

California Air Resources Board
November 9, 2016

ARB Compliance Offset Program

Tribal Project Baseline Legal Constraints Determination

ARB has received the following letter from the United States Department of Interior regarding the legal requirements of the National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C. 3101 et seq., as they apply to the California Air Resources Board (ARB) Compliance Offset Protocol U.S. Forest Projects. The legal constraint of NIFRMA is identified in the letter as sustainable yield. The letter also notes that other federal laws (i.e., Endangered Species Act (ESA)) that apply to the project may also serve as legal constraints, although such constraints are independent of NIFRMA's sustainable yield requirement. Tribes may contact ARB for further clarification.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

SEP 15 2016

Ms. Mary D. Nichols
Chair, California Air Resources Board
1001 I Street
Sacramento, California 95814

Dear Ms. Nichols:

In response to inquiries from the California Air Resources Board and from tribal governments, I write to provide clarification regarding the National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C. 3101 *et seq.*, and its application to forest management on tribal trust and restricted lands as you work to implement California's greenhouse gas emissions trading program. I understand several tribes are interested in participating in the program. This letter provides additional detail on the Bureau of Indian Affairs (BIA) implementation of NIFRMA to assist in your processing of tribal applications under the State program.

Congress enacted NIFRMA in 1990, affirming the sovereign authority of tribes to manage their forest lands in partnership with the Secretary of the Interior (Secretary). The NIFRMA requires the Secretary to review and approve Forest Management Plans (FMP). As a legal and policy matter, those plans are developed with a tribe's "full and active consultation and participation" given that tribes are in the best position to make and implement management decisions of their resources. The primary legislative goal of NIFRMA is that the FMP implement sustained yield management of tribal forests. The NIFRMA defines sustained yield forest management as "the development, maintenance, and enhancement of Indian forest land in a perpetually productive state in accordance with the principles of sustained yield and with the standards and objectives set forth in forest management plans."¹

The BIA defines sustained yield as "the yield of forest products that a forest can produce continuously at a given intensity of management."² Sustained yield is not defined with reference to a particular type of wood product or a particular timeframe in NIFRMA; it is left to the discretion of the relevant tribe in consultation with BIA. Within the framework of NIFRMA, so long as the timber harvest is sustainable over an identified time frame and consistent with maintaining the forest in a "perpetually productive state," a tribe may target sustained yield of a wide variety of forest products from large diameter timber or, at the other end of the spectrum, Christmas trees. In 25 CFR § 163.1, commercial forest land is defined as "forest land that is producing or capable of producing crops of marketable forest products and is administratively available for intensive management and sustained production." A tribe may target the management of any or all of their commercial forest acreage and apply any harvest level, in compliance with NIFRMA, to achieve a sustained yield of products and a sustainable level of forest health and ecological resilience. Many tribes typically do, for example, choose

¹ 25 U.S.C. 3104(b).

² 25 CFR § 163.1.

management goals that lead to conditions favorable for the production of large diameter trees or, average residual growing stock levels higher than neighboring private landowners. The targeted or desired future condition of tribal forests is not mandated by NIFRMA. Other Federal laws, such as the Endangered Species Act, may restrict harvesting in some areas or place limits on the amount of vegetation manipulated in tribal forests, but these are independent of NIFRMA's sustained yield requirement.

The legal constraint of NIFRMA is sustainable yield, which is NIFRMA's legislative mandate. The various standards and metrics used by professional foresters in reaching that sustainable yield include concepts such as Maximum Biological Yield, Maximum Biological Cut, Indicated Allowable Cut, and Annual Allowable Cut. These standards and metrics are not legally binding constraints, but are targets used in implementing a forest management plan developed by a tribe in consultation with, and approval by, the Secretary.

While some tribes may agree to the use of Indicated Allowable Cut as the harvest level to achieve sustained yield management goals, applying this approach to all tribes would generate confusion, be contrary to tribal self-determination, and be inconsistent with the spirit of tribal decisionmaking regarding the implementation of NIFRMA. Furthermore, a tribe may legally harvest substantially more than the Indicated Allowable Cut in a given year for a variety of reasons such as a result of insect and disease epidemics or market fluctuations, provided that over the planning period the Indicated Allowable Cut is not exceeded. Tribes may also amend their FMP at any time, either increasing or decreasing the Indicated Allowable Cut or, managing for different tribal goals, objectives, or products, provided sustained yield management is achieved. These FMP changes are subject to BIA's approval.³

To the extent this guidance conflicts with any prior guidance provided by BIA Pacific Region, this letter's guidance supersedes the BIA Pacific Region guidance.

I understand the goal of identifying a uniform legal constraint under NIFRMA as California works to implement its cap-and-trade program. However, NIFRMA appropriately provides for a personalized approach to each tribe. I understand that this may involve additional work for your staff. I offer the assistance of our forestry experts, some of whom you have already been working with, to assist your team as it moves forward with this important program. In closing, I am personally willing to meet with you and the interested tribes if that would be helpful to foster the review of the tribes' applications in a timely manner.

Sincerely,



Lawrence S. Roberts
Principal Deputy Assistant Secretary –
Indian Affairs

³ See, e.g. 25 CFR § 163.11(a), 53 IAM 2-H, p.11 ("It is intended that the FMP will be a flexible and ever changing document that will incorporate any revisions in the goals and objectives of the tribe, any change in the conditions of the natural resources within the reservation and include all new state-of-the-art scientific information in the natural resources area. Examples of these specific areas of change could be the seating of a new tribal administration with different objectives, a cataclysmic event such as wind throw or fire in the forest, or a new forest inventory.")