



US Army Corps of Engineers



REAL ESTATE PROTECTION

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RULES AND REGULATIONS

**Generally the site protection rules for
compensatory mitigation are found at:**

33 CFR 332.7 and

40 CFR 230.97



SITE PROTECTION

“...mitigation project must be provided long-term protection through real estate instruments or other available mechanisms as appropriate.”

33 CFR 332.7(a)(1) 40 CFR 230.97(a)(1)



TIMING

- **Banks: site protection instrument must be finalized before any credits can be released.**
- **ILF: site protection instrument must be finalized before advance credits become released credits (and/or ILF funds are released.)**



WHAT ARE SOME EXAMPLES OF SITE PROTECTION DOCUMENTS?

- Conservation easements
- Restrictive Covenants
- Transfer of title
- Federal facility management plan
- Integrated natural resource management plan
- Multi-party agreements



What is the difference between a restrictive covenant and a conservation easement?

What is a federal facility management plan?



WHY ARE THERE SO MANY TYPES OF SITE PROTECTION DOCUMENTS?

- Real estate laws change from state to state
- The entities involved in protecting the property differ from state to state



“...consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protections...”

33 CFR 332.7(a)(1) 40 CFR 230.97(a)(1)



**What form of site protection
does your Corps District
and/or IRT require for
mitigation banks? ILF?**



ADVANTAGES OF HAVING A CONSERVATION EASEMENT

- **Third party holder may assume the responsibility for long term management**
- **Holder generally has the right to enforce the terms of the easement against the owner**
- **Owner transfers the land to new owner but holder of conservation easement remains (forever?)**
- **Holder may want to be responsible for monitoring & maintenance, may accept responsibility for managing wildlife habitat or protection of endangered species and may provide educational programs**



WHY MIGHT LAND TRUSTS OR NATURAL RESOURCE AGENCIES NOT WANT TO VOLUNTARILY HOLD CONSERVATION EASEMENTS ON MITIGATION PROPERTY?

- Property lacks suitable habitat or aquatic resource that the organization has as its mission to protect
- Ownership rather than easement holder may be preferable
- Property is small, part of a subdivision, or hard to access
- Owner (local governmental entity) may not have reliable yearly resources to fund stewardship and staff



PROBLEMS WITH CONSERVATION EASEMENTS

- **Land trusts can come and go. A conservation easement can be extinguished for lack of a holder.**
- **There may be no state department or agency willing or authorized to hold an easement**
- **Governmental conservation easement holders may not have sufficient funds to monitor and enforce during “lean spending” years.**
- **Conservation easement holders may not choose to enforce the easement terms**
- **Natural resource department or agency may be subject to state, county or local governments who determine management procedures year to year**



ADVANTAGE OF RESTRICTIVE COVENANT

- Restrictive covenants often “run with the land” in perpetuity and the covenant remains regardless of ownership of the land
- Owner acknowledges that property is protected for “value received” in the instrument (for the permit/bank that allows for profit) and it is therefore a contractual agreement (quid pro quo)



Problems with Restrictive Covenants or Deed Restrictions

- There may be no third party (non-owner) easement holder to determine if the owner is complying with the terms of the covenant and agency may not have the resources to monitor each site.
- Some states may not have strong laws to support restrictive covenants or may have time limits (number of years) on covenants
- Owner can petition court to remove deed restrictions.
- Some county recorders resist recordation of deed restrictions



TITLE TRANSFER AS SITE PROTECTION

Problem:

Some agencies have converted mitigation sites to other purposes (e.g. wildlife food plots or wetlands habitats)

Solution:

Reversionary clause so that mitigation land reverts to original landowner if land is not managed for intended use.



Does your IRT or Corps District offer a credit incentive for every additional layer of legal site protection?

How would that work? How do you layer site protection documents?



IN-LIEU FEE

- In Lieu Fee site protection documents may vary from those required for mitigation banks. Why?
- What form of site protection document does your Corps District require for In Lieu Fee property protection?



