

**NIFRMA Task E** - An analysis of the potential for reducing or eliminating relevant administration procedures, rules, and policies of the BIA consistent with federal trust responsibility.

## **Overview**

Federal statutes and treaties establish the trust responsibility of the federal government to Native American tribes. This responsibility extends beyond the DOI BIA to all agencies of the federal government. Treaties further establish tribes as sovereign nations and grant tribes rights to hunt, fish, and gather natural resources on lands ceded to the federal government. Ceded lands include both public and private ownerships. Meeting the trust responsibility and satisfying treaty rights requires environmental conditions both on and off reservations such that lands and waters are biologically diverse, productive, resilient to both natural and human-caused disturbance, and capable of sustainably yielding desired resources and settings.

The policy of “Self-Determination” was passed in 1975 (Public Law 93-638). The Act called for increased involvement of tribal leadership in all decision-making, including forestry. Congress passed NIFRMA in 1990 to increase the tribal role in management of their forests consistent with objectives of self-determination. In 1994, Self-Determination was further modified by adding the “Self-Governance” amendments to the Act. The Self-Governance amendments provide for the transfer of Federal authority toward Indian authority over programs and services including forestry.

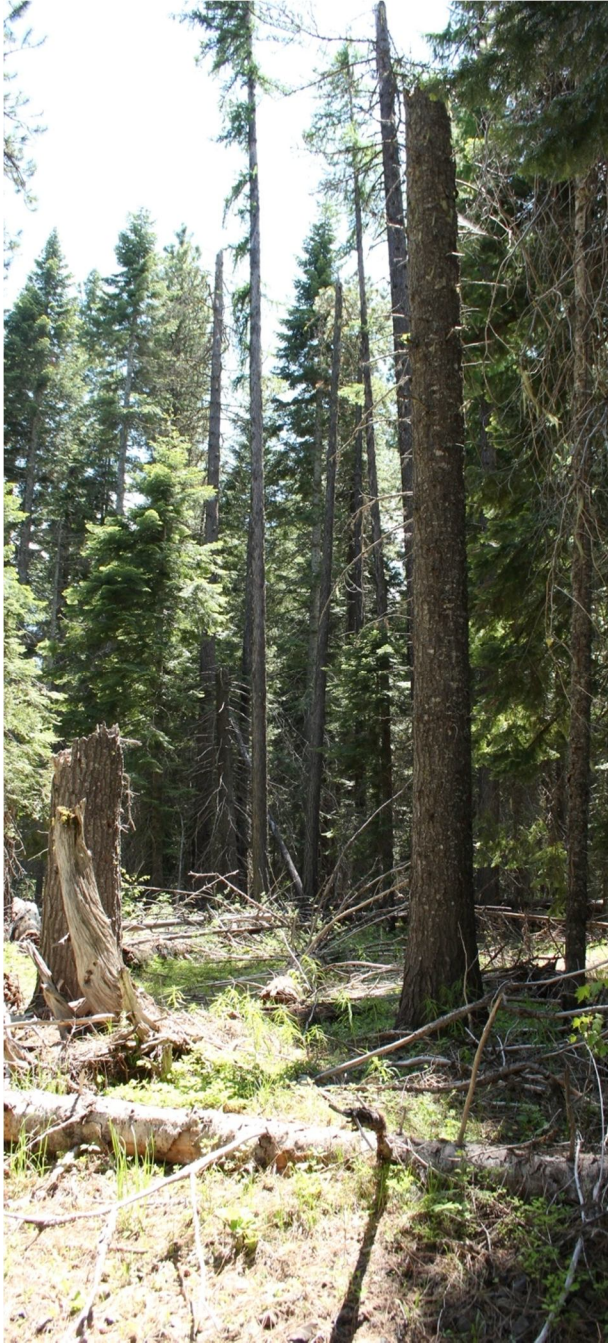
Achievement of self-governance is dependent on the right and responsibility of a tribe to make its own rules and policies and to negotiate such with others on matters affecting more than a single political entity, such as water, migratory animals, and other resources relevant to tribal wellbeing. However, self-determination and self-governance have not changed the way federal environmental law is applied on Indian forest lands. The BIA and tribes must still fully comply with the NEPA, the ESA, the National Historic Preservation Act, and other federal laws.

