

FACT SHEET

Assistant Secretary of the Army for Civil Works Announces Tribal Initiatives

SUMMARY: Based on Tribal input, and in order to continue to uphold the Tribal trust responsibility, the Assistant Secretary of the Army for Civil Works (ASA (CW)) is implementing two significant actions to remove administrative impediments for the benefit of Federally-recognized tribes and their communities. These actions include the implementation of Section 1031(b) of the 2014 Water Resources Reform and Development Act, and removal of the “Waiver of Sovereign Immunity Article” from all Project Partnership Agreements (PPA) and Environmental Infrastructure Assistance Agreements (EIAA). The implementation of these actions will have the simultaneous effect of expanding opportunities for the U.S. Army Corps of Engineers (USACE) and Indian Tribes to partner on water resources projects and activities of mutual interest, such as flood risk management, ecosystem restoration, emergency response, and the protection and management of natural and cultural resources.

KEY POINTS:

1. Implementation of Section 1031(b) will allow the USACE and Tribes to work cooperatively to carry out USACE authorized activities to protect fish, wildlife, water quality and cultural resources.
2. Cooperative agreements implemented under this authority will benefit tribal economies while protecting fish, wildlife, water quality and cultural resources at USACE water resources projects.
3. The Office of the Assistant Secretary of the Army for Civil Works determined the “Waiver of Sovereign Immunity Article” in PPAs and EIAs is not necessary to enforce these agreements in federal court.
4. The “Waiver of Sovereign Immunity Article” will be removed from all future PPAs and Environmental Infrastructure Assistance Agreements.

WRRDA 2014, SECTION 1031(b) AUTHORITY

DESCRIPTION: The delegation of this authority will allow Corps MSCs and Districts to coordinate directly with their local Federally-recognized tribes to engage in cooperative agreements that are mutually beneficial for the Corps and Tribe. More specifically, these agreements will allow Tribes to build economic capacity while working on joint issues with the Corps pertaining to the protection of fish, wildlife, water quality, and cultural resources. For example, along the Columbia River tribes will be able to work with the Corps on fish and wildlife mitigation projects. Also, Tribes will be able to help maintain infrastructure and conduct natural and cultural resource management activities such as invasive species control, planting and management of native species, and monitoring archaeological and sacred sites such as for the series of reservoirs on the Missouri River within the external boundaries of reservations.

BACKGROUND: Section 1031(b) of WRRDA 2014 provides authority for the Secretary of the Army to enter into a cooperative agreement with an Indian Tribe (or a designated representative of an Indian Tribe) to carry out authorized activities of the Corps to protect fish, wildlife, water quality, and cultural resources. The authority to enter into these cooperative agreements has been delegated from the ASA (CW) to the Corps for

implementation at any level of the organization, but primarily at the district level where on the ground project operation and management activities occur. The Corps has drafted implementation guidance for this authority which includes information on Memorandum of Agreements, cooperative agreements and scopes of work.

“Tribes and the Corps are logical and natural partners when it comes to treaty resource management, water quality monitoring and cultural resource protection”, said Jeremy Red Star Wolf, Chairman of the Columbia River Inter-Tribal Fish Commission. “Tribes have state of the art expertise and a place-based commitment to getting the job done right. We’ve wanted to partner with each other on key projects for some time, the Cooperative Agreement Authority will now allow that to happen”.

SOVEREIGN IMMUNITY ARTICLE

DESCRIPTION: The Tribal Sovereign Immunity Article will be deleted from all future PPAs to facilitate better partnerships with Tribal Nations, and all PPA models will include an expanded WHEREAS clause that acknowledges the enforceability of the PPA in federal court. Many Indian Tribes have found this clause to be offensive, which caused them to choose not to participate with the Corps in water resource development projects or activities. As a result, important projects that could have benefitted Tribal economics and environments, or species of significance, or that protected Tribal communities from floods and other perturbations were not being implemented. In cases where projects did move forward, a significant amount of time and funds were expended discussing and figuring out how to move forward with the waiver of sovereign immunity clause in place. The removal of this article from all future PPA and EIAA documents will eliminate a major impediment to Indian Tribal—Corps partnerships on water resources project development and implementation. Fundamentally, the Corps supports and acknowledges tribal sovereignty.

Mr. Walter Phelps, Delegate to the Navajo Nation Tribal Council from the Leupp Chapter stated: “The Army Corps decision to lift the long standing waiver requirements is welcome news! Not only does this benefit the Navajo Nation alone but all tribal communities throughout the country will have a streamlined process to get important watershed related projects accomplished. We certainly appreciate the Army Corps swiftly acting in alleviating this tedious regulatory hurdle.”

BACKGROUND: Tribal Nations that are partnering, or seeking to partner, with the U.S. Army Corps of Engineers have objected to the PPA Article on Tribal Sovereign Immunity, which has impeded negotiations. After listening to concerns from Indian Tribes, and noting the effect this article had on the finalization of PPA and EIAA documents, and conducting a new legal analysis, the Office of the Assistant Secretary of the Army for Civil Works determined that the clause was unnecessary and not required to enforce PPAs or EIAs in federal court.

Enclosure – Questions and Answers on Section 1031(b) and the “Sovereign Immunity Clause”

17 June 2016

Water Resources Reform and Development Act 2014 (WRRDA 2014) Section 1031(b):

Question: Who is the Assistant Secretary of the Army for Civil Works and what does the Office of the Assistant Secretary of the Army for Civil Works (OASA (CW)) do?

Answer: The Assistant Secretary of the Army for Civil Works establishes policy direction and provides supervision of the Department of the Army functions relating to all aspects of the Civil Works program of the Army Corps of Engineers. The Assistant Secretary is nominated by the President and confirmed by the Senate.

