



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

SACW

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF
ENGINEERS

SUBJECT: Alaska Native Corporations as Non-Federal Interests

1. References:

- a. Section 221(b) of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b(b)), Definition of non-Federal interest.
- b. Section 1156 of the Water Resources Development Act (WRDA) of 1986, as amended (33 U.S.C. 2310), Cost sharing for Territories and Indian tribes.
- c. Implementation Guidance for Section 2003(b) of the Water Resources Development Act (WRDA) of 2007 – Definition of Non-Federal Interest, dated 5 April 2012.
- d. Implementation Guidance for Section 1131 of WRDA 2016, Participation of Non-Federal Interests, dated 6 July 2017.
- e. Implementation Guidance for Section 1119 of WRDA 2016, Indian Tribes, dated 11 May 2017.
- f. Implementation Guidance for Section 1129 of WRDA 2016, Application of Section 1156 Cost Sharing Waiver to Indian Tribes and Territories, dated 5 May 2017.

2. The purpose of this memorandum is to establish the policy and procedures for partnering with Alaska Native Claims Settlement Act (ANCSA) corporations as non-Federal sponsors to better align Civil Works policy with updated legislation and legal precedent. This policy furthers the objective of this Office by removing barriers to entities that represent Tribal interests and thereby improving access to U.S. Army Corps of Engineers (USACE) Civil Works programs.

3. This policy supersedes the definition of a Federally-recognized Indian Tribe in References 1.c. and 1.d. Section 1155 of WRDA 2018 amended Section 221(b)(1) of the Flood Control Act of 1970 (42 U.S.C. 1962d-5b(b)(1)), Reference 1.a., by inserting "Indian tribe or tribal organization (as those terms are defined in section 5304 of title 25)". In 2021, the U.S. Supreme Court held that the Indian Self Determination and Education Assistance Act (25 U.S.C. 5304) definition of "Indian Tribe" expressly

includes ANCSA corporations for all purposes (See *Yellen v. Confederated Tribes of the Chehalis Reservation*, No. 20-543, 141 S. Ct. 2434 (2021)).

4. ANCSA Corporations. The WRDA 2018 amended definition of “non-federal interest” and Supreme Court precedent have clarified that Regional and Village corporations established under ANCSA are eligible to be non-Federal sponsors and enter into cost share agreements for water resources development studies, the design and construction of projects, or other planning or technical assistance. Districts may proceed to enter into cost share agreements with ANCSA corporations following regular agency procedures and the following guidelines.

a. Consent of Affected Local Government. The affected Tribal governments must consent, in writing, to the ANCSA corporation acting as sponsor for the feasibility study, design, or construction of a project. Prior to the execution of the feasibility cost share agreement, the ANCSA corporation must identify, and coordinate with, the affected federally recognized Indian Tribes¹. Typically, in the contiguous United States where Tribes have legal jurisdiction over certain lands, the affected Tribal government is the Federally-recognized Indian Tribe that has jurisdiction over the area impacted by the potential project. For projects in Alaska in areas other than the Annette Island Reserve, the affected Tribal government(s) is/are the Tribal governments in close proximity to the proposed project such that use of the land will have implications to a Tribe(s), plus Tribal governments with documented ancestral connection to the lands where the proposed activity would occur.

(1) For larger or more complex projects that affect lands used by multiple Tribes, or projects where the proposed Sponsor is a Regional Corporation representing the interests of several Tribes, multiple Tribal governments may be involved, and written consent must be obtained from each affected Tribal government by the ANCSA corporation. PMs and planners should ensure they communicate with Tribal liaisons and cultural resource specialists in their Districts to ensure appropriate Tribal governments are identified.

(2) The written consent must be included in the approval request package for the applicable agreement (FCSA, Design Agreement, or Project Partnership Agreement), with the date of the written consent(s) included in a Whereas clause in the draft agreement. The written consent can be via email including a signature block of a representative with the authority to represent the Tribe. In cases where there is a lack of written response from the affected federally recognized Tribe, the ANCSA corporation must provide evidence of attempts to communicate with the Tribe for consideration by the MSC during review of the approval package for the applicable agreement.