MULTIPLE PARTY AGREEMENTS

- The land trust or natural resource agency or department who is the ILF proponent may not be the ultimate owner. They may be acquiring the land pending transfer
- The ultimate owner (Federal or State) agency cannot by statute accept transfer of real property if it has any limitation (recorded conservation easement or restrictive covenant or deed restriction)
- Multiple sources of funds (not just ILF)



CONSERVATION LAND USE AGREEMENT

- All parties to the ILF project sign the agreement
- The agreement provides for acquisition and transfer of ownership
- The agreement names the entity that will ultimately record the site protection document



If CWA mitigation credits for banks or ILF are approved in buffers paid for by ACUB and the credits are used by the military institution as mitigation, what site protection document is used? What if a land trust agrees to hold a conservation easement over the military buffer property but the proposed reserved rights of owner conflict with prohibited uses enforcing the CWA?



Enforcement

“...Where practicable, establish in an appropriate third party the right to enforce sites and provide the resources necessary to monitor and enforce the sites protected...”

Who provides the enforcement of the site protection document?



HOW DOES SITE PROTECTION WORK ?

- Recording at the courthouse in the record deeds office provides a public record of the interests associated with land.
- Land management plans should be kept and be accessible (military base, tribal land office, natural resource office).



WHO LOOKS AT THOSE RECORDS?

- **Potential buyer of land**
- **Title Search – open to public**
- **Financial Institutions prior to lending**
- **Private and Governmental developers**
- **Court proceedings**
- **Land planning (military, tribal)**



WHAT DO YOU WANT TO KNOW ABOUT THE LAND BEFORE ACCEPTING IT AS A MITIGATION SITE?

- Who or what owns it?
- Does the owner have good title?
- Does the owner have title insurance?
- Who else has an interest in the land?
- Is the land protected already?



INTERESTS IN LAND

- **Ownership (individual, couple, family, partnership, LLC, business, in common, land trust, government)**
- **Easements (utility, water/sewer, cable)**
- **Right-of-Ways (roads, access)**
- **Lien Holders (Financial i.e. mortgages)**
- **Property that passes by probate (wills and trusts)**
- **Leases, rights (mineral, timber, water)**



What is a marketable record title statute?

In some states, a marketable record title might mean a title of record which operates to extinguish interests and claims existing prior to a certain date.

Need to know if there are exceptions.



Title Insurance

The requirement of title insurance means that a title insurance company is hired to go to the courthouse and research the history of the property (chain of title) going back 30-60 years to see if the owner has clear title and to see if there is any conflict in ownership. If there is clear title, then they back their determination with insurance.

It may be a good thing to require.



Will title insurance suffice to address all the issues regarding the property?

NO

- Title insurance just assures clear title.
- It often doesn't list all the existing easements, right-of-ways, tax liens, financial liens and other interests less than ownership.
- A search for other interests should be conducted



Will a title search for all other interests, claims, liens regarding the property reveal everything?

NO



So how do I find out about unrecorded interests in the land?

ASK

- Are there any outstanding mineral rights?
- Are there water rights affecting the property?
- Are there any outstanding timber rights?
- Is the property subject to any uses not of record?
- Are there any outstanding leases? Contracts?



When do I request this information?

- Develop a policy and process regarding real property in coordination with counsel.
- Maybe when the Joint Public Notice goes out would be a good time to require submittal of title insurance, title search and questionnaire regarding land issues.
- There is no point in proceeding if there are outstanding issues regarding the land in conflict with mitigation and site protection requirements.



What if the information provided is inaccurate or fraudulent and becomes an issue after the mitigation is accepted?

Your site protection document should address that issue



Suggested language

“Should an easement, right or lease on or to the property not shown on the survey or listed in the (document) and prior in time and recording to this (document), or unrecorded, be exercised in such a manner that it conflicts with or voids the prohibited uses of the property set out in this (document), then the owners of the property shall be responsible for providing alternative conservation mitigation in such amounts and of such service and function as the USACE or any enforcer of this (document) shall determine in accordance with...CWA.”



