DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G ST. NW
WASHINGTON DC 20314-1000

CECC-ZA

April 7, 2011

MEMORANDUM FOR

CHIEF, OPERATIONS & REGULATORY COMMUNITY OF PRACTICE (ATTN: CECW-CO / MR. MIKE ENSCH)
DIRECTOR OF REAL ESTATE (ATTN: CEMP-CR /MR. SCOTT WHITEFORD)
ALL DIVISION, DISTRICT, CENTER, AND LABORATORY COUNSEL

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations Follow-Up

1. References.

a. Memorandum from the Office of the Chief Counsel to Chief, Operations & Regulatory Community of Practice (ATTN: CECW-CO / Mr. Mike Ensch), Subject: Leases and Cooperative Agreements with Cooperating Associations, dated June 25, 2010.

b. EP 1130-2-500, Project Operations—Partners and Support, dated 01 June 2006.

c. ER 405-1-12, Real Estate Handbook, dated 30 September 1994.

d. Memorandum from CECW-CO/CEMP-CR for Commanders, Major Subordinate Commands, Chiefs, Operations Divisions, Chiefs Real Estate Divisions, Subject: Guidance Pertaining to Real Estate Instruments and Cooperative Agreements with Cooperating Associations, dated March 15, 2011.

2. Background and Summary. On June 25, 2010, we issued an opinion finding that an inventive mechanism for working with local cooperating associations ("CAs") went beyond the existing legal authorities. See Ref. 1.a. ("CECC-ZA Opinion"). Per Section 4 of the CECC-ZA Opinion, we recommended that the Operations & Regulatory Community of Practice instruct the Districts to review their existing leases and agreements. If these leases or agreements were found to be inconsistent with the CECC-ZA Opinion, we recommended that the Districts revise or terminate those arrangements and, where applicable, execute new leases or agreements consistent with the advice in that opinion. It is our understanding that most affected Districts (i) have completed this review, (ii) have terminated or will soon terminate any improper leases or agreements, and (iii) where applicable, have executed or will soon execute new agreements following the model provided in EP 1130-2-500 ("Model Cooperative Agreement"), see Ref. 1.b. App. P, and new leases following the model provided in ER 405-1-12 ("Model CA Lease"), see Ref. 1.c. Fig. 8-C-7, as amended to include new model language by Ref. 1.d. (together, "Model Documents"). This memorandum provides additional clarification on the limits and restrictions

under the existing authorities applicable to any such new leases and agreements under the Model Documents.

3. Discussion.

a. If executed as provided in the CECC-ZA Opinion, ER 405-1-12, and EP 1130-2-500, it is our view that using the Model Documents will allow the Districts to continue operation of the affected recreation sites while complying with all applicable legal constraints. However, use of the Model Documents will admittedly cause both the Districts and the CAs to lose some of the "benefits" that were gained through use of the inventive mechanism that was the subject of the CECC-ZA Opinion.[1]

b. First, under the Model Documents, USACE may not exercise actual or constructive control over the fees collected or revenues otherwise generated by the CA. When USACE exercises actual or constructive control over funds generated from the use of USACE recreational facilities by third parties, these funds must be viewed as "funds received by the Secretary" and are thus subject to the deposit requirements of 16 U.S.C. § 460d-3. See Ref. 1.a. ¶ 3.c. However, so long as USACE does not have actual or constructive control over the fees collected or revenues generated by the CA from the use of leased property, then the CA is permitted under the ER 405-1-12 version of the Fees, Rates, and Prices clause of the Model Lease ("Original Model Lease FRP Clause") to reinvest these monies to fulfill its obligations under the Model Agreement. See Ref. 1.c. Fig. 8-C-7 ¶ 9. Also, under the alternative Model Lease "Fees, Rates, and Prices" clause announced in Reference 1.d. ("Alternative Model Lease FRP Clause"), the CA may reinvest these monies for the continued administration, maintenance, operation and development of the leased property.[2] See Ref. 1.d. pg. 3. ("All monies received by

---

[1] See Ref. 1.a. ¶ 3.b. Unfortunately, these benefits cannot be realized under current law. If USACE desires to receive these benefits, we believe that USACE must seek additional legislation. CECC-G provided legislative language on this point to the Operations and Regulatory Community of Practice in July 2010.

