



## ***U.S. ARMY CORPS OF ENGINEERS***

### ***CONTRIBUTION TO PROGRESS REPORT FOR AUGUST 2012- JULY 2013 IN COMPLIANCE WITH EXECUTIVE ORDER 13175 AND THE PRESIDENT'S PROCLAMATION OF 2009***

#### ***INTRODUCTION***

The US Army Corps of Engineers (Corps) has an established Tribal Nations program that implements the Corps' six Tribal Policy Principles: 1. Recognition of Sovereignty; 2. Government-to-government relationships with Federally recognized Tribes; 3. Pre-decisional consultation; 4. Fulfillment of the Trust responsibility; 5. Protection, where feasible, of cultural and natural resources; and 6. Promotion of tribal economic capacity building and self-reliance. The Policy Principles echo those of Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 6 Nov 2000, and the Presidential Memorandum, *Tribal Consultation*, 5 Nov 2009. While the concepts embodied in these documents are immutable, their implementation evolves each year. In 2013, the Corps has Tribal Liaisons or tribal points of contact in every Division and District office. The Tribal Nations Community of Practice (CoP) within the Corps is comprised of roughly 200 individuals spread across the Nation and in every District office in Alaska, Hawaii and the 48 contiguous states.

#### ***POLICY DEVELOPMENT AND IMPLEMENTATION***

The Corps' Tribal Consultation policy was signed by the Chief of Engineers on 01 Nov 2012, after several drafts were sent to Tribes for informal consultation. The most difficult task faced by USACE and the Tribes was coming up with a definition of consultation that all could agree to. The final published definition is:

“Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.”

Input from Tribal Nations greatly enhanced the document. Tribal input was received from the Oneida Nation of Wisconsin, San Manuel Band of Mission Indians, Yavapai Indian Tribe, Village of Stebbins, Hopi Tribe, Pala Band of Mission Indians, Santee Sioux Nation, Lytton Rancheria of California, Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, Ho Chunk Nation, Seminole Tribe of Florida, and Confederated Tribes of the Umatilla Indian Reservation. Other

groups commenting include the Institute for Tribal Government (Portland State University, OR), the Great Lakes Indian Fish and Wildlife Commission, and several Corps districts. The process to approve the policy, including engaging in Tribal consultation, lasted from April 2011 through October 2012.

A policy booklet, *USACE Consultation Policy and Related Documents*, was published in the spring of 2013. It includes the USACE, DA and DoD consultation policies; a memorandum from the Chief of Engineers endorsing the six Tribal Policy Principles; Executive Order 13175; and the Presidential Memorandum of November 5, 2009. This handy reference is given to students of our consultation class and to tribal members alike.

To continue supporting capacity building and self determination, the second edition of our booklet entitled *How to Plan a Water Resources Project with the US Army Corps of Engineers: A Guide for Tribal Governments* has gotten wide circulation. Tribal governments have praised it highly, as have other Federal agencies and other offices within the Corps. We are almost out of copies of our second edition, and need to update the document in 2014.

All of our documents list the six Tribal Policy Principles-- a pocket protocol, a wallet-sized card on consultation tips; a bookmark, a brochure entitled *Consulting with Tribal Nations: Guidelines for Effective Collaboration with Tribal Partners*, the booklet mentioned above, and the upcoming consultation policy. In this way, we strive to give the Tribal policy principles as much visibility as possible.

During the last reporting period, quarterly or monthly teleconferences were continued in each regional division: Great Lakes and Rivers, Mississippi Valley, North Atlantic, Northwestern, Pacific Ocean, South Atlantic, South Pacific and Southwestern. Minutes are circulated to all districts within the division and are also sent to HQUSACE in Washington DC. This practice leads to sharing of valuable information, including lessons learned, throughout all the regions. If there is an issue in one region, another region may have already faced that issue. The Senior Tribal Liaison participates in the phone calls when possible, and uses information from them to report important developments to the senior leadership. For example, Vicksburg District recently completed a repatriation of human remains with the Choctaw Nation. For the first time in USACE history, a Tribe requested a District Engineer and other senior staff physically participate in a repatriation of human remains.