Question: What is the ongoing work the OASA (CW) is doing in Indian Country?

Answer: Acting through the Army Corps of Engineers a number of water resources projects are being studied and implemented for flood risk management, ecosystem restoration, shoreline and bank protection, and other purposes. The Corps partners with tribes for emergency response activities, identification and protection of historic properties and sacred sites, co-management at reservoir projects, and leasing of facilities for recreation and agricultural purposes. OASA(CW) staff are engaged with tribal governments to explore opportunities and address issues, and staff participate on national and regional working groups and task forces focused on working with Indian Nations.

Question: What is the Water Resources Reform and Development Act of 2014 (WRRDA 2014)?

Answer: Generally speaking, water resources development acts provide authorities to OASA(CW) and the Army Corps of Engineers for programs, projects, and activities, along with administrative improvements and other requirements at the request of Congress. Section 1031(b) of WRRDA 2014, the subject of today's announcement, provides the authority for the Department of the Army to use Cooperative Agreements with Federally-recognized tribes do perform work at water resources projects under the jurisdiction of the Corps. A number of these operating projects are on or adjacent to reservations and involve natural and cultural resources of concern to tribes.

Question: How will the new Section 1031(b) authority benefit Indian Tribes?

Answer: With this important new authority, Indian Tribes will have the ability to enter into cooperative agreements with the U.S. Army Corps of Engineers (USACE) to perform work at USACE water resources projects. These agreements will allow Tribes to build economic capacity while working on infrastructure and natural and cultural resources of mutual interest with the USACE, especially in Indian Country. Furthermore, these agreements will allow resource sharing on a Government-to-Government basis.

Question: What types of projects can be done under this authority?

Answer: The authority allows Indian Tribe/USACE cooperative agreements to carry out authorized activities, such as providing specialized knowledge and expertise, to protect fish, wildlife, water quality and cultural resources. For example, along the Columbia River tribes will be able to implement fish and wildlife mitigation projects with the Corps. Also, tribes will be able to help maintain infrastructure and conduct natural and cultural resource management activities such as invasive species control, planting and management of native species, and monitoring archaeological and sacred sites.

Question: What do Indian Tribes need to do to work with the Corps under this authority?

Answer: The authority to enter into these cooperative agreements has been delegated from the Assistant Secretary of the Army for Civil Works to the Corps for implementation at any level of the organization, but primarily at the district level where on the ground project operation and management activities occur.

Question: If an Indian Tribe is interested in developing a cooperative agreement with the USACE, how do they go about it?

Answer: Any Federally-recognized tribe may contact their local USACE District main office or visit that district's website for instructions on who to contact and to obtain template agreements to use to help develop the required over-arching agreement, and the agreements or written work orders that will be used to execute actual work.

Question: What Are the Criteria for Identifying Qualifying Work?

Answer: At the discretion of the district commander, a district may evaluate its programs to protect fish, wildlife, water quality, and cultural resources activities that might benefit from such assistance. Once these activities are identified, and a willing Federally-recognized Tribal partner has been identified a Memorandum of Agreement can be formulated.

Sovereign Immunity Clause

Question: What is the “Sovereign Immunity Clause?”

Answer: For over ten years, the Corps Project Partnership Agreements (PPA) and Environmental Infrastructure Assistance Agreements (EIAA) contained an article that required Indian Tribes to waive their Sovereign Immunity as a condition for being a non-Federal sponsor for water resources development projects.

Question: Why was the “Sovereign Immunity Clause” removed?

Answer: After listening to concerns from Indian Tribes, noting the effect this article had on the finalization of PPA and EIAA documents, and conducting a new legal analysis, the Office of the Assistant Secretary of the Army for Civil Works determined that the clause was unnecessary and not required to enforce PPAs or EIAs in federal court. The clause will be removed from all templates used to development PPAs and EIAs and replaced with a slightly expanded WHEREAS clause that acknowledges the enforceability of the PPA or EIAA in federal court for all non-Federal sponsors, tribal and non-tribal. Below are the old and new statements:

CLAUSE TO BE REMOVED:

ARTICLE XXII – TRIBAL SOVEREIGN IMMUNITY

By _____ dated _____, the Non-Federal Sponsor waived any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court related to the provisions, terms, and conditions contained in this Agreement. Further, such _____ authorized _____ to include such waiver as part of this Agreement. Accordingly, the Non-Federal Sponsor hereby waives any sovereign immunity that it may possess from suit by the United States in an appropriate Federal Court to: (1) enforce the terms and conditions of this Agreement; (2) recover damages for any breach of the terms and conditions of this Agreement; and (3) seek indemnification or contribution based on the Non-Federal Sponsor’s obligations under Article IX of this Agreement.

NEW WHEREAS CLAUSE:

“WHEREAS, the Government and the Non-Federal Sponsor have the full authority and capability to perform in accordance with the terms of this Agreement and acknowledge that Section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962-5b), provides that this Agreement shall be enforceable in the appropriate district court of the United States;”

Question: How does the removal of this clause benefit Indian Tribes?

Answer: Many Indian Tribes have found this clause to be offensive, which caused them to choose not to participate with the Corps in water resource development projects or activities. As a result, important projects that could have benefitted tribal economics and environments, or species of significance, or that protected tribal communities from floods and other perturbations were not being implemented. In cases where projects did move forward, a significant amount of time and funds were expended discussing and figuring out how to move forward with the waiver of sovereign immunity clause in place. The removal of this article from all future PPA and EIAA documents will eliminate a major impediment to Indian Tribal—Corps partnerships on water resources project development and implementation. Fundamentally, the Corps supports and acknowledges tribal sovereignty.