[2] This alternative language is necessary because of a potential gap that appears in the Model Lease and Model Agreement as the arrangement is applied to larger undertakings with an increased range of operation and maintenance responsibilities. As consideration under the Model Lease, the CA commits to assume (in cooperation with the Secretary) operation and maintenance responsibility for the leased premises. Ref. 1.c. Fig. 8-C-7 ¶ 1. However, under the Original Model Lease FRP Clause, the CA is only permitted to use the "[m]onies received . . . from operations conducted on the premises . . . to fulfill its obligations *under the Agreement*." Id. ¶ 9. The Model Agreement does not list operation and maintenance of the leased property as one of the CA's obligations under the Agreement. See Ref. 1.b. App. P ¶¶ 3&4. Accordingly, as the Original Model Lease FRP Clause restricts use of the fees to those CA obligations discussed in the Model Agreement, and as the Model Agreement does not discuss operation and maintenance of the leased property, it follows that the Original Model Lease FRP Clause does not permit the CA to use monies generated from the use of the leased property to finance the operations and maintenance tasks for which the CA is responsible as consideration for the lease. The Alternative Model Lease FRP Clause announced under Ref. 1.d. remedies this issue by making clear that the CA may use the revenues generated from the leased property to finance the operation and maintenance costs that the CA incurs as consideration for the lease.

the Lessee from operations conducted on the premises must be utilized by the Lessee for the administration, maintenance, operation, and development of the premises.").[3]

c. Second, under the Model Documents, the CA may not collect any fees or assess any user charges if USACE would be prohibited by law from collecting those fees or assessing those charges. Ref 1.c. Fig. 8-7 ¶ 9 ("[N]o user fees may be charged by the CA (Lessee) for use of facilities developed in whole or in part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law."). Accordingly, the CAs may not collect entrance fees or admission fees for public recreation areas located at lakes or reservoirs under USACE jurisdiction. See 16 U.S.C. § 460d-3(a) ("No entrance or admission fees shall be collected ... by any officer or employee of the United States at public recreation areas located at lakes and reservoirs under the jurisdiction of the Corps of Engineers, United States Army).

d. Third, the CA may not use monies collected through the operation of the leased properties to pay costs off the site where collected or for purposes other than those specified in the lease. For instance, if the lease contains the Original Model Lease FRP term, then the CA may not retain 50 percent of the monies that it receives from its operation of a leased recreation site and then use them to pay costs incurred with regard to another property, or to pay the salaries of persons performing tasks other than those specifically identified in the Model Agreement. Similarly, if the lease contains the Alternative Model Lease FRP term, then the CA may not retain these monies and use them to pay costs incurred with regard to another property, or to pay the salaries of persons not directly engaged in the administration, maintenance, operation or development of the leased premises. As set forth in the CECC-ZA Opinion, we are aware of no authority that permits a CA to (i) operate a USACE recreational facility for which USACE retains some operation and maintenance authority (ii) collect fees from third party users of that USACE recreational facility, and then (iii) treat any portion of those fees as its own and use such fees for purposes not related to the operation and maintenance of the leased property. Ref. 1.a. ¶ 3.c.xiii. Put another way, we are aware of no authority that permits the CA to earn this type of return on the taxpayers' investment of operation and maintenance dollars into the leased property.

e. However, depending on which version of Fees, Rates, and Prices paragraph is employed, the CA may use the monies generated through the use of the leased properties to

