

Tribal Input on Infrastructure Investment and Jobs Act Tribal Provisions

NOAA Executive Summary and Response

May 19, 2022

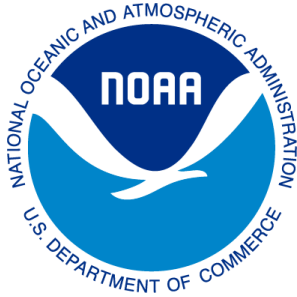


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I. Background

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA), which provides more than \$13 billion for direct investments in tribal nations across the country. The investments in the IIJA underscore the importance of the National Oceanic and Atmospheric Administration's (NOAA) mission to understand and predict changes in climate, weather, oceans, and coasts; to share that knowledge and information with others; and to conserve and manage coastal and marine ecosystems and resources. Over the next five years, NOAA expects to have funding from the IIJA that will be of interest to tribal nations. We have made it our priority to garner input from tribal leaders on the important opportunities and decisions that this funding provides and will engage interested tribal nations in a sustained dialogue about this funding.

For our initial discussions, we requested tribal input on three provisions of the law that authorize NOAA to provide funding to tribal nations. In addition to these three provisions, there is other IIJA funding that tribal nations can apply for above and beyond that which is dedicated exclusively to tribal nations. The three provisions include:

- **\$400 million to enhance fish passage by removing barriers and providing technical assistance under the Magnuson-Stevens Fisheries Conservation and Management Act (15 percent of funding for tribes).** These funds will support projects that eliminate in-stream barriers to restore fish passage and help protect and restore habitats that sustain fisheries, recover protected species, and maintain resilient ecosystems and communities. (Fish Passage)
- **\$172 million to support recovery efforts for Pacific coastal salmon.** These investments will protect, restore, and conserve Pacific salmon and steelhead and their habitats through competitive funding to the States of Alaska, Washington, Oregon, Idaho, Nevada, and California and Federally recognized tribes of the Columbia River and Pacific Coast (including Alaska), or their representative tribal commissions and consortia. (Pacific Coastal Salmon Recovery Fund)
- **\$56 million for established Regional Ocean Partnerships (ROP; 10 percent of funding for tribes).** This funding will support coordinated interstate and intertribal management of ocean and coastal resources and implement their priority actions, including to enhance associated sharing and integration of Federal and non-Federal data by ROPs or their equivalent.

To obtain early input on the execution of the three provisions, NOAA distributed a letter on January 21, 2022, inviting federally recognized tribes and Alaska Native Corporations (ANCs) to provide verbal input at two sessions in February 2022 and written input during the 60-day comment period. Each invitation letter also contained additional information on the three tribal provisions and framing questions highlighting key topics for tribal input.

NOAA hosted the consultations on a WebEx format. Dr. Richard Spinrad, Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator, welcomed the tribal

representatives on each call. Approximately 44 tribal nations and tribal organizations participated and NOAA received 15 written submissions. Transcripts, audio recordings, and presentation slides for the sessions are available on NOAA's website.¹

II. Summary of Comments & NOAA Response

Tribal nations and ANCs provided comments in areas broadly categorized as either administrative aspects of the funding or prioritization of activities for funding. NOAA summarized the comments within these two broad categories and further refined them into themes. This document summarizes individual verbal and written input NOAA received during the 60-day comment period. NOAA considered all the input we received. We were advised that some of the individual comments did not represent consensus input from a tribal nation or might not reflect a tribal endorsement of specific ideas. Although this request focused on the three specific provisions in the law, we welcomed verbal and written input on other NOAA programs and priorities. Comments provided outside of the three provisions are not captured in this summary, and have been shared with appropriate NOAA offices depending on the topic.

Administrative Aspects of the Funding

NOAA received comments regarding how the agency currently administers funding or proposes to administer funding through the three provisions. These comments are categorized in themes below.

Capacity and Coordination

Tribal nations provided comments concerning constraints on the amount of time, energy, and expertise they have available for locating funding, applying for funding, coordinating opportunities, leveraging resources, administration, planning, design, conservation and restoration, implementation, and reporting.