Certain federal laws have been interpreted to apply to tribes and reservations beyond trust and treaty responsibilities, for example NEPA, ESA, and the Clean Water Act. These laws carry implementation costs and constraints on action, both on and off reservations. The trust responsibility means the federal government has a fiduciary responsibility to the health, safety, economic, educational, environmental, and cultural wellbeing of tribes and their members. Costs imposed but not funded constitute “unfunded mandates.” Those costs plus constraints unmitigated by federal action constitute an erosion of trust obligations. IFMATS I, II, and III have each observed tensions and conflicts between trust and treaty obligations and the costs and constraints imposed by other federal laws, rules, and policies. During the same time, tribes have made substantial progress in self-determination and self-governance empowering the capacity to more fully function as sovereign nations. Conflicts regularly arise in forest management, however, when federal

regulations and unfunded mandates constrain self-determination and stewardship of natural resources.

## Findings

- E1. Because some Indian forests have been managed more effectively in pursuit of tribal goals than surrounding private forests, they sometimes provide habitats and services no longer found on private lands.** This leads to a view that Indian forests have an obligation to continue to provide those services, even at the expense of generating revenue for the tribal beneficiaries. Payments to tribes for ecosystem services as advocated by the USFS could bring needed support for integrated management. NEPA imposes costly processes in planning projects that use federal funds. We found variable degrees of full natural and cultural resources integration in plans or management staffs across the tribes visited. On a positive note, in some case tribes are able to use Environmental Assessments (less costly, more timely) for the same kind of project work that requires the USFS to use Environmental Impact Statements (more costly, more time and resource consuming).
- E2. Goals for and laws granting sovereignty and enabling self-determination are often made difficult** to achieve by requiring tribes to adhere to federal forest and environmental laws and policies, especially when not adequately funded. Because of concerns over liability for breach of trust and unique jurisdictional and political complexities of Indian Country resulting from over two hundred years of history replete with vagaries of policy, legislation, and court decisions, an extensive set of rules, regulations, and procedures is contained in manuals and handbooks for trust administration of Indian forests. A federal nexus created by funding provided to fulfill treaty and trust obligations and the involvement of the United States as trustee, coupled with the lack of consideration for the special status of lands held in trust for Indians has resulted in the application of such laws to Indian forestry. IFMAT III regards these requirements as “unfunded mandates. In the extreme case, they inhibit full sovereignty and self-determination and make reaching tribal goals insurmountable. Dealing with species listed as threatened or endangered under the ESA, including costly Section 7 consultation, is the most troubling example.



Untreated spotted owl habitat – Yakama.  
Photo by Mark Rasmussen.



Coyote tracks on the skid trail – Penobscot.  
Photo by Larry Mason

**E3. Forest roads in Indian Country are of much lower quality than on other federal lands**, creating adverse environmental impacts and reducing potential for tribes to derive full benefits from their resources. Tribal roads often lack adequate drainage capabilities (surface/ditch/cross-drainage). Road funding for Indian Country comes from the FHWA

through the BIA. Unlike FHWA funding for USFS, there is no special recognition of the importance of Indian forest roads for the protection, administration, use and development of tribal forest resources. BIA funds only a portion of the forest transportation system. Timber sales fund a substantial portion of construction, and road use fees cover maintenance of roads that are not on the BIARS or IRR. Because FHWA road funding requires those roads to be open for public use, this source of funding raises tribal concerns for control of access, infringement on sovereignty, and potential for harmful trespass (fire and theft). Most tribes do not desire general public use of forest roads on their reservations, yet to receive BIA support it is required that roads be open to the public.

**E4. Trespass, particularly for illegal plant cultivation, has been identified as a significant management problem** on several western reservations. Law enforcement officials frequently find sophisticated marijuana operations on Indian forests in addition to trespass problems such as theft of natural resources and poaching.