---

[3] The question has been raised as to how to reconcile (a) the fact that the USACE-created Model CA Lease directs how the CA may use the monies collected through the operation of the leased premises, see Ref. 1.c. Fig. 8-C-7 ¶¶ 2, 9, and (b) the requirement that USACE not exercise constructive control over the monies collected through the operation of the leased premises, see Ref. 1.a. ¶ 3.c. In our view, USACE's direction under the Model Lease—whether using the Original or Alternative Model Lease FRP Clause—that the generated revenues be used in a particular fashion does not rise to the level of constructive control. In either variant of the Model Lease, USACE is not attempting to control the CA's funds and thus do through the CA that which it could not do itself. Rather, USACE is acting as landlord to generally define the types of tasks or scope of responsibility that it will accept as consideration under the lease and that it will allow the lessee to perform. As landlord, USACE can establish consideration under the lease and direct the activities of a tenant to protect and conserve the property. We believe that these actions taken as a fundamental part of the landlord-lessee relationship are distinguishable from actions taken to control and indirectly expend CA-collected funds in a way that USACE could not do itself.

fulfill its responsibilities under the Model Documents. If the Original Model Lease FRP Clause is employed, then the CA may use all monies that it receives through its operation of the leased premises fulfill its obligations under the CA Agreement. It must be noted, however, that this version of the Fees, Rates, and Prices paragraph does not permit the CA to use the monies generated from the use of the leased premises to pay the costs of operating and maintaining those premises. As discussed in footnote 2, supra, this version of the Fees, Rates, and Prices clause only allows the CA to use the generated revenues to discharge its obligations under the Model Agreement. See Ref. 1.c. Fig. 8-C-7 ¶ 9 ("Monies received by the Lessee from operations conducted on the premises shall be utilized by the Lessee to fulfill its obligations under the Agreement."). Because operation and maintenance of the leased premises is not one of the CA's obligations under the Model Agreement, see Ref. 1.b. App. P ¶¶ 3&4, this is not a proper use of the revenues generated under a lease executed with the Original Model Lease FRP Clause.

f. Alternatively, if the new substitute Fees, Rates, and Prices paragraph announced in Reference 1.d. is employed, then the CA may use monies generated from the use of the leased premises to pay costs directly related to the administration, development, operation, and maintenance of the leased property. This includes the salaries of CA employees directly involved in the operation and maintenance of the leased premises. For instance, the CA could use revenue generated from a gift shop operated under a CA lease to purchase stock for the gift shop, or could use the fees collected from its operation of a campsite to pay the salary of a CA employee who manages the campsite. However, general administrative costs, including planning or managerial activities, may only be paid with monies collected from the operation of the premises if they are directly related to activities done on the premises.

g. Finally, we acknowledge that a significant issue remains unresolved with regard to the CA's operation and maintenance responsibility. The Model CA Lease is unique among the various model leases in ER 405-1-12 in that it does not vest the lessee with exclusive operation and maintenance responsibility for the leased premises. Instead, as consideration for the lease, the CA is responsible under the Model CA Lease for "the operation and maintenance of the premises . . . , *in cooperation with the Secretary*"—an arrangement that plainly envisions USACE continuing to bear at least some responsibility for the operation and maintenance of the leased premises Ref. 1.c. Fig. 8-C-7 ¶ 2 (emphasis supplied). Compare with id. Fig. 8-C-5 (Lease to Nonprofit Organization for Park and Recreational Purposes). While we believe that 16 U.S.C. §460d permits this type of shared operation and maintenance arrangement, we are concerned that this term provides little specificity when applied to the parties' operation and maintenance responsibilities for large scale undertakings and will thus make the lease difficult to administer or enforce.

h. In a small scale CA program, the limited scope of the endeavor would generally restrict the parties' potential operation and maintenance responsibilities. For instance, if the arrangement only allows for the CA to operate a gift shop on leased property at a USACE recreation site, then the range, volume, and expense of operation and maintenance responsibilities for which USACE and the CA are responsible for "cooperati[ng]" on should be rather limited. In other words, the potential degree of operation and maintenance responsibility

that USACE incurs in a small scale CA program is minimal. And in this scenario, the lack of specificity in the Model CA Lease may not be fatal because the risk of USACE being saddled with unforeseen or unwanted operation and maintenance responsibilities is so negligible.