Several task forces were formed at the annual Tribal Liaisons meeting in December 2011. The taskforce dedicated to tribal liaison classification, development, standards, and education met informally in April 2013. Several decisions were made. Importantly, there will be a move to re-classify all Tribal Liaison positions to series 0340, Program Manager. Many are archeologists and other series that fall under career program 18 (CP-18), scientists and engineers, program. Unfortunately, most of the liaisons in the northwest and one in the southwest are classified as 0301s, also as program managers. However, this job series also includes administrative and

“miscellaneous” positions, and is *not* in CP-18. Therefore those classified as 0301 do not get the training available to those in CP-18 series. The taskforce also reaffirmed the fact that any employee hired after 2008 must take the Army Civilian Education System (CES) classes in order to advance in grade. This information was sent to the field. Liaisons in the 0301 series are meeting with their classification specialists.

### ***CONSULTATION AND OUTREACH***

The Corps consults with Federally-recognized Tribes and Native Hawaiian Organizations every day. Issues are varied: ecosystem restoration, repatriation of human remains, protection of sacred sites, access to usual and accustomed fishing and hunting sites, partnering for projects under various water resources authorities, permitting activities, and management of our rivers—the Mississippi, Missouri, Rio Grande, Columbia and Snake, for example.

For the reporting period, July 2012-July 2013, the Corps reports 3,400 instances of consultation. Districts report coordination and consultation with 291, or just over 51% of federally recognized Tribes in Alaska and the continental states, as well as with Native Hawaiian Organizations, including the Office of Hawaiian Affairs and Hui Malama I Na Kapuna O Hawaii Nei. Because of the shutdown and sequestration, data is incomplete this year on numbers of written v face to face meetings. However, it should be noted that last year USACE reported about 1,400 consultations, regardless of type, and this year, the number has increased dramatically. Some of the increase is due to the special effort made to include Regulatory actions. Of the many face-to-face-meetings reported, most have been at the staff level, working on particular issues.

For example, members of the Narragansett, Mashpee Wampanoag, Mohegan and Wampanoag of Gay Head (Aquinnah) met with HQ and New England District staff to discuss a linear project requiring a permit, with little Corps involvement. Several sacred sites had been identified by the Tribes in the general area. There had been an impasse concerning the area of potential effects, but when all examined a topographic map together, the Tribes and the Corps agreed to avoid certain areas and to exclude other areas from study.

Government-to-Government meetings are defined as those in which the District Commander and the legal head of a Tribe decide a course of action, a path forward, or sign an agreement document. During this reporting period, one of the major government-to-government consultations resulted in the signing of a Programmatic Agreement (PA) under Section 106 of the National Historic Preservation Act by the Chairman of the Quapaw Tribe and the Memphis District Engineer. Five other tribal leaders also signed this PA including the Osage Nation, the Absentee and Eastern Shawnee Tribes, the Thlopthlocco (Creek) Tribal Town, and the Delaware Nation. The action initiating this consultation was the activation of the Birds Point New Madrid Floodway in 2011 through the purposeful dynamiting of a levee at Birds Point Missouri to avoid upstream flooding on the Ohio River and downstream flooding on the Mississippi and in Northeast Arkansas. The Osage Nation and Memphis District staff worked diligently to recover the remains of NLT 21

individuals exposed by scouring when the rushing floodwaters impacted a previously unknown late Mississippian age cemetery buried under a historic levee.

For this reporting period, two national programs will be described; one old, the other fairly new. This is a different approach than that taken during the last reporting period, which was regional in focus.

