

RESOLUTION OF THE
NAABIK'ÍYÁTI' COMMITTEE OF THE
NAVAJO NATION COUNCIL

23rd NAVAJO NATION COUNCIL - Second Year, 2016

AN ACTION

RELATING TO RESOURCES AND DEVELOPMENT AND NAABIK'ÍYÁTI';
SUPPORTING AMENDMENTS TO SECTION 1156 OF THE WATER RESOURCES
DEVELOPMENT ACT OF 1986, PUBLIC LAW 99-662, AS AMENDED (33
U.S.C. § 2310)

WHEREAS:

- A. The Navajo Nation established the Resource Development Committee (RDC) as a Navajo Nation Council standing committee and as such empowered RDC to review and recommend resolutions regarding water. 2 N.N.C. §§ 164 (A)(9), 500 (A), 500 (C), 500 (C)(2) (2015); *see also* CO-45-12.
- B. The Navajo Nation established the Naabik'íyáti' Committee as a Navajo Nation Council standing committee and as such empowered Naabik'íyáti' Committee to coordinate all federal programs and to assist and coordinate all requests for information, appearances and testimony relating to federal legislation impacting the Navajo Nation. 2 N.N.C. §§ 164 (A)(9), 700 (A), 701 (A)(4), 701(A)(6) (2015); *see also* CO-45-12.
- C. The Navajo Nation has a government-to-government relationship with the United States of America, Treaty of 1868, Aug. 12, 1868, 15 Stat. 667.
- D. On January 3, 1985, the Water Resources Development Act of 1986 (WRDA of 1986) - sponsored by Congressman James Howard - was introduced to the 99th United States Congress and signed into law by the President on November 17, 1986. See HISTORY of Pub. L. 99-662 at <https://www.govtrack.us/congress/bills/99/hr6>.


- E. The WRDA of 1986 was introduced to provide for the conservation and development of water related resources and the improvement and rehabilitation of the United States water resources infrastructure.
- F. Under Section 1156 of the WRDA of 1986, Pub. L. 99-662, as amended, 33 U.S.C. § 2310, "the Secretary [of Interior] can waive local cost-sharing requirements up to \$200,000 for all studies and projects in American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, Puerto Rico, and the Trust Territory of the Pacific Islands." Therefore, Federally Recognized Tribes within Indian Country do not benefit from the cost-sharing waiver.
- G. This law, 33 U.S.C. § 2310, does not currently include Indian Country. Indian Country is defined as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.. ." 18 U.S.C. § 1151.
- H. An amendment of the WRDA of 1986 by adding Indian Country the Navajo Nation would benefit from the conservation and development of water related resources in order to improve, as well as rehabilitate the water resources infrastructure within the Navajo Nation.

NOW THEREFORE, BE IT RESOLVED:

- A. The Navajo Nation requests the amendment to Section 1156 of the WRDA of 1986, Pub. L. 99-662, as amended 33 U.S.C. § 2310 to include, "Indian Country" (as defined in 18 U.S.C. § 1151).
- B. The Navajo Nation hereby authorizes the Navajo Nation President, the Navajo Nation Speaker, the Navajo Nation Chief Justice and their designees, to advocate for the amendment to 33 U.S.C. § 2310, to include "Indian Country."

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Naabik'íyáti' Committee of the 23rd Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona), at which a quorum was present and that the same was passed by a vote of 14 in favor, 0 oppose, this 2nd day of March, 2016.



LoRenzo Bates, Chairperson
Naabik'íyáti' Committee

Motion: Honorable Alton Joe Shepherd
Second: Honorable Davis Filfred

Subject: FW: Sec 203 WA single phase agreement and 100% in-kind (UNCLASSIFIED)
From: Kneebone, Ronald R SPA (Ronald.R.Kneebone@usace.army.mil)
To: governor@santaclarapueblo.org; nakaidinee@yahoo.com;
Date: Tuesday, October 27, 2015 7:29 AM

Classification: UNCLASSIFIED
Caveats: NONE

Gentlemen;

I know you both are concerned about USACE cost share burden to your communities posed by recent changes in USACE policy. As you can see from the email traffic below significant savings can be accomplished through simple additional language in law, Section 1156 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2310) waives almost one-half million dollars in cost share for certain areas of the country. Unfortunately "Indian Country" is not currently included among those areas. By the addition of "within Indian country (as defined in section 1151 of title 18, United States Code) or in proximity to Alaska Native villages," Native American communities might enjoy the same benefit.