- **Several tribal nations expressed the need for funding to be used for capacity building, including:**
 - Assistance with drafting strong proposals, retaining staff with technical skills in addition to utilizing the expertise of national and local NOAA staff, achieving streamlined environmental compliance, and supporting coordination across federal agencies and existing partnerships.
 - Many tribal nations were **appreciative of the assistance NOAA staff currently offer** along with their funding. Tribal nations shared that this assistance has been helpful through all phases of a project. Specific to PCSRF,

¹ <https://www.noaa.gov/legislative-and-intergovernmental-affairs/noaa-tribal-resources-updates>

it was recommended that funding should allow prospective applicants to obtain technical assistance from NOAA staff in preparing applications and have NOAA provide feedback that can be applied to future applications.

- **Many tribal nations felt it was important to leverage existing agreements between tribal nations, tribal organizations, and state and federal agencies** - such as the Columbia Basin Fish Accords² and other Memoranda of Agreement/Understanding, to access additional resources and expertise to support tribal priorities. Tribal nations commented by working through these agreements, they will demonstrate support for ongoing and planned efforts.
- Some tribal nations suggested that **funding agreements should provide flexibility to divert funds where they are needed most**, such as internal capacity or subcontracting with subject matter experts.
- **A few tribal nations mentioned that responding to this request is time consuming** and recommended consulting with tribal nations on specific projects on their tribal lands (e.g., fish passage barriers). Tribal nations felt this more targeted approach could better determine if the tribal specific set asides are sufficient for completing projects.

NOAA Response

NOAA heard several tribal nations express concern about limitations in capacity to apply and implement funding. We will work with tribal nations to explore alternatives to reduce the burden associated with the funding application process. While NOAA staff are not allowed to directly assist prospective applicants in preparing applications, we are available to answer questions during the application process and we can and do provide post-competition feedback based on submitted applications.

The Pacific Coastal Salmon Recovery Fund (PCSRF) grant program supports tribal capacity as an eligible activity to be funded. However, NOAA recognizes and heard that the current levels of funding awarded toward capacity has not been prioritized within the program. PCSRF will incorporate tribal capacity as a program priority in future funding opportunities. With regards to streamlining environmental compliance and coordinating across federal agencies, the PCSRF program is in the process of developing programmatic agreements for our compliance with Section 106 of the National Historic Preservation Act. As part of this process, we are working to coordinate with the appropriate federal agencies that have a parallel undertaking to develop efficiencies for funded projects. Furthermore, PCSRF and Fish Passage programs utilize National Environmental Policy Act (NEPA) programmatic documents and Endangered Species Act (ESA) biological opinions to streamline environmental compliance for funded projects.

In addition to help with capacity limitations, our Fish Passage staff provides support to reduce the time our partners need to spend on federal environmental compliance and can

² <https://critfc.org/fish-and-watersheds/fish-and-habitat-restoration/columbia-basin-fish-accords/>

assist with applicant capacity shortfalls related to restoration planning, design, and implementation.

The IIA ROP grant program announcement will include a range of capacity building activities, including staff time to participate in ROP-related work, convening discussions about coastal and ocean management priorities and alignment with ROP activities, and support for travel to meetings relevant to ROP activities. In a separate but related funding opportunity, ROPs can propose to hire tribal coordinators and/or provide application assistance to federally recognized tribes in their region.

Funding Allocation Process

Tribal nations provided comments on how NOAA identifies spending requirements, as well as the method and execution of funding.

- **Several tribal nations expressed frustration with competing for funds** due to inadequate staff capacity to develop proposals, the uncertain nature of competing for funding, inefficiencies with competing on a project by project basis, and non-competitive funding aspects for the existing programs.
- **Many tribal nations recommended dedicated set aside funding** and some offered to work with NOAA on how those funds are distributed and what the priorities should be.
 - A few tribal nations were supportive of funding going **directly to tribal nations or their partner organizations**, such as tribal commissions and consortia, and expanding exemptions from the percent limit for administrative expenses to these entities—especially where administrative expenses tend to be higher, such as Alaska.
 - Some comments recommended specific dollar amounts, such as a portion of the non-set aside funding for Fish Passage (\$340 million) be **allocated to tribal projects**, whereas the tribal set aside (\$60 million) be **dedicated to tribal capacity grants**.
- A few comments recommended specific priorities for the tribal set asides:
 - Some comments recommended tribal set asides should include **priorities that are specifically related to recovery and conservation of tribal trust species and their habitats for subsistence use**, as well as basic monitoring to track the status of species that are not listed under the ESA or managed under Magnuson–Stevens Fishery Conservation and Management Act (MSA).
 - For PCSRF, a few comments recommended specific **discrete allocations be made for the respective program priorities**. It was also recommended that program priorities should be removed if corresponding activities will not receive funding in a given fiscal year.
- Eight tribal nations communicated support for **direct transfer of funds to the Bureau of Indian Affairs (BIA)** and subsequent disbursement to tribal nations

through self-governance compacts or 638 contracts. A few tribal nations noted the advantages of BIA administering funding, such as more streamlined processes, less administrative cost, and increased transparency.