### *REGULATORY PROGRAM*

USACE was entrusted by Congress to review permit applications to place structures in navigable waterways (such as docks, piers and bollards) under the authority of Section 10 of the Rivers and Harbors Act of 1899. Congress more recently entrusted USACE to review applications for the placing of fill in wetlands and other waterways of the US (WOUS) under the authority of Section 404 of the Clean Water Act of 1974. Waters of the US include wetlands, mud flats, playa lakes, prairie potholes, vernal pools, coastal areas, lakes, reservoirs, and perennial, intermittent, or ephemeral streams. The Regulatory Program issues about 70,000 written authorizations each year affecting waters of the US (WOUS), 75% on private property. About 63,000 jurisdictional determinations, in which the Corps determines whether or not a particular area needs a permit, are done in the field. A majority of permits are issued on private land, but several federal statutes still apply. These include the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and, importantly for this discussion, the National Historic Preservation Act (NHPA).

Meeting the requirements of the NHPA can sometimes be difficult in the regulatory program. Corps jurisdiction is very small (the permit area) as defined in our regulation, 33 CFR 325, Appendix C, v large (the area of potential effects) as defined in 36 CFR 800, promulgated by the Advisory Council on Historic Preservation (ACHP). The Corps walks a fine line between fulfilling federal law and not unduly burdening an applicant. Regulatory is cognizant of its NHPA requirements and is also aware that consultation with tribal nations must go farther than those requirements. If a Tribe requests a consultation meeting separate from the standard NEPA scoping meetings, the Corps meets with them. While the Corps may have less than one acre of jurisdictional waters such as a culvert or a dock under their jurisdiction, the development allowed by that permit may be quite large. NHPA and tribal consultation become long processes that are sometimes fraught with tension.

Mining of all kinds is an example of development potentially allowed by a very small area under Corps jurisdiction. For example, the Saint Paul District is heavily involved in tribal consultation concerning five ongoing taconite mine operations and a proposal for a copper/nickel mine. The District has been involved in face-to-face consultation for several years on these proposals. One proposal affects the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, and resources that have been determined to be of national significance in one

instance, while several Ojibwa bands are cooperating agencies for development of an EIS for a mining proposal in Wisconsin. The issues are complex and challenging because they involve the concept of natural resources as cultural resources and sacred sites. Treaty rights and how environmental impacts may affect Ojibwa ability to exercise those rights are a significant concern. Mines, just by the scale of their activities, bring Districts to the consultation table with Tribes across the country. There are similar issues in the northwest, Alaska, West Virginia and in the southwest.

### *INTERAGENCY AND INTERNATIONAL SERVICES*

IIS is a relatively new program that, even more recently, been effectively used to the benefit of Tribes. The program was authorized under Section 211 of the Water Resources Development Act of 2000 and allows the Corps to provide specialized or technical services to non-DoD agencies, Tribes, states, and local governments. It is a fully reimbursable program. The Tulsa District has done the most work with Tribes. The District and the Tribe define a project of interest to the Tribe. The Tribal Liaison assists Tribes in completing grant applications from other federal agencies. When the Tribe receives the grant money, it awards a contract for the Corps using Corps technical expertise in contracting and construction management. The Corps and the Tribe continue working as partners throughout design phase, construction phase, and, finally, the construction management stage. The facility is turned over to the Tribe who operates and manages it. The authority is also used for water resources studies.

Services that may be provided include construction management, civil, mechanical, and electrical engineering; architecture, fire protection, surveying, NEPA documentation, remediation, water demand/supply analysis, drought contingency plans, water and wastewater management, floodplain management, master planning real estate acquisition and disposal support, GIS mapping, and project management. Inspection of a facility includes footings, slab, framing, plumbing, electrical, roofing, mechanical fire protection, drywall, millwork/hardware, and floors.

