

INTERAGENCY REVIEW TEAMS

The Lummi Nation Wetland and Habitat Bank— Restoring a Piece of History

The first tour I was given of the Lummi Nation's reservation land that would eventually become the U.S. Army Corps of Engineers (the Corps), Seattle District's largest mitigation bank, I was transported back in time. Eagles and hawks soaring overhead, huge rafts of waterfowl protected within a cove in Lummi Bay, wind gently bending native reeds, sedges, and grasses of estuaries, and a deep beauty and peace resonated as far as the eye could see. I felt a sense of awe and pride to be involved in creating something that had never been done before: authorizing the first Native American commercial mitigation bank in the nation.

There were parts of the reservation we traveled that day reminiscent of how this land likely looked prior to Euro-American settlement. Indian tribes have always inhabited the watersheds of western Washington with their cultures based on harvesting fish, wildlife, and other natural resources in the region. In the mid-1850s, when the U.S. government wanted to make Washington a state, a series of treaties were negotiated with tribes in the region. Through the treaties, the tribes gave up most of their land, but also reserved certain rights to protect their way of life. The promises of the treaties were broken time and again, and the struggle to obtain recognition of those rights continued until the landmark Boldt Decision (*United States v. Washington*, 1974) reaffirmed treaty fishing rights.

The Lummi Nation is the third-largest tribe in Washington State and has about 5,000 members. The reservation is approximately 12,500 acres of upland and 7,000 acres of tidelands. Wetlands make up approximately 50% of the upland area, with 60% of the wetlands located in the floodplain. Much of the land was converted to agriculture years ago. Rivers have been diked and channelized.

Wetlands have been filled and altered, but deep in the reservation, there is still that sense of what it must have been like when the Lummi Nation lived off the bounty of the land and the richness of the sea. With fisheries declining and agricultural fields too wet to be highly productive, the seed of a mitigation bank was planted in the late 1990s, with the first bank prospectus submitted in 2004. The Lummi bank was signed by the Seattle District Engineer on July 6, 2012. This is a synopsis of that long journey and the unique lessons I hope to share about Native American banks, so in the future this wheel does not have to be reinvented and the bank process streamlined.

Located along the western boundary of Whatcom County, Washington, the reservation includes the mouth of the Nooksack and Lummi Rivers. Both the Nooksack and Lummi Watersheds are under environmental pressures from rapid regional growth. Because of the number and distribution of wetlands on the reservation, an administratively efficient, technically sound, and legally defensible mechanism was needed to effectively manage wetland resources. The Lummi Nation determined that a wetland and habitat bank would be a key tool in this effort. This bank represents a regionally significant opportunity for ecological restoration on a large scale.

The bank will be developed in four phases and will total 1,945 acres. A majority of the bank will be co-located with other estuary restoration projects for a combined 2,750 acres, or 22% of the reservation (excluding the 7,000 acres of tidelands). Here are a few relevant factors about the differences between Native American and other banks.

State Role and Authority: The state had no authority over or jurisdiction on tribal lands, but still needed to figure out

a way for the state to be involved, since the bank would allow impacting projects off the reservation to secure credits from their bank. Those actions would require Washington State to issue a Clean Water Act §401 Water Quality Certification. Therefore, if the Lummi wanted projects outside the reservation to utilize the bank, then the state had to somehow "certify" the bank. To use bank credits in Washington, the bank must be certified by the state, so we appeared to have a significant conundrum. However, subsequently, the state's banking rule was revised to include a section on tribal banks. The revised language states that if the Corps authorizes the bank, then the state will consider it certified, as long as the Washington State Department of Ecology has a seat on the interagency review team (IRT) and remains an active member. For the Lummi Bank, the Department of Ecology sent a letter of support, but did not sign the mitigation bank instrument (MBI).

Sovereign Immunity: Sovereign Immunity is a doctrine precluding the institution of a suit against the sovereign entity without consent. Tribes must be willing to waive their sovereign immunity to be a bank sponsor, since the mitigation responsibility is being transferred from the permittee to the sponsor. The Corps must be able to enforce the MBI conditions. With sovereign immunity intact, this would not be possible, hence the requirement to waive this specifically for tribal banks. The MBI has the following stipulation: "[b]y Lummi Indian Business Council resolution the Sponsor waived any sovereign immunity that it may possess from any suit by the United States in an appropriate Federal Court related to the provisions, terms, and conditions contained in this instrument."

Financial Assurances: We handled financial assurances for both the establish-



Left: Frank Lawrence III, Lummi steward for Phase 1 of the bank, overlooks an area of reed canarygrass that will be enhanced with native willow species. Photo courtesy of Kari Neumeyer/Northwest Indian Fisheries Commission. Right: A view from the bank looking toward the outlet of the Nooksack River and estuary adjacent to Bellingham Bay. Photo courtesy of Lummi Nation.

ment and long-term phases of the Lummi Bank similarly to other governmental sponsors through guaranteed appropriations and a political promise. The MBI contains the following language:

[t]he Lummi Nation will appropriate funding through the Sponsor's Departmental Operating Account. To the extent, if any, that these funds are insufficient to fully and timely fund the Sponsor's obligations as delineated in this Agreement, the Sponsor shall include in its budget request for each fiscal period appropriations sufficient to cover the Sponsor's obligations under this Agreement for that fiscal period, and will use all reasonable and lawful means to fulfill its obligations hereunder.

In addition, we have added another stipulation in the MBI requiring that no mitigation credit sale revenue may be diverted directly into bank establishment or management activities. We wanted to ensure that the Lummi Nation was not dependent on credit sales to fund the successful establishment of the bank. With non-native, private banks, we have financial assurances in place to ensure successful implementation of the bank project and meet performance standards outlined in the MBI.

Cultural Sensitivity and Site Protection Mechanism: Sensitivity to cultural differences was paramount throughout the bank process, from what type of site-protection mechanism is appropriate to what uses and activities would be allowed within the bank boundaries. Hunting, fishing, and gathering activities were very important to retain for the Lummi Nation. Ceremonial uses within the bank boundaries also needed to be retained. To do so required provisions in the MBI to allow the erection of temporary structures and access for tribal members. We needed to make sure there were provisions for cultural resource recovery, since the reservation likely contains significant undiscovered cultural and archaeological resources.

Conservation easements are the preferred form of site-protection mechanism for all of our banks in the Seattle District, and the IRT knew that this was going to be a sensitive issue for a tribal nation, since, in essence, a conservation easement entrusts your land to another entity. The Lummi approached a couple of federal agencies without success. For a variety of reasons, having the state or local government hold the easements was out of the question for the Lummi Nation, which left nonprofit organizations and other tribes. Both these options were also met with resistance. This looked to

be a significant stumbling block. Finally, the Northwest Indian Fisheries Commission (NWIFC) was proposed as grantee of the conservation easement, which turned out to be a brilliant idea, since the commission is a unique entity. They had never fulfilled this role previously, but once approached, embraced the idea wholeheartedly.

The NWIFC is a support-service organization for 20 treaty Indian tribes in western Washington and was created following the Boldt Decision. The commission is composed of representatives from each member tribe. Since the Lummi Nation is a member of the NWIFC, the conservation easement language contains a provision that the Lummi Nation NWIFC representative must step aside in any decision concerning matters arising from the bank's conservation easement. This first-of-its-kind role for the NWIFC will certainly extend to other situations in the Pacific Northwest, and all involved are excited about future possibilities. One significant conflict was overcome with a win-win resolution.

Credit demand is very high within the Lummi Bank Service Area, and as credits sell, we will all look forward to implementation of future phases of this historic and unique bank. ■

- Gail Terzi