- A few tribal nations requested that NOAA **utilize memoranda of understanding (MOUs) with individual tribal nations or tribal organizations as a method to distribute and prioritize funding**. Additionally, these types of formalized agreements could serve as support for funding proposals.
- Some comments recommended **direct allocations to tribal nations to support their capacity to review court ordered fish passage barrier removal projects**. Other comments recommended against direct allocations for implementation of court ordered projects.
- A few tribal nations commented that **multi-year funding is essential** for retaining and building staff dedicated to salmon recovery specific to a particular tribal territory or region.
- One comment referenced a model of **small, direct allocations to tribal nations based on the size of tribal membership and land base**, supplemented by competitive funds for restoration projects, similar to the Environmental Protection Agency's Puget Sound Estuary Program.
- A few tribal nations were **supportive of competitive funding models** and suggested longer application periods would be beneficial for them to prepare strong proposals. A comment was also supportive of cooperative agreements to help fill capacity gaps that applicants may have.
- Several comments requested **improvements to the application evaluation process to ensure the process is objective and transparent**. Suggestions included using an independent advisory group and awarding proposals based on the technical review and not allowing the panel review to fund proposals out of rank order.
 - For the Fish Passage provision, a comment recommended the 15 percent set aside be **competed and made available to tribal nations with treaty reserved fishing rights for anadromous fish**.

NOAA Response

While NOAA appreciates that many tribal nations are interested in direct allocations instead of funding competitions, funding will be provided through a competitive process per the congressional direction in the IJA. However, we will work to address the burden of competing for funds throughout the three provisions where we have the flexibility to do so.

For the PCSRF IJA funding, Congress did not establish a tribal set aside for this funding opportunity. Tribal commissions and consortia are eligible for funding as pass-through entities to assist in the distribution and prioritization of funding. Although PCSRF allows both states and tribal nations to apply for funding under the same funding opportunity, each submitted application is reviewed based on the sole merit of its own proposal and is

not compared to other applications or previously submitted applications. Furthermore, technical reviewers are only assigned a subset of applications to review based on applicant type to limit potential biases associated with comparing individual tribal applicants to state applicants. PCSRF will continue to consider the tribal input provided and further clarify the review and evaluation processes in future funding opportunities.

NOAA recognizes that some tribal nations and tribal commissions/consortia perceive that the PCSRF program's priorities are not inclusive of tribal-trust species and their habitats. However, PCSRF's Congressional authorization explicitly mandates that projects and activities that are necessary for maintaining populations necessary for the exercise of tribal treaty fishing rights or native subsistence fishing are eligible for PCSRF funding. Moreover, the PCSRF program priorities establish that such activities are coequal with activities supporting populations listed as threatened or endangered, or identified by a state as at-risk to be listed.

PCSRF grants include a period of performance of up to five years supporting multi-year awards to assist with tribal program continuity and capacity needs. The Consolidated Appropriations Act of 2000 imposed a PCSRF funding restriction that states "as program entities, the states and tribal commissions or consortia will not expend more than three percent of the direct federal funds for administrative expenses." It is NOAA's policy to continue implementing this cap on administrative expenses unless directed otherwise by Congress.

To lessen the burden for competing for the Fish Passage funding, NOAA will have a separate funding opportunity available only for tribal nations and tribal partnerships, which includes the dedicated 15 percent of Fish Passage IIJA funds. Additionally, tribal nations will be eligible to apply for and be considered for the remaining Fish Passage funding. We will also continue to offer applicants the opportunity to apply for awards for more than one year, which can create certainty in acquired funding, address capacity concerns, and provide consistent support. To address comments we heard about prioritizing work related to tribal trust species and subsistence use, we will encourage tribal nations and tribal partners to include in their applications how projects are tribal priorities, and we will evaluate proposals based on this element.