-----Original Message-----

Hi Corinne,

I'm not sure what guidance would be needed for Option 5 when the FCSA, itself says: Option 5: Study in American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, Puerto Rico, or the Trust Territory of the Pacific Islands. In accordance with Section 1156 of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. 2310), up to \$455,000 in non-Federal cost sharing is waived.

These particular groups apparently have special consideration under the law, and I don't think we can place Native American tribes in the US under the same category.

As for the sequence of activities during the former reconnaissance phase, I have included below some excerpts from guidance. You will note that the implementation guidance for TPP refers back to ER1105-2-100 and FC 1105-2-411. The Planning Bulletin appears to be more specific on sequence, rather than just lumping all of the reconnaissance activities together. The bottom line is we would not develop a PMP for the feasibility phase if, when we conducted the reconnaissance study, we found there was no federal interest. So logically the PMP would follow the 905b from a process standpoint.

Regards,
Cincy

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## 1.) EC1105-2-411

## Paragraph 7.b.(1)

(1) Initial Watershed Assessment (similar to a traditional reconnaissance study): The Initial

Watershed Assessment (IWA) will be used to identify a non-Federal sponsor(s), define the scope

and the objective of the Section 729 Assessment, prepare a Watershed Assessment Management

Plan (WAMP) and negotiate a cost sharing agreement.

2.) CECW-PG Memorandum dated 08 January 2002, Subject: Implementation Guidance for Section 203 of WRDA 2000, Tribal Partnership Program.

## Paragraph 3. Program Management and Budgeting.

b. When funded, up to \$100,000 of Federal funds may be used to prepare a reconnaissance study in accordance with guidance in ER 1105-2-100, Appendix G, paragraph G-7. The purpose of a reconnaissance study is to identify the problem, the project purposes, types of outputs, and whether or not the intended project purpose and/or likely outputs are consistent with Army/Corps implementation and budgetary policy. If it is determined that the outputs are not consistent with Army/Corps implementation and budgetary policy, no further studies should be undertaken and a recommendation as to an appropriate course of action should be made to the tribal interests. If it is determined that the outputs are consistent with Army/Corps implementation and budgetary policy, you must identify a cost sharing partner, define the scope of the feasibility study [e.g., PMP] and negotiate a Feasibility Cost Sharing Agreement (FCSA). [note added]

## 3.) ER1105-2-100

## 4-1. Types of Studies and Reports.

## a. Pre-authorization Studies and Reports.

(1) Reconnaissance Phase. The objectives of the Reconnaissance Phase are to: (1) determine if the water resource(s) problems warrant Federal participation in feasibility studies,

(2) define the Federal interest, (3) complete a 905(b) Analysis (refers to Section 905(b) of the

WRDA of 1986) or a Reconnaissance Report, (4) prepare a Project Management Plan (PMP), (5)

assess the level of interest and support from non-Federal entities, and (6) negotiate and execute a

Feasibility Cost Sharing Agreement (FCSA). This determines whether or not planning to develop

a project should proceed to the more detailed feasibility stage. The reconnaissance phase is

Federally funded and the target for completion is 6-12 months from initial obligation of

reconnaissance funds to a signed Feasibility Cost Sharing Agreement.

## 4.) No. PB 2014-02, SMART Planning in the Reconnaissance Phase.

Paragraph 2. "Typically, a Section 905(b) analysis will be completed within six months to ensure adequate time and resources to develop the Project Management Plan (PMP) and the Review Plan (RP) and negotiate the FCSA."



Paragraph 4a. Project Management Plan Preparation, Coordination, and Feasibility Cost Sharing Agreement.

"Following MSC approval of the Section 905(b) analysis and recommendation to continue study, the PDT begins development of the PMP."

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Cindy Tejeda
Watershed & Floodplain Program Manager
PAS/FPMS/TPP Program Manager
South Pacific Division
US Army Corps of Engineers

1455 Market Street
San Francisco, CA 94103
office: 415-503-6591
mobile: 415-602-8031

-----Original Message-----

From: O'Hara, Corinne V SPA
Sent: Friday, October 23, 2015 2:27 PM
To: Tejeda, Cindy L SPD
Cc: Summer, LeeAnn M SPA; Nieto, Jerry D SPA; Kneebone, Ronald R SPA
Subject: RE: Sec 203 WA single phase agreement and 100% in-kind (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Hi Cindy, thanks for the response. For my information and that of the tribes I am currently negotiating with, can you please provide the guidance that states that Option 5 is only available to a "Study in American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, Puerto Rico, or the Trust Territory of the Pacific Islands."