i. In contrast, as the CA program expands to include many acres of land, multiple buildings or structures, roadways, trails, and so on, there is an increasing universe of operation and maintenance tasks that must be performed for the upkeep of the premises. Yet the Model CA Lease does not assign responsibility for these tasks among the parties, and instead provides that the parties will "cooperat[e]" in fulfilling these operation and maintenance responsibilities.

j. This ambiguity is problematic for two reasons—first, because it is not clear what level of financial commitment USACE must continue to provide for the operation and maintenance of the leased property; and second, because it is not clear what standard of operation and maintenance the CA must provide to satisfy its commitments under the Model CA Lease. Under the Model Lease, the clause that establishes the parties' cooperative operation and maintenance responsibilities would read the same when the CA is expected to fund 99 percent of the operation and maintenance costs, with USACE "cooperat[ing]" with the additional one percent, as when USACE is expected to provide the bulk of the costs with the CA "cooperat[ing]" on the remainder; either funding arrangement is possible under this lease term, and either funding arrangement would fully satisfy the plain language of the lease. As a result, it is impossible to determine at the outset whether the arrangement is "reasonable in the public interest"—i.e., whether the arrangement is appropriate under 16 U.S.C. §460d. As the lease continues in effect, it is also impossible to assess whether the CA is performing adequately. Indeed, so long as the CA provides at least *some* level of operation and maintenance—no matter how minor or insignificant—the CA could argue that it is compliant with the lease—no matter what other funding responsibilities may have been initially contemplated by the parties.

k. This ambiguity that manifests with the expansion of the CA program's scope creates the risk of operation and maintenance shortfalls as the lease proceeds and the true operation and maintenance capabilities of the CA become known. This in turn opens the door for the type of creative, but legally objectionable, funding schemes as were the subject of the CECC-ZA Opinion. To guard against this risk and to ensure that USACE's CA leases are in fact "reasonable in the public interest," as required by 16 U.S.C. § 460d, we believe that this ambiguity in the Model CA Lease must be addressed for all but the most limited CAs. At the same time, we recognize that this issue likely cannot be adequately resolved through the creation of new standard or model language; the identification and explanation of joint operation and maintenance responsibilities will instead likely need to be addressed on a case-by-case basis at the local level with specific regard for the operation and maintenance requirements of each project. Accordingly, we concur with the directive put forward in Reference 1.d.: if it is envisioned that the CA will bear less than one-hundred percent of the responsibility for the operation and maintenance of the leased premises, that arrangement must be clearly documented—either through an approved lease deviation or an appendix—with the approval of the relevant Office of Counsel.

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations Follow-Up

4. Conclusions. If executed as provided in this memorandum, the CECC-ZA Opinion, the CECW-CO/CEMP-CR memorandum, ER 405-1-12, and EP 1130-2-500, it is our view that using the Model Documents will allow the Districts to continue operation of the affected recreation sites while complying with all applicable legal constraints. However, we acknowledge that further action is required to correct a significant shortcoming in the Model Documents regarding joint operation and maintenance responsibilities for large scale CA programs. We stand ready to assist the Operations & Regulatory Community of Practice and local offices as they engage in the effort to address this shortcoming. If you have any questions or concerns, you may contact me at (202) 761-0018, or CPT Steve Rice at (202) 761-8561.