**E5. The NIFRMA and Code of Federal Regulations apply to all tribes.** Procedures contained in BIA manuals and handbooks, developed to ensure that policies are met, apply to those contracted tribes where the contract does not specifically waive use of the manuals and handbooks. Self-governance tribes are not restricted by procedures contained within the manuals and handbooks. Some tribes have made progress in developing procedures and associated tribal codes to address items such as trespass. This allows tribes to increase the level of self-governance and exert greater sovereignty over their resources.

**E6. All three IFMATs have found a lack of natural and cultural resources integration in planning.** Siloed disciplines within the BIA undermine remedy. NIFRMA calls for development of integrated resource management plans (IRMPs), yet the BIA places forest and wildland fire management in one administrative division, and fish, wildlife, recreation, agriculture, and rangeland in another natural resources division; water in yet another. BOFRP is the keeper of process and planning records for the Division of Forestry and Wildland Fire Management, but data for other forest and natural resources are gathered and stored elsewhere. Although there are few IRMPs developed and implemented, there are notable exceptions. Those notable exceptions are models of progressive management to sustain the full array of forest ecosystem values, uses and products.

**E7. Mill-owning tribes lack sufficient commercial forest land** to sustain a local mill, while adjoining public lands have sufficient supply, yet are constrained by various policies and judicial orders from providing it. This could be interpreted as failure to meet federal agency trust responsibility for the welfare of the tribe(s) under the TFFPA.



## Recommendations

**E1. Encourage interdisciplinary planning.** Examine opportunities for improved integration of all forest and rangeland natural resource responsibilities at all BIA administrative levels, i.e., forest, wildland fire, fish, wildlife, recreation, water, rangelands, and cultural resources and promote the development of IRMPs by the tribes.

**E2. Reward tribes that demonstrate capacity for and commitment to forest and natural resource management and stewardship** that meets balanced cultural, social, environmental, and economic goals, as vetted by tribal leadership, such as through an approved IRMP, by enabling such tribes to establish and implement their own rules and procedures as sovereign, self-determining nations.



Forested vista – Eastern Band of Cherokee. Photo by Larry Mason.

**E3. Enable the use of Categorical Exclusions and Environmental Assessments.** For tribes that have well-integrated forest, cultural, and natural resource plans or management staff and strong support for those plans and staffs from council and tribal publics, enable Categorical Exclusions for integrated projects or streamline NEPA to facilitate the development of less costly single-alternative Environmental Assessments. Self-governance tribes should be able to develop tribal NEPA procedures and associated code to replace BIA NEPA manuals and handbooks. This approach furthers self-determination and self-governance and would reward tribes for progress in integrated planning.

**E4. Remove costly unfunded mandates of implementing federal laws and processes,** including consultation under the ESA, or provide full federal funding for carrying out those laws and processes.

**E5. Use TFPA to work with federal agencies, and collaborate with state forest agencies** to dedicate sufficient federal forest or state land within economically feasible haul distance for sustainable timber supply to augment tribal forest supply and form the combined anchor forest for local employment and manufacturing of forest products.

**E6. Build upon the anchor forest concept** to explore the creation of “anchor plant, fish, and wildlife management areas” on federal lands to secure treaty rights on ceded lands that have suffered due to historic or current management practices on those areas.

**E7. Amend current funding formulas to recognize the importance of forest transportation systems on Indian lands.** Investigate and amend current FHWA funding formulas or processes that impede the availability of funds for forest roads.

### **Allotments: fragmented forests and management**

Complicating the management of Indian forests are the thousands of fragmented and fractionated allotted parcels of forest land, generally 40–160 acres in size, that are owned by individual Indian families and are held in trust by the federal government, most often within reservation boundaries, and managed in conjunction with tribal forest trust lands.

The allotment system, created by the Dawes Act of 1887, gave individual Indians ownership interest in specific parcels of land (Indian Land Tenure Foundation 2012a). The intention was to introduce private property ownership and encourage tribal people to become farmers. However, the amount of land suitable for agricultural use was very limited on reservation lands. In carrying out the terms of the Dawes Act along with its amendments and special acts, the Indian Service found it necessary to allot millions of acres of forest land wholly unfit for agriculture. The allotment of forest lands created an extremely difficult problem for the management and administration of Indian forests.

