan or IRMP that is based on the tribal vision for its forest, subject to approval and signature of the Secretary. The trustee will be evaluated on whether it has provided resources and technical support to carry out and follow the approved plan. A state-of-the-art Indian forestry program must: 1) be assured of predictable, consistent, and adequate funding for forestry programs on all reservations, whether direct service, contracting, or self-governance compacting; 2) have access to adequate technical and research support; 3) be guided by each tribe's vision for its forests; and 4) strive to sustain tribal resources and objectives. The condition of the forest itself, over time, is the best measure of whether state-of-the-art management is being achieved. A central part of the trust responsibility is to see that each tribe has the means to develop its vision and management plans with adequate technical resources and personnel.

Adopting IFMAT I's recommendation to define the standard as compliance with a FMP or IRMP based on the tribal vision for its forest will require that tribal councils be fully engaged in the process. We found tribal council engagement in forestry to vary, ranging from intense to much less so.

G2. Establish standards for funding Indian forestry that recognize the special ecological, social and economic importance of Indian forests. Fulfillment of the trust duty depends on provision of predictable, consistent, and adequate funding for forestry programs on all reservations, whether direct service, contract, or compact. Coordinate federal funding and technical services delivery with tribal priorities to improve access to predictable funding and technical resources.

G3. Ensure that the annual evaluations of compacted and contracted tribes, now done by the Office of the Special Trustee, include personnel with expertise in forestry. Trust evaluations should include a field component to determine if forest management is in compliance with the forest management plan and tribal vision.

- G4. Provide on-going education and technical resources for tribal government leaders on natural resources management** so that contracting and compacting, and direct services tribes can make informed decisions about their resources.
- G5. Adopt interagency agreements between BIA and other federal agencies to coordinate deliveries of funding and technical support to tribes.**
- G6. Adopt interagency agreements to increase TFPA activities on federal lands** where tribes have off-reservation treaty rights and on sites where tribes identify that action is needed.
- G7. Consistent with IFMAT I and II, create an independent trust oversight body, for example, a permanent commission independent of both the BIA and Secretary of the Interior, to evaluate the overall federal government's fulfillment of its trust duties to Indian tribes.**