**WILL THE SITE PROTECTION
INSTRUMENT BE GIVEN PRIORITY
OVER RECORDED PROPERTY
INTERESTS?**



FORECLOSURE

- If a mitigation bank or ILF property is used as collateral and the borrower defaults on the loan, the financial institution can foreclose on the property.
- If the site protection instrument was recorded after the deed to secure the debt, it could be wiped out.

How can this be prevented?



WHAT IS SUBORDINATION AND WHY IS IT IMPORTANT TO AVOID LOSING MITIGATION SITES TO FORECLOSURE?



Consent and Subordination

The undersigned (Lender) beneficiary under a Deed to Secure Debt (dated) and recorded in (Deed Book) and (Pages) in the (County, State) records, for itself, its successors and assigns, consents to the foregoing (easement/covenant).

Lender agrees that, upon recordation of the (document) the provisions of the (document) shall run with the land which serves as security for the debt evidenced by the Security Deed and further agrees that any foreclosure or enforcement or any other remedy available to Lender will not render void or otherwise impair the validity of the (easement, covenant).

The undersigned acknowledges that it has received and reviewed a copy of the (document and exhibits).



WHY WOULD A FINANCIAL INSTITUTION AGREE TO A CONSENT AND SUBORDINATION?

- Usually the wetlands/streams/buffers cannot be impacted without a permit.
- The property doesn't diminish substantially in value. There are uplands that can be developed.
- The lender wants to lend money and have the developer or mitigation banker succeed and pay interest so the lender makes money.
- Problem when the lender goes belly up!



REAL PROPERTY V PERSONAL PROPERTY

- The mitigation bank land is legally called “real property.”
- The credits that have monetary value are called “personal property.”
- Statutes and case law treat them differently
- What might happen when different entities own the (1) land and (2) the mitigation bank with the right to sell credits?
- How can division of property rights be prevented?



RULE ON NOTIFICATION

**60-day advance notification
before voiding or modifying any
site protection document or
mechanism**



HOW DOES THE PUBLIC FIND OUT THAT NOTICE MUST BE GIVEN?

Title search of property reveals document

Owner knows of site protection document

Site protection language in document recorded at the courthouse provides that a 60-day advance notice must be given.



Sixty-Day Notice Language

“... the (Corps) shall be provided with a 60-day advance written notice of any legal action concerning this (document) or of any action to extinguish, void or modify this (document) in whole or in part. This (document) is intended to survive foreclosure, bankruptcy, condemnation or judgments affecting the property.”



TRANSFER NOTICE

Does your IRT have a policy regarding notice when the owner/sponsor of a mitigation bank or ILF project transfers the ownership of the bank/project willingly or unwillingly to another entity?



Suggested Language Regarding Notice

At any time during the life of the mitigation bank, should the real property and/or credits available for sale by a mitigation bank be transferred, sold, conveyed, merged with another entity, become a subsidiary to a corporation, become part of a new partnership or business entity, be subject to foreclosure, bankruptcy or court order, or transferred by any other means whatsoever, the owner, sponsor or administrator shall immediately notify “x” in writing and no further credits shall be sold pending a review by “x”.



Suggested Language if Bank is to Continue

The new transferee shall provide “x” with written adoption of the terms and conditions of the mitigation banking instrument and provide acknowledgement of the terms and conditions of the recorded (site protection document).



RULE

When an alternative mechanism is used & changes result in incompatible use, agency must provide alternative mitigation acceptable to the Corps



THE SITE PROTECTION DOCUMENT MAY STATE SOMETHING TO THE EFFECT:

“This (document) shall not be amended or extinguished except by written approval of the (Corps). Amendments to the (document) for the purpose of proposing additional impact are not favored and will be considered only in rare circumstances following (Corps) policy and procedures.”



Who are the usual culprits
who dare to propose to
amend the site protection
document to impact the
resources on the land?



CULPRITS

- Department of Transportation
- Developers
- Linear project proponents
- Owners
- Local governmental entities (public interest)
- Military
- Even the Corps!!!!