The Secretary of the Interior through the BIA is mandated to hold Indian forest land in trust for the benefit of individual Indian and Tribes, managing them in the best interest of the Indian beneficiaries (25 CFR Subchapter M, Part 163). This responsibility is outlined in the Indian Affairs Manual (IAM Part 53. Forestry; BIA 2006) and includes timber harvesting and management, wildfire control, and various silvicultural activities. An essential part of this policy is to provide for management of Indian forest lands under the sustained yield concept.



Discussion of the unique challenges to management created by fragmented and allotted forest lands at the agriculture interface – Nez Perce. Photo by Mark Rasmussen.

Over time, ownerships divided among heirs through probate and many parcels became fractionated - shared among multiple owners. Each allottee holds an undivided fractional interest in the revenue from the allotment property. The proceeds from a timber sale, for example, would be paid to each allottee based on his or her percentage ownership of the allotment (Indian Land Tenure Foundation 2012b).

Our site visits indicate that the challenges that the allotment system presents to the forest manager are amplified as allotments become increasingly fractionated. For example, the number of fractional interests grew by about 12.5% from 2007 to 2011 (DOI 2012b). Obtaining permission from a majority share of allottees is difficult. Different allottees might have different needs for revenues from harvest. And because servicing allotments is more time consuming, a backlog of forest management work develops. Allottees sometimes wait for long periods for attention from forestry staff. In general, management of allotments is not responsive to individual owners' needs.

Allotments have long-lasting negative impacts on the nature, use, and structure of Indian forestry programs. This ownership structure increases management costs, limits forest products marketability, frustrates landscape level management, results in an uneven distribution of



management constraints between allotment owners, and reduces the economic development potential of Indian forest assets.

The proportion of allotments varies considerably by reservation. Many reservations have no allotted lands, but on 150 reservations, 2.9 million fractional interests are owned by more than 219,000 individuals summing to more than 10 million acres or about 20 percent of all Indian trust lands. It is unknown how many million acres of forest land are in allotment status but there has been little progress in consolidation of forested allotments since IFMAT I<sup>23</sup>. However, we do know that about half of all allotted lands are located on 19 reservations that have been classified as Category 1 or 2 timber tribes (DOI 2012b). Seven of these reservations were visited by IFMAT.

IFMAT has recommended three times, over more than two decades, that allotment lands be consolidated into tribal ownership through a willing buyer-willing seller program, and further recommends easing NEPA and ESA regulatory burdens on allotted forest lands.

### **The Cobell Settlement**

In 1996, Eloise Cobell, a member of the Blackfeet Tribe, filed a lawsuit in federal court on behalf of herself and hundreds of thousands of other American Indians. One issue was whether the United States had breached its fiduciary duty to account for revenue derived from lands held in trust by the federal government for individual Indian allotment owners (allottees). The BIA has responsibility for management of trust lands, and a responsibility to account for revenue from land leases, oil and gas, and mineral extraction, grazing, and timber harvesting.

The Cobell court cases continued from 1996 to 2009. During the course of the litigation, the court found that the BIA had failed to account properly for revenue from trust lands for over 100 years. However, the evidence was inadequate to permit an accurate accounting of the exact amount of funds that should have been distributed to Indian beneficiaries.

In 2009, the Indian plaintiffs and the federal government reached a settlement agreement in the amount of \$3.4 billion out of which \$1.55 billion has been dedicated as the Trust Land Consolidation Fund for acquisition of fractional allotted interests and consolidation into tribal ownership (DOI 2012b). It is too early to tell whether or to what extent Cobell settlement funds might consolidate forested allotments in tribal ownership or otherwise benefit Indian forestry.

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<sup>23</sup> In spite of numerous requests to BIA and other sources, IFMAT was unable to obtain data on the total number of acres in forested allotments.