The ROP funding includes a 10 percent set aside for tribal nations and the funding for ROPs can also support tribal capacity, coordination, and projects. The set aside provides dedicated funding to tribal nations or tribal serving organizations. Tribal nations may also receive funds from the funding allocated for ROPs. NOAA intends to provide flexibility by making some of these grants two years to help provide the certainty in capacity that is noted in the comments. Lastly, NOAA anticipates hiring a staff person in the coming year that will be focused on providing technical assistance related to ROP tribal funding in the IIJA, from application to management and tracking.

Prioritization of Activities for Funding

Tribal nations provided comments on the priorities and project types that should be considered for funding. These comments are categorized in themes below.

Project Types

A project is an individual or coordinated set of activities that is carefully planned to achieve a particular goal, such as creating passage for migratory fish, recovering species and their habitats, and coordinating on coastal management priorities. Tribal comments received spoke to the type, scope, and size of projects NOAA should consider for IIJA funding.

- Some tribal nations expressed interest in **funding for more small scale projects**, such as irrigation ditches and feasibility studies.
- One tribal nation requested **support for the removal of debris (rocks, concrete, sheet metal piling, and rebar) that continues to impede fish migration** despite larger barrier removal.
- Tribal nations in the **Great Lakes emphasized their unique challenges**, such as sea lamprey, an invasive species that could impact habitat recovery post-barrier removal. In instances such as this, tribal nations recommended predation management be considered for funding.
- Several tribal nations requested funding go towards **supporting tribally owned hatchery facilities and their operations**.

NOAA Response

Both PCSRF and Fish Passage funding will be eligible for a wide range of small and large scale projects from planning to implementation. Small-scale projects, including debris removal that impedes fish migration, are eligible activities funded under the PCSRF program. PCSRF does not have a minimum funding requirement for proposals. PCSRF also supports some activities related to hatchery production and reform, although those activities are not the main focus of the PCSRF program.

Under the Fish Passage funding, NOAA encourages developing early stages of fish passage restoration projects and sets of projects. For example, a set of projects could contain several projects across a watershed, one main project and planning for another, or a theme across a geography that reflects several recovery plans. Reintroduction proposals, and proposals for restoration where ESA species such as salmon and steelhead are no longer present, while eligible for funding, may not rank as highly as proposals that more closely meet the Fish Passage priorities. The evaluation criteria section of the funding opportunity will clarify how proposals will be evaluated so tribal nations can ensure they understand the priority and scoring before submitting an application.

Priority Considerations

Tribal nations recommended that NOAA consider priorities to better meet the needs of tribal nations, including but not limited to applicant eligibility, broader applications outside of existing mandates (e.g., ESA and MSA), and use of tribal priorities and traditional ecological knowledge (TEK).

- Several tribal nations were **supportive of a whole-ecosystem approach**, such as accounting for the integration of projects through a watershed, even upstream where fish may not currently have access due to large instream barriers.
- One tribal nation recommended **fish passage through natural barriers be considered** to open habitat in areas that are better suited to withstand climate change impacts.
- Many tribal nations provided comments on how the provisions can have a broader focus that includes and extends beyond both habitat restoration and ESA:
 - Several tribal nations **requested both Fish Passage and PCSRF funding be expanded** to include opportunities such as research to support planning, design, installation, and testing of fish passage facilities.
 - In both verbal and written comments, tribal nations expressed interest in having **funding available to support reintroduction efforts** where there are no salmon and steelhead due to downstream barriers. Tribal nations emphasized that several existing programs and ESA recovery plans identify reintroduction as a NOAA priority.
 - Some tribal nations recommended that NOAA should take a **holistic view of funding for all ESA-listed species**, such as Pacific salmon. This recommendation included understanding available funding sources across all geographic areas, at federal, state, and local levels, to best support the species and review incoming proposals for NOAA funding.
- Many West Coast tribal nations provided specific comments on **reprioritization and new categories for PCSRF**. A few of those comments included:
 - Revise PCSRF criteria to ensure it aligns with salmon recovery priorities of tribal sovereign governments. This alignment will yield the highest chance for basin-wide ecosystem health and address environmental injustices and cultural impacts to Indian tribes.
 - Create a specific category within PCSRF for funding to be directed towards the research and development of large complex projects including salmon restoration upstream of hydroelectric dams.
 - Include baseline monitoring and long-term monitoring as standalone projects.
 - Consider new approaches to salmon recovery rather than doubling-down on existing efforts.