ARGUMENTS MADE BY
PROPONENTS TO IMPACT
CONSERVATION RESOURCES
ON SITES PROTECTED WITH A
LEGAL REAL ESTATE
INSTRUMENT:



- It will only impact the buffer/upland and therefore no waters of the U.S. will be affected
- It is the best alternative for this (road/pipeline) because all other alternatives involve impacts to homes, businesses or developed areas (people v natural resources)
- It will save lots of (taxpayer) money if we can cross the protected site and not have to go around it
- The values/functions/services of the wetlands or streams are not very high. It won't be a great loss.
- The wetlands/streams are no longer jurisdictional
- We have “political clout” and you should do as we say and get out of our way
- The military needs to impact the site for training.



SUGGESTED POLICY REGARDING AMENDMENTS

- Owner of property must consent
- Alternatives analysis – cost saving, although a factor, is not the most significant consideration
- It is not relevant that proposed impact is to a buffer or upland. The mitigation was required after deliberation of the IRT as to the functions, services and values of the entire tract
- IRT/Corps may determine that impact will affect the entire site and not just the portion directly impacted
- Mitigation for impact to the protected site will be required at a substantial higher credit ratio than for permit actions (or SOP)



ARE YOUR IRT MEMBERS
NOTIFIED WHEN THERE IS A
PROPOSAL TO AMEND A SITE
PROTECTION DOCUMENT AND
ASKED TO COMMENT?



AMENDMENTS TO SITE PROTECTION DOCUMENTS OR PROPERTY MANAGEMENT PLANS

**Does your IRT/Corps District have a
policy for proposals to amend the site
protection document or management
plan?**



EMINENT DOMAIN

Suggested language in the site protection document:

“If protected mitigation property is taken in whole or in part through eminent domain, the consequential value of the property protected by the Clean Water Act is the cost of replacement of the conservation functions, services and values with other property in the same watershed.”



WHAT SHOULD THE REAL ESTATE DOCUMENT SAY REGARDING PROHIBITED USES ASSOCIATED WITH MITIGATION SITE ?



Suggestions for Prohibited Uses

- Clearing, cutting, mowing
- Earthmoving, grading, topography change
- Mining, drilling, timbering
- Draining, diking
- Diverting or affecting the natural flow of surface or underground waters
- Spraying with herbicides that violate water quality standards
- Grazing or use by domesticated animals
- Use of off-road vehicles and motor vehicles



WHAT ARE PERMITTED USES
THAT MAY BE STATED IN THE
REAL ESTATE INSTRUMENT?



Possible acceptable uses of land:

- Walking trails in upland using pervious materials
- Minimal structures and boardwalks for the observation of wildlife, stream and wetland ecology
- Hunting, fishing, canoeing, hiking, passive recreation
- Carrying out approved conservation and wildlife management plans
- Fence out livestock, trespassers



EXHIBITS TO SITE PROTECTION DOCUMENTS – MITIGATION BANKS

- The CWA banking instrument, or the executive summary
- Survey/Legal Description (Survey shows any easements that will remain in place)
- Conservation functions, services, values on the site to include aquatic resources, listed species, habitat, vegetation and contribution to the watershed.



EXHIBITS TO ILF SITE PROTECTION DOCUMENT

- Survey/Legal Description
- Conservation functions, values, services
- List of permit actions from which funds were applied for the ILF project



CONSERVATION VALUES

- If the site owner sets out the conservation functions, services and values in the site protection document exhibit, it is difficult later to argue that it doesn't have value.
- Once the mitigation property is finalized, then the contractual agreement is completed. The site protection document should state that it will remain conservation mitigation even though it may later be determined through case law decisions or otherwise not to be jurisdictional waters of the US. A deal is a deal!



Litigation in Court

“In any state court action, the United States Army Corps of Engineers reserves the right to be represented by the U.S. Department of Justice and/or to remove a legal action affecting jurisdictional waters of the U.S. to the United States Federal District Court in the district where the land lies.”



US Army Corps of Engineers



QUESTIONS ?

COMMENTS ?