Since I am feeling a bit defensive, if it wasn't irrelevant, I would also ask you to please provide the guidance that states that an approved IWA was required prior to the development of the WAMP. I haven't found that in any of the guidance that I could locate from here (teleworking) in a cursory search of the planners toolbox docs and other online sources. The attached memo from Wes Coleman discusses the IWA and the "associated WAMP," implying that the WAMP would be developed along with the IWA. And nothing in Appendix H or Appendix G of ER 1105-2-100 that I can find says we needed the IWA approved prior to developing the WAMP. In fact, Appendix G seems to require the completion of the PMP/WAMP prior to approval of the 905(b)/IWA -- on page G-16, Item 7 of Exhibit G-2 says: "The 905(b) Analysis must be accompanied by a letter of intent from the non-Federal sponsor stating their willingness to pursue the feasibility study described in the PMP and to share in the costs of construction."

In any event, since the WAMP is primarily boilerplate and the PDT had already developed scopes in order to estimate the project costs for inclusion in the IWAs we had in progress prior to the new guidance being issued, compiling the WAMPs for Zia and Laguna did not constitute a significant effort.

We will meet with LeeAnn next week regarding whether a deviation or something is warranted, but the way forward seems fairly straight forward. Lacking further

guidance to the contrary we will have to include the language requiring a \$25K cash contribution and negotiate the WACSA from there.

Thanks,
Corinne

Corinne V. O'Hara, PLA
Project Manager | Civil Project Management
U.S. Army Corps of Engineers
505.342.3361

-----Original Message-----

From: Tejeda, Cindy L SPD
Sent: Monday, October 19, 2015 5:41 PM
To: O'Hara, Corinne V SPA
Cc: Nieto, Jerry D SPA; Phillips, Leslie L SPD; Kuz, Annette B SPD; Axt, Josephine R SPD; Kneebone, Ronald R SPA; Morales, Lisa T HQ02
Subject: RE: Sec 203 WA single phase agreement and 100% in-kind (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Corinne,

Leslie Phillips, Annette Kuz and I discussed this issue/question today and can provide you with some feedback. First, Option 5 of the new model cost share agreement is NOT applicable and cannot be used to waive the \$25,000 sponsor cash requirement. Option 5 is only available to a "Study in American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, Puerto Rico, or the Trust Territory of the Pacific Islands."

The second issue that we see is federal dollars were spent developing a PMP even though a reconnaissance report had not been certified AND/OR a cost-share agreement had not previously been signed. Unfortunately, these two studies were getting off the ground right when WRRDA 2014 passed and guidance was unclear for some time. The problem is that under the old process (with recons), you would not have prepared a PMP without a reconnaissance report / confirmation of federal interest, and under the new process, you would not have prepared a PMP without a cost-share agreement. So now you are in a predicament where you have neither (recon nor cost share agreement), and you've spent federal dollars on the PMP. Planning, programs and counsel in the vertical team will need to weigh in & determine a path forward. One possibility may be a deviation; there may be other possibilities.

Regards,
Cindy

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Cindy Tejeda  
Watershed & Floodplain Program Manager  
PAS/FPMS/TPP Program Manager  
South Pacific Division  
US Army Corps of Engineers

1455 Market Street  
San Francisco, CA 94103  
office: 415-503-6591  
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-----Original Message-----

From: O'Hara, Corinne V SPA  
Sent: Tuesday, September 15, 2015 3:02 PM  
To: Tejeda, Cindy L SPD  
Cc: Nieto, Jerry D SPA  
Subject: RE: Sec 203 WA single phase agreement and 100% in-kind (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Cindy, I did - LeeAnn (SPA DC) said that she would interpret this the same way I did, but she said she would need concurrence from her counterparts at SPD/HQ and could not give me a formal opinion.

So we just need someone up the chain to weigh in. Your guidance on how to proceed would be appreciated, if there is anything I can/need to do. So far, yours is the only response I have received...