- Create greater flexibilities within Priority 1, which includes native subsistence fishing prioritization for broader recovery purposes than just ESA-listed stocks and habitat restoration projects. Support those salmon populations underserved by PCSRF.
- Revise current criteria that prioritizes restoration over tribal fishery research, management, and evaluation. Tribal nations should not be penalized because they have a higher ratio of capacity/management/evaluation needs rather than restoration needs.
- Use of PCSRF for management capacity and stock assessment.
- Prioritize activities that have not previously received PCSRF funding and that have demonstrated stakeholder support (e.g., contributions from other funding sources).
- Tribal nations mentioned the need to ensure that the **ROPs and the Integrated Ocean Observing System Regional Associations (RAs) (where those groups exist) engage with tribal nations on data efforts** to ensure those activities are coordinating with each other and support tribal priorities.
- A comment regarding **ROPs requested their membership criteria be clarified to explicitly include non-coastal tribal nations** with strong coastal interests.

NOAA Response

To provide greater flexibility and equity, NOAA staff will review funding priorities and consider additional or modified priorities consistent with the congressional authorization for tribal applicants, including tribal commissions and consortia.

Reintroduction efforts, including associated research and planning, are eligible activities under the PCSRF program. NOAA will review whether additional clarification regarding reintroduction is warranted in future funding opportunities.

NOAA will align Fish Passage funding priorities to consider tribal priorities such as consideration of TEK, the watershed context of the proposed work, and climate impacts on tribal communities.

NOAA does not anticipate that the ROP funding announcement will define coastal geography for tribal eligibility. The criteria will be focused on types of activities being proposed rather than where the tribe is located. ROPs have identified priority ocean issues that require coordination across states and, where appropriate, tribal governments, as well as various other levels of government. This funding will support activities that address the priorities identified by the ROPs (regardless of whether they are conducted by states, tribal nations or other organizations) and must be coordinated with the ROPs.

Per the comments requesting coordination between the ROPs and RAs, the data sharing initiative funds being provided to the ROPs encourage connections between the ROPs and RAs, and recommend engaging and involving tribes as part of regional data coordination

and development. In regions without ROPs, funding going to the RAs will also be expected to support tribal engagement with data coordination and development within those geographies. It is a priority for NOAA to promote collaboration and coordination between ROPs and RAs where geographies are shared.

III. Conclusion & Next Steps

NOAA appreciates the thoughtful engagement, comments, and feedback received from tribal nations and their affiliated organizations. Both verbal and written comments will help direct the three IJA provisions with funding intended for federally recognized tribes and ANCs. Furthermore, the value of the tribal feedback received can help us improve the implementation of other programs beyond IJA.

Overall, NOAA heard tribal nations are interested in greater funding and support for their capacity to develop proposals, tap into experts, implement projects, and increase coordination with federal agencies. Tribal comments requested more transparency and ease in applying for grant funding. Several tribal nations provided feedback on the types of projects they would like to see considered for this funding. Additionally, tribal nations encouraged NOAA to recognize their priorities and the agency's trust responsibility to address the recovery of culturally significant species. Incorporating tribal comments per the NOAA responses above, funding opportunities will be released in fiscal year 2022 for both Fish Passage and ROPs. Given NOAA has already released the PCSRF funding opportunity for fiscal year 2022, we will seek continuous program improvements for future funding years based on tribal comments received. NOAA will work with other federal agencies with similar funding opportunities to communicate priorities and identify synergies where possible.

NOAA also received a few comments that were outside the scope of the three targeted IJA provisions and will follow up with the respective tribes on those issues. NOAA hopes the responses provided in this document explain NOAA's next steps, such as where we have the flexibility to implement tribal recommendations and, when we have less flexibility because we must be responsive to congressional direction and current mandates

This is the first year of a five year funding effort, and NOAA intends to continue this discussion on how to modify the implementation of these provisions to address tribal nations' needs. Subsequent engagement is expected to evolve throughout the implementation of these provisions, and NOAA will be responsive to tribal nations' preferred methods of communication, including formal consultations per the NOAA Tribal Consultation Handbook.

NOAA remains committed to fulfilling the federal trust responsibility to tribal nations and communities. We look forward to a productive relationship between our agency and tribal sovereign governments.