Facilities of many kinds have been constructed for the United Keetoowah Band of Cherokee Indians of Oklahoma, Quapaw Tribe of OK, Eastern Shawnee Tribe of Oklahoma, Kaw Nation, Caddo Nation, Wichita and Affiliated Tribes, and the Seneca-Cayuga Tribe of OK, among others. Examples of completed projects include administration buildings, centers for career resources, food distribution, senior and youth activities, education, substance abuse, community activities, wellness, and cultural activities. Other finished project types include infrastructure projects, emergency generators, health clinics, elder housing, water systems, housing rehabs, fire stations, EMS stations and master plans.

During the current reporting period, the Tribal Nations Community of Practice has made a distinct effort to familiarize all Corps Districts with this program. Only a handful of Districts-Tulsa, Alaska, and Albuquerque-use it with Tribes. Because the Tulsa Tribal Liaison has given a presentation on IIS three times at national meetings in the past year, the popularity of the program is just now beginning to grow. The CoP has published a number of brochures. The next one will be on this program.

## ***COLLABORATION***

The Corps has seen growth in the use of our authorities in Indian Country. For example, we consider Section 203 of the Water Resources Development Act (WRDA) of 2000 useful tool to familiarize Tribes with the Corps. 203 is a study authority only. A reconnaissance level study is fully federally funded and then, if the Tribe wishes to proceed, a cost sharing agreement is signed by the Tribe and the local District. Our first cost share agreement occurred in 2011 between Albuquerque District and the Pueblo of Santa Clara. During the current reporting period, Albuquerque has signed cost share agreements with the Pueblos of Acoma, San Felipe, and Santa Ana. Albuquerque District is working with the following Tribes on additional cost sharing documents: Navajo Nation (3 separate projects), and the Pueblos of Santo Domingo and Cochiti. Los Angeles District will soon have a cost sharing agreement with the Gila River Indian Community, the Tohono O'odham Nation and, possibly, the Torres Martinez Band of Cahuilla Indians . Finally, the New England District has an agreement with the Houlton Band of Maliseets under final review at Headquarters. Our popularity in Indian Country is growing. In some areas, we are the partner of choice in the federal family.

The Corps continues to support a unique cultural immersion course entitled *Native American Perspectives on Corps Projects*. The course is aimed at all those who interact with Tribes, including District Commanders. The student learns about the environment from a Native American perspective, and leaves with a greatly enhanced perspective on the interconnectedness of all components in the natural and cultural world. The course takes place on Indian reservations. Students sleep in tents or tepees and engage in typical Native activities such as food preparation and tracking. In March 2014, the Seminole Nation (FL) will host the course. Sessions rotate between the Seminole and the Osage. We are looking for additional venues since the Confederated Tribes of the Umatilla Indian Reservation (OR) and the Lac du Flambeau Band of Lake Superior Chippewa Indians have elected to not continue in the program. The facility at the Pueblo of Cochiti was lost due to fire and flood in 2012. The course is taught by tribal members exclusively.

We continue to sponsor a two and a half day training course, *Consulting with Tribal Nations*, to educate our workforce. It is held at Corps Districts and, occasionally, at Indian Reservations near Corps Districts. Begun in 2005, the following Districts have hosted the training: Memphis, New York, New England, Jacksonville, Louisville, Detroit, Buffalo, Chicago, Kansas City, Vicksburg,

Tulsa, Albuquerque, Seattle, Walla Walla, Alaska, Chicago, Phoenix, and Portland. The December training will be held in Washington DC, along with a training session. Instructors include Tribal Liaisons representing HQ, St. Louis, Sacramento, Portland, Albuquerque, Alaska, Tulsa Districts, the Office of the Assistant Secretary of the Army (Civil Works), and the hosting district's liaison. More importantly, instructors include Tribal officials from the specific region. Tribes who have participated and given unselfishly of their time include the Narragansett Indian Tribe of Rhode Island, the Kiowa Nation, Confederated Tribes of the Grand Ronde Reservation, and the Fond du Lac of Lake Superior Chippewa. The Tribes present a panel discussion on the topics of their choice, that usually include tribal history, how they interact with the federal government, what their rights are, and what our responsibilities to them are. A typical agenda also includes History of Indian Legislation, Partnering with Tribes, Laws that Require Consultation, Consultation Strategies and Cross Cultural Communication, Corps and DoD policies, a local presentation of the host district's relationship with Tribes, and one or two Tribal panels. Tribal members may comment on any aspect of the course or on any issue they have with the Corps or with the federal government. *Consulting with Tribal Nations* is often an employee's first exposure to an American Indian or an Alaska Native.