EARL H. STOCKDALE
Chief Counsel

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON, D.C. 20314-1000

MAR 15 2011

CECW-CO/CEMP-CR

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS, CHIEFS, OPERATIONS DIVISIONS, CHIEFS REAL ESTATE DIVISIONS

SUBJECT: Guidance Pertaining to Real Estate Instruments and Cooperative Agreements with Cooperating Associations

1. References.

a. 16 U.S.C. § 460d-3.

b. 16 U.S.C. § 460d.

c. 33 U.S.C. §2328.

d. ER 405-1-12, Real Estate Handbook, dated 30 September 1994.

e. ER 1130-2-500, Project Operations—Partners and Support, dated 27 December 1996;

f. EP 1130-2-500, Partners and Support (Work Management Guidance and Procedures), dated 27 December 1996.

2. Background and Summary.

a. This is to provide clarification and guidance to field elements following the legal opinion provided by the Chief Counsel dated 25 June 2010, Subject: Leases and Cooperative Agreements with Cooperating Associations. That opinion remains relevant in its entirety, and focused specifically on non-standard clauses inserted into Cooperative Agreements and Cooperative Association leases. Those clauses were determined to be beyond existing authority. The non-standard language permitted retention of fees collected by third parties, bypassing the fee deposit requirement of 16 U.S.C. § 460d-3 for funds under the actual or constructive direction and control of USACE.

b. USACE recreational facilities may be operated in collaboration with cooperating associations ("CAs"). Authority for engaging CAs is granted under 33 U.S.C. § 2328. However, that statute neither expands nor contracts the authority granted in 16 U.S.C. §460d to enter into real estate instruments with various entities, including CAs under 16 U.S.C. §460d. Therefore, once a CA becomes a cooperator, if a real estate instrument is required to further the

purposes of the CA, that real estate instrument must conform to the authorities granted under 16 U.S.C. §460d.

c. Approved template agreements for this purpose have been developed, and are found at:

1) ER 405-1-12, Appendix 8-C-7, Cooperative Association Lease ("Model CA Lease"); and

2) EP 1130-2-500, Appendix P, Sample Agreement ("Model CA Agreement").

3. Discussion.

a. Existing Legal Framework.

i. Through legislation enacted in 1992 and 1996, Congress authorized USACE to enter into agreements with CAs for the management of federally-constructed recreation facilities. Explicitly, USACE was permitted to "develop and implement a program to share the cost of managing recreation facilities and natural resources at water resource development projects" operated by USACE. 33 U.S.C. §2328. Congress also authorized USACE to "enter into cooperative agreements with non-federal public and private entities to provide for operation and management of recreation facilities...where such facilities and resources are being maintained at complete Federal expense." See id.

ii. Beginning with legislation enacted in 1944, USACE has been authorized to enter into real estate instruments with various entities to permit the operation and maintenance of park and recreation facilities by those interests. 16 U.S.C. §460d. Leases or licenses to non-profit organizations may be granted for that purpose at reduced or nominal consideration in recognition of the public service to be rendered in utilizing the leased premises. See id.

b. Existing Policy Framework. The nature and scale of activities envisioned to be permissively performed with a CA under the authority granted in 33 U.S.C. §2328 are listed in ER 1130-2-500. That list is not all inclusive, and "creative identification of other activities which are a benefit to the Corps of Engineers is encouraged and can be approved by the District Commander." See Ref. 1.e. Ch. 9. Although the joint use and management of an entire USACE recreational facility is not explicitly listed in the regulation, it is not prohibited. See id. However, any third-party use of Army Civil Works real property requires a real property instrument as well as a CA Agreement, and that real property instrument must conform to the authority granted in 16 U.S.C. §460d.

c. Existing Template Documents. Approved template documents for the facilitation of the authorities discussed infra include clauses that are specifically required to avoid fiscal violations. Those clauses are mandatory, and include, but are not limited to, the following:

i. *Pertaining to fee collection*: The Model CA Lease Condition 9 states as follows:

> The Lessee may charge a general admission fee and/or fees for visitor/interpretative services or special events. The said officer shall have the right to review such rates and prices and require an increase or reduction when it is determined that the objective of this paragraph has been violated. However, no user fees may be charged by the Lessee for use of facilities developed in whole or in part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law. Monies received by the Lessee from operations conducted on the premises shall be utilized by the Lessee to fulfill its obligations under the Agreement. The Lessee shall furnish an annual report of itemized receipts and expenditures to said officer.

