



USET

SOVEREIGNTY PROTECTION FUND

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April 6, 2018

Headquarters, U.S. Army Corps of Engineers
C/O James Dalton
Director of Civil Works
Attn: CECW-CE/3E62
441 G Street NW
Washington, DC 20314-1000

RE: EC 1165-2-220 Comments

Dear Mr. Dalton,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) submits the following comments in response to the notice published in the Federal Register on February 5, 2018, seeking comment on the Draft Engineering Circular (Draft EC) intended to replace current policy and procedural guidance for processing requests pursuant to 33 USC 408 (Section 408). Section 408 provides that the U.S. Army Corps of Engineers (USACE) may grant permission for another party to alter a Civil Works project upon a determination that the proposed alteration will not be injurious to the public interest and will not impair the usefulness of the Civil Works project.

USET SPF is an intertribal organization comprised of twenty-seven federally recognized Tribal Nations, ranging from Maine to Florida to Texas¹. USET SPF is dedicated to enhancing the development of federally recognized Tribal Nations, to improving the capabilities of Tribal governments, and assisting USET SPF Member Tribal Nations in dealing effectively with public policy issues and in serving the broad needs of Indian people.

USET SPF is encouraged that the Draft EC includes requirements for Tribal Consultation for Section 408 requests and projects, particularly with reference to the protection of cultural and historical resources. However, we have concerns on the implementation of Tribal Consultation requirements provided in the Draft EC due to previous instances of the ineffective consultation implementation of USACE projects despite USACE's existing Tribal Consultation policy. Failures to effectively engage with Tribal Nations on previous USACE projects have caused irreversible damage and harm to Tribal resources. These projects include a USACE highway project in the everglades and the Dakota Access Pipeline, which have impacted cultural, spiritual, and natural resources despite requirements to engage in Tribal consultation. Furthermore, the actions of certain non-federal sponsors, as defined with the Draft EC, have shown that

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

these entities do not take the best interest of the health of Tribal Nations, or their historical and sacred sites, into consideration. Therefore, USET SPF is concerned that USACE, despite stipulations under the Draft EC, may not engage in meaningful consultation with Tribal Nations. Below, USET SPF provides comments and recommendations to USACE on the Draft EC when it comes ensuring adequate and meaningful Tribal Consultation to protect sacred sites and Tribal water resources as the USACE considers changes to the current Section 408 policy.

Fulfillment of USACE Tribal Consultation Obligations

USET SPF highlights USACE's own Tribal Consultation policy, which states, "USACE will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands." Further, the USACE's Tribal Consultation policy states that, "Consultation will be an integral, invaluable process of USACE planning and implementation." USET SPF thoroughly agrees with this policy and we urge USACE to include reference to the agency's Tribal Consultation policy within the Draft EC to require USACE to engage in meaningful consultation with Tribal Nations that results in the implementation of Tribal guidance—not simply to satisfy consultation requirements.

Tribal consultation is a minimum standard for evaluating efforts to engage Tribal Nations in decision-making. Tribal Nations continue to experience inconsistencies in consultation policies across the federal government, as we frequently receive mere notification of federal action as opposed to a solicitation of input. We urge USACE to ensure Tribal consultation in the Section 408 permitting process and during all USACE actions fully upholds trust obligations to Indian Country, including the protection of Tribal resources. The determination of what level of consultation is required must come from Tribal Nations and must be reflected within the Draft EC. Tribal Nations must be engaged at the very beginning of any Section 408 project planning, assessment, or review processes on a nation-to-nation basis and actions taken must be based on Tribal guidance and input. Meaningful consultation requires a dialogue with Tribal partners occur with a goal of reaching consent.

USET SPF reminds USACE that providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not reflective of a respectful government-to-government, nation-to-nation relationship. A meaningful consultation process ensures that Tribal Nation interests are genuinely considered and factored into final federal actions to prevent Tribal Nation interests from being negatively impacted. USET SPF recommends that language be included within the Draft EC that reflects the principles of meaningful consultation and states that Tribal Nations must certify that meaningful consultation has taken place before proposed Section 408 projects can move forward. USET SPF further recommends USACE revise the language within the Draft EC to promote the achievement of consent from Tribal Nations for proposed Section 408 projects impacting Tribal sacred sites or resources. The implementation of Tribal guidance must be required whenever Section 408 or other USACE projects have the potential to have significant impacts on traditional lands, resources, cultures, and ways of life.

In addition, USACE must avoid delegating consultation responsibilities to non-federal requestors under the Draft EC for Section 408 projects. Certain non-federal entities as defined under the Draft EC, such as state and local governments, as well as local water districts and industry proponents, do not have a federal trust responsibility to consult with Tribal Nations to ensure protection of Tribal resources. Only working with the representatives of Tribal Nations, can USACE determine whether an area has Tribal cultural, historic, or spiritual significance. USET SPF recommends USACE include clarification within the Draft EC.

Tribal Inspection and Monitoring of Section 408 Projects

Under the proposed revisions to Section 408, USET SPF urges USACE to include language within the Draft EC that would provide appropriate authorization for Tribal inspection and monitoring of Section 408

projects for impacts to Tribal resources. If non-federal entities are harming or have the potential to harm Tribal resources while they carry out Section 408 projects, as reported by Tribal Nations or others, USACE must exercise its oversight authority and trust responsibility to investigate allegations and take appropriate action. **This includes work stoppages, withdrawals of permits, and legal action, if necessary.**

When it comes to historic and environmental review from Tribal Nations on the presence of Tribal resources, Tribal representatives must have the opportunity to assess and evaluate all sites of Section 408 projects. Tribal Nations must be able to inspect and monitor Section 408 projects before and after the project has been approved by USACE. Furthermore, Tribal knowledge and tradition must supersede all other assessments and opinions. As such, non-Tribal and non-federal Section 408 requestors and their representatives must never be allowed to make key determinations regarding Tribal interests or Tribal resources. Similarly, if another federal agency, particularly the Department of Interior, calls for additional review or consultation for a Section 408 project, the USACE must take the necessary steps to provide additional review and adequate outreach for additional consultation.

Training Under Section 408 Program Governance

The Draft EC proposes that USACE Commanders at each level will have ultimate responsibility for ensuring that Section 408 decisions comply with current policy and procedures. This includes USACE headquarters, division and district offices. USET SPF has concerns that individual division and districts offices may not have a full understanding of Tribal Nations and their unique histories and traditions. If sufficient training within USACE does not currently exist, USET SPF recommends USACE provide comprehensive training to all employees on the federal trust responsibility, Tribal consultation requirements, how to work effectively with Tribal Nations, and the fulfillment of the federal trust obligation. This training should be designed in consultation with Tribal Nations.

Conclusion

USET SPF reminds USACE that as our federal partner in this unique government-to-government relationship, it is incumbent upon the agency to ensure the protection of Tribal cultural sites and Tribal water resources for each Section 408 project requiring USACE approval. This can only be accomplished through meaningful and comprehensive Tribal Consultation. From the Mississippi Band of Choctaw Indians' Nanih Waiyah mounds to the ceremonial stone landscapes of New England, each USET SPF Tribal Nation has specific places and locations that we consider sacred. Through these sites, we are inextricably linked to our spirituality, the practice of our religions, and to the foundations of our cultural beliefs and values. Our sacred sites are of greatest importance as they hold the bones and spirit of our ancestors and we must ensure their protection, as that is our sacred duty. From both a legal and a moral perspective, it remains the duty of the federal government, as well. Thank you for the opportunity to provide comment on these important issues. USET SPF looks forward to working with USACE on the Draft EC in the future. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 202-624-3550.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director