Corinne

Corinne V. O'Hara, PLA  
Project Manager | Civil Project Management  
U.S. Army Corps of Engineers  
505.342.3361

-----Original Message-----

From: Tejeda, Cindy L SPD  
Sent: Tuesday, September 15, 2015 3:56 PM  
To: O'Hara, Corinne V SPA; Kneebone, Ronald R SPA; Morales, Lisa T HQ02  
Cc: Nieto, Jerry D SPA  
Subject: RE: Sec 203 WA single phase agreement and 100% in-kind (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Corinne,

Have you run this through you office of counsel?

Cindy

-----Original Message-----

From: O'Hara, Corinne V SPA  
Sent: Monday, September 14, 2015 2:16 PM  
To: Kneebone, Ronald R SPA; Morales, Lisa T HQ02; Tejeda, Cindy L SPD  
Cc: Nieto, Jerry D SPA  
Subject: Sec 203 WA single phase agreement and 100% in-kind (UNCLASSIFIED)  
Importance: High



Classification: UNCLASSIFIED

Caveats: NONE

Hi all, I am currently negotiating a WACSA with one of our new Pueblo sponsors, since we can no longer complete the Initial Watershed Assessment per WRRDA 2014. At the sponsor's request, I went ahead and created the PMP (aka WAMP), so that the Pueblo would have some information in writing regarding the scope of the assessment.

While preparing the WACSA for the project, I was directed to replace the language in Section II.B with the language in attachment Option 5 (pg A-5 of the attached) because we had already prepared the PMP (WAMP). So instead of saying:

"B. The Non-Federal Sponsor shall contribute 25 percent of the shared assessment costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

1. No later than 15 calendar days after the effective date of this Agreement, the Non-Federal Sponsor shall provide funds in the amount of \$25,000, for the Government to initiate the Assessment, including preparation of the PMP. In the event more funds are needed to develop the PMP, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor, and no later than 15 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government."

\*If a PMP was developed prior to signing the agreement is revised to say:

"B. The Non-Federal Sponsor shall contribute 25 percent of the shared assessment costs in accordance with the provisions of this paragraph and provide required funds in accordance with Article III.

1. After considering the estimated amount of credit for in-kind contributions that will be afforded in accordance with paragraph C. of this Article, the Government shall provide the Non-Federal Sponsor with a written estimate of the amount of funds required from the Non-Federal Sponsor for the remainder of the initial fiscal year of the Assessment. No later than 15 calendar days after such notification, the Non-Federal Sponsor shall provide the full amount of such funds to the Government."

I interpret "the estimated amount of credit for in-kind contributions that will be afforded in accordance with paragraph C" as 100%, since the cost match for Section 203 can be made with 100% in-kind, and that was what was discussed with the Pueblo. So after considering that 100% credit, I interpret the "estimate of the amount of funds required from the Non-Federal Sponsor for the remainder of the initial fiscal year of the Assessment" to be \$0.

Therefore, if we are provided enough start-up funds to put together the PMP (WAMP) for new projects - maybe \$10-15K - tribes would not need to provide a \$25K cash contribution. I ran this by Albuquerque District Counsel, who said that she also would interpret it this way (my way), but said she would need concurrence from her counterparts at SPD/HQ before giving me any kind of formal opinion on that.

It would be helpful if someone could get a legal confirmation of this interpretation for me so I can properly inform both Zia and Laguna Pueblos of their requirements under the new process.

Thanks!

Corinne

Corinne V. O'Hara, PLA  
Project Manager | Civil Project Management  
U.S. Army Corps of Engineers  
505.342.3361

Classification: UNCLASSIFIED  
Caveats: NONE

Classification: UNCLASSIFIED  
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Caveats: NONE

Classification: UNCLASSIFIED  
Caveats: NONE

Classification: UNCLASSIFIED  
Caveats: NONE

# NAVAJO NATION

RCS# 335

3/2/2016

Naa'bik'iyati Committee

07:50:33 PM

Amd# to Amd#

Legislation No. 0039-16

PASSED

MOT Shepherd

Supporting Amendments to Section

SEC Filfred

1156 of the Water Resources Act  
of 1996, P.L. 99-662, as amended

**Yea : 14**

**Nay : 0**

**Not Voting : 10**

**Yea : 14**

Begay, K  
Begay, M  
Bennett  
Chee

Damon  
Filfred  
Perry  
Phelps

Shepherd  
Slim  
Smith

Tso  
Tsosie  
Witherspoon

**Nay : 0**

**Not Voting : 10**

Bates  
Begay, NM  
BeGaye, N

Brown  
Crotty  
Daniels

Hale  
Jack

Pete  
Yazzie