The Corps continues to engage in dialogue with Tribes and organizations representing consortia of Tribes. Examples our relationship with the Columbia River Intertribal Fish Commission (CRITFC), an organization that advocates for all Columbia basin Tribes, and the United South and Eastern Tribes (USET), an organization comprised of 27 federally recognized Tribes along the east coast and in Texas.

We continue to pursue a partnership with FEMA. Several Liaisons are now on FEMA's Tribal distribution list to alert them to pending disasters in their area. Several Corps liaisons have expressed interest in staffing FEMA's Tribal desk during disaster declarations. We continue to pursue joint Corps/FEMA session at an NCAI event in the near future, perhaps the next convention in Atlanta in October 2014. The session will distinguish between Corps services authorized under PL 84-99 and FEMA services authorized under the Stafford Act, and describe protective measures Tribes can take before a disaster.

The Corps participates in Tribal conferences--National Congress of American Indians (NCAI), United South and Eastern Tribes (USET), Associated Tribes of Northwest Indians (ATNI), National Tribal Environmental Council (NTEC) and American Indian Science and Engineering Society (AISES). We are co-sponsors of AISES' yearly career fair and recruit young American Indians, Alaska Natives and Native Hawaiians.

The Tribal program has a small budget (25K) that funds such expenditures as sending Liaisons to conferences and training, and bringing Liaisons to HQ to learn more about the Corps and the Tribal program. It funds booths at NCAI, NTEC and ATNI. Some funds are also spent on reprinting our Tribal brochure, booklet, bookmark, and pocket protocol. During the reporting period, the Tribal Nations program received an additional 12K funding. This funding enabled Tribal Liaisons to

attend the annual meeting. Funding to attend any meeting is increasingly difficult to find, so the extra funds were very timely.

### ***OPPORTUNITIES AND CHALLENGES AHEAD***

The Corps has a multitude of opportunities in Indian Country. Tribes suffer drought, floods, and fires. They want flood protection, erosion control, navigation improvements, elimination of hazardous waste, and assistance in planning for the future, and ecosystem restoration to protect their tribal and trust resources. The unique perspectives and intimate knowledge of their surroundings makes Native American communities key in defining water resource problems and acceptable solutions. The Tribes challenge the creativity of Corps engineers and technical staff and produces better projects. We have shown consistently that, with the help and knowledge of tribal partners, these issues can be tackled. We can fulfill Corps missions and our Trust responsibility at the same time due to our water resources missions.

During the current reporting period, we have begun planning a Tribal Nations Technical Center of Expertise (TCX), most likely at the Albuquerque District. The TCX would be the one stop shop for tribal information for Tribal Liaisons and program/project managers alike. The District is developing a GIS-based tribal mapping database which would be made available to the Liaisons. Other functions would include support for the two consulting courses, the cultural immersion course, and the annual meeting. All design and printing would be accomplished there. If a District needed help in a difficult consultation, the TCX would find one. The TCX would also suggest tribal participants in our courses and provide the administrative support to provide travel and per diem to them. An on-line library would be developed, to include sample memoranda and programmatic memoranda of agreement, cost share agreements, grant application forms, past agendas from classes and meetings, copies of all hand outs from them, policy statements, statutes, regulations and significant books about Tribes. All Liaisons would be able to contribute to the library. Services would be on a reimbursable basis.

We are passionate about our profession and consider it a privilege to work in Indian Country. Challenges are met with enthusiasm. We grow stronger every year.

16 December 2014, G L Reynolds, CECW-IF