An alternative is authorized as follows:

> Fees may be charged by the Lessee for use of the premises or facilities constructed thereon. The said officer shall have the right to review such fees and require an increase or reduction when it is determined that the objectives of this lease have been violated. However, no user fees may be charged by the Lessee for use of facilities developed in whole or in part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law. All monies received by the Lessee from operations conducted on the premises must be utilized by the Lessee for the administration, maintenance, operation and development of the premises. Any such monies not so utilized or programmed for use within a reasonable time shall be paid to said officer at the end of each 5 year period. The Lessee shall furnish annual statements of receipts and expenditures to said officer.

ii. *Pertaining to operation and maintenance responsibilities*: The Model CA Lease Condition 2 states as follows:

> The consideration for this lease is the operation and maintenance of the premises by the Lessee, in cooperation with the Secretary, for the benefit of the United States and the general public in accordance with the terms of this lease and those of the Agreement. It is understood and agreed that this lease will be controlling if there are any conflicts between the two documents.

If it is envisioned that operation and maintenance will be less than one-hundred percent responsibility of the CA, that responsibility must be explicitly addressed in this lease, or in a special additional condition clause. In other words, if there will be a USACE component to continuing operations and maintenance, the responsibilities of the CA and USACE must be

stated, whether through an approved deviation in the lease document or an appendix to the lease document, so that the agreement of the parties is clear. That deviation must be approved by Office of Counsel.

iii. *Pertaining to construction on leased premises*: The Model CA Condition 10 states as follows:

> The Lessee shall construct, operate and maintain the premises in accordance with the Agreement. All structures shall be constructed and landscaping accomplished in accordance with plans approved by said officer. The Lessee also agrees to prohibit any exclusive or private use of all or any part of the premises by any individual or group of individuals. Title to improvements constructed or placed on the premises by the Lessee shall remain vested in the Lessee, subject to the Condition on **RESTORATION,** and shall be maintained by the Lessee to the satisfaction of said officer.

iv. *Pertaining to fiscal management*: The Association will conduct its fiscal operations in accordance with accepted business practices. This includes the appropriate use of a funds accountability system, purchase orders, receipts, invoices, and inventory records. The Association shall annually submit (within 135 days following the end of each fiscal year) a complete financial report to the Corps which includes a written summary of Association activities for the year. The Corps may review the fiscal records of the Association at any time during the term of this Agreement. See Model CA Agreement at ¶D.

d. Permissible Actions within the Existing Legal Framework.

i. Agreements may be entered into with CAs for the purposes of managing developed public recreation areas, and fees may be collected at facilities located within those areas, such as campsites, beaches, and boat ramps, but USACE may not collect, retain or expend these fees. Instead, all fees must be collected and retained by the CA, and must be expended by the CA for the administration, maintenance, operation and development of the recreation area from which the fees are collected.

ii. Agreements must conform to the Model CA Lease and the Model CA Agreement. Any substantive deviation from these templates must receive prior approval from HQ USACE, CEMP-CR and HQ USACE, CECW-CO.

iii. USACE may retain operation and maintenance responsibilities on an area outgranted to a CA, but those responsibilities must be explicitly defined in the outgrant agreement, by an approved deviation in the lease document or appendix to the lease document.

iv. Construction on the lease area by the CA is permissible so long as the construction receives prior approval.

4. Pursuant to the reviews completed and guidance contained herein, Districts who have entered into a cooperative agreement or lease that is inconsistent with this guidance or the referenced Chief Counsel legal opinion, must revise or terminate those agreements and leases as soon as practicable.

