

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

WHAT IS A MITIGATION AGREEMENT?

- “A written agreement between the project proponent and the entity qualified to hold the property and the endowment pursuant to this chapter, which is submitted to the state or local agency for the purpose of obtaining any permit, clearance, or mitigation approval from that state or local agency.”
- “A written agreement between the project proponent and the entity qualified to hold the property pursuant to this chapter, including any agreement with an entity qualified to hold the endowment pursuant to this chapter, which is submitted to the state or local agency for the purpose of obtaining any permit, clearance, or mitigation approval from that state or local agency.”

[Source: Cal. Gov. Code § 65965(f)(1) and (f)(2).]

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

FUNCTION OF A MITIGATION AGREEMENT --

- A mitigation agreement shall govern the long-term stewardship of the property and the endowment.

[Source: Cal. Gov. Code § 65965(f)(2).]

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

THRESHOLD ISSUES RELATED TO DEFINITIONS OF A MITIGATION AGREEMENT --

- **Is a Mitigation Agreement required for a nonprofit land trust to hold the stewardship endowment for a conservation easement granted to the land trust to fulfill a mitigation requirement?**

An Expressed CDFW Regional View: No, unless the specific government approval pursuant to which the endowment is exacted includes a requirement for endowing the stewardship responsibilities of the land trust as holder of the conservation easement.

Possible Statutory Basis: Statutory definition of “Endowment” which includes the provision that: “Endowments shall be governed by the underlying laws, regulations, and specific governmental approvals under those laws and regulations *pursuant to which the endowments were exacted . . .*” Cal. Gov. Code § 65965(a) (emphasis added).

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

- **Can a nonprofit land trust hold an endowment required to support funding of the management of a property (as distinct from stewardship of a conservation easement) pursuant to a Mitigation Agreement, even if the land trust does not hold title to the property and is not responsible for the management functions to be funded by the endowment?**

An Expressed CDFW Regional View: Yes.

Possible Statutory Bases: (1) Statutory provision that “Any local or state agency that requires property to be protected pursuant to subdivision (a) or (b) of Section 65967 may identify the funding needs of the long-term stewardship of the property will be met.” Cal. Gov. Code §65966(b); and (2) Statutory provision that “the endowment shall be held by one of the following: . . . (B) The . . . nonprofit organization that either holds the property, or holds an interest in the property, for conservation purposes.” Cal. Gov. Code § 65968(b)(1)(C).

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

ESSENTIAL ELEMENTS OF A MITIGATION AGREEMENT (WITH LAND TRUST) –

- Provisions governing the long-term stewardship of the property.
Cal. Gov. Code § 65965(f)(2).
- Provisions governing the long-term stewardship of the endowment.
Cal. Gov. Code (§ 65965(f)(2).
- Provisions for annual fiscal reporting to CDFW regarding the endowment.
Cal. Gov. Code § 65966(e).
- Land Trust's certification of certain qualifications.
Cal. Gov. Code § 65968(e).

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

Example Draft Mitigation Agreement

(Available upon request.)

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

DOCUMENTING CDFW APPROVAL OF A MITIGATION AGREEMENT

- Approval as a signatory party
- Approval as to form
- Other written acknowledgment

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

RELATIONSHIP TO FEDERAL REQUIREMENTS FOR MITIGATION TRANSACTION –

- There are no comparable federal statutory requirements.
- A mitigation agreement does not guarantee federal agency approval of a land trust as the holder of an endowment.
- Federal authorizing agencies may impose additional or conflicting requirements.
- Land Trust may want to seek at least federal “approval as to form” to evidence “buy in.”

MITIGATION AGREEMENTS UNDER S.B. 1094

ISSUES PRESENTED FOR A NONPROFIT LAND TRUST

RELATIONSHIP TO AGENCY-APPROVED TEMPLATES FOR MITIGATION AND CONSERVATION BANKS –

- In the “mitigation preserve” context, a mitigation agreement is analogous to the Bank Enabling Instrument used in the Mitigation and Conservation Bank contexts.
- In the context of a Mitigation or Conservation Bank, a mitigation agreement may be seen as a substitute for the existing “Long-Term Land Management Funding Recipient Agreement” approved by the agencies in July 2011.