¹ In this memorandum, “federally recognized Indian Tribe” means any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130-5131).

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(3) Requests for technical assistance and watershed planning activities, such as those under Planning Assistance to States (PAS), Floodplain Management Services (FPMS), and certain activities under the Tribal Partnership Program (TPP) do not require consent of the affected federally recognized Indian Tribes because they result in a transfer of information and data analysis only.

b. Demonstration of Project Benefit. It is the intent of this Office to support Tribal Nations through the use of USACE capabilities and programs to advance the interest of Tribal communities. In addition to the ANCSA corporation providing written consent from the affected Tribal governments, the ANCSA corporation must include a statement as to how their sponsorship of a particular project or agreement would benefit federally recognized Indian Tribe(s) in proximity to the proposed activity.

c. Sponsorship by an ANCSA Corporation.

(1) For study, design, and construction of water resources development projects, an ANCSA corporation is eligible to act as a sole sponsor so long as it is the land holding entity of surface rights for the necessary lands needed for the project. If the ANCSA corporation is not the land holding entity with surface rights, the district should explore with the ANCSA corporation the possibility of the land holder being a co-sponsor. Joint and several liability language must be added to the Agreement at issue.

(2) If an ANCSA corporation chooses to act as a non-federal sponsor for a study or project, that ANCSA corporation and its subsidiaries are in a position to access non-public information. An ANCSA corporation that acts as a non-Federal sponsor on a study or project may not later compete for a contract where its previous status as a non-Federal sponsor would give it an unfair competitive advantage. Therefore, an ANCSA corporation and its subsidiaries are prohibited from bidding on study, design, or construction work that may result from any work arising from an agreement for which the ANCSA corporation was the non-federal sponsor. Model language regarding this prohibition should be developed and included in the Agreements with ANCSA corporations. This does not prohibit other ANCSA corporations or federally recognized Indian tribes from bidding on such work, nor does this policy modify or supersede any Federal Acquisition Regulation (FAR) or Defense FAR. This prohibition also does not alter any rights a non-Federal Sponsor has to seek in-kind contributions allowable by law.

d. Sponsor Responsibilities. As with any legally constituted public body, any ANCSA corporation that proposes to act as a sponsor for technical assistance or a feasibility study must be able to demonstrate that it has the full legal and financial authority and capability to perform the terms of the agreement, including payment of its required share of study costs. For agreements addressing construction of a project, the ANCSA corporation must demonstrate the capability to satisfy a sponsor's responsibilities under the agreement, including payment of its required share of project costs; provision or

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performance of lands, easements, rights-of-way, relocations, and disposal areas for the project, as applicable; and performance, in perpetuity, of any non-Federal OMRR&R. In evaluating the ANCSA corporation's authority and capability, the District should analyze the ANCSA corporation's Articles of Incorporation and by-laws and, commensurate with the magnitude of the ANCSA corporation's responsibilities for, and the nature of, the project, review any other documents and consider relevant factors bearing upon the ANCSA corporation's ability to meet the statutory requirements to act as a non-Federal sponsor.

e. Applicability of Adjusted Waiver Amount. Reference 1.b., Section 1156 of WRDA 1986, as amended (33 U.S.C. 2310), provides a non-federal cost sharing waiver currently up to \$665,000 in Fiscal Year 2023 (adjusted annually) for all studies and projects for any Indian tribes or tribal organizations (as defined in section 5304 of title 25). Districts should proceed with applying this cost share reduction provision under currently applicable guidance to studies and projects for which it applies where ANCSA corporations are non-federal sponsors.

5. Questions regarding this memorandum may be directed to Stacey Jensen, at stacey.m.jensen.civ@army.mil or 703-459-6026.

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