FOR THE COMMANDER:

MICHAEL G. ENSCH
Chief, Operations

SCOTT L. WHITEFORD
Director of Real Estate

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G ST. NW
WASHINGTON DC 20314-1000

Office of the Chief Counsel

June 25, 2010

MEMORANDUM FOR CHIEF, OPERATIONS & REGULATORY COMMUNITY OF PRACTICE (ATTN: CECW-CO / MR. MIKE ENSCH)

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations

1. References.

a. 16 U.S.C. § 460d-3.

b. Cooperative Agreement Between U.S. Army Corps of Engineers, Ft. Worth District, and the Our Lands & Waters Foundation, dated 8 October 2007.

c. Amendment 1 to the Cooperative Agreement Between U.S. Army Corps of Engineers, Ft. Worth District, and the Our Lands & Waters Foundation, dated 23 July 2009.

d. Lease to Nonprofit Organization for Cooperative Management of Hickory Creek Park, Lewisville Lake, Denton, Texas, dated 23 December 2008.

e. 16 U.S.C. § 460d.

f. Letter from Mr. Ronald C. Allen, Assistant Chief Counsel for Legislation, to Mr. Robert S. Wilkins, St. Louis District, dated 02 July 1976.

g. ER 1130-2-441, Cooperating Associations Program, dated 01 March 1991.

h. ER 405-1-12, Real Estate Handbook, dated 30 September 1994.

i. EP 1130-2-500, Project Operations—Partners and Support, dated 01 June 2006.

j. 33 U.S.C. §2328.

2. Background and Summary.

a. It is our understanding that the USACE recreational program has faced financial difficulties in recent years.[1] This owes to a combination of factors, including: a "no growth" freeze on budgets at USACE recreational facilities[2]; changing recreational requirements (*e.g.*,

---

[1] See Mr. Douglas Cox, USACE Regional Partnerships PM, PowerPoint Briefing: Partnership – U.S. Army Corps of Engineers Ft. Worth District, dated 11 November 2009.

[2] As used herein, the term "USACE recreational facilities" refers to any of the recreation sites discussed in 16 U.S.C. § 460d (discussing "public parks and recreational facilities at water resources development projects under

changes to safety regulations, environmental regulations, etc.); general operational cost increases (*e.g.*, increases in labor costs, repair costs, etc.) with little or no corresponding increase in operations and maintenance ("O&M") budgets; and the application of 16 U.S.C. § 460d-3, which requires USACE to deposit any fees that it collects for the use of developed recreation sites and facilities into the Land and Water Conservation Act Fund ("LWCF") at the U.S. Treasury rather than reinvesting them into the park where collected.[3] See Ref. 1.a. (reproduced in full at Appendix 1). As a result, USACE Districts are apparently forced to choose between maintaining USACE recreational facilities in a declining manner until they are closed, reducing the number of recreational facilities and redirecting the available funds to the remaining sites, or developing creative financing approaches by attempting to leverage the various statutory authorities that allow partnership with non-Federal entities.[4]

b. Pursuing this third option, the Fort Worth District ("SWF") created a new arrangement under which USACE jointly manages and operates USACE recreational facilities with non-profit cooperating associations ("CAs"). This arrangement, referred to herein as the SWF Arrangement, utilizes a cooperative agreement issued under the authority of 16 U.S.C. § 460d and 33 U.S.C. § 2328 and a lease issued under the authority of 16 U.S.C. § 460d. See Refs. 1.b., 1.c. (amending Ref. 1.b.), & 1.d.

c. Under the SWF Arrangement, the USACE District continues to budget for, receive, and expend Civil Works appropriated funds to maintain a USACE recreational facility. At the same time, the CA operates the USACE recreational facility and collects entrance fees, admission fees, and user fees from third parties. Through the addition of non-standard language into USACE's model for leases under 16 U.S.C. § 460d ("Model CA Lease"), USACE allows the CA to retain up to 50 percent of these fees for its own administrative purposes. The CA must either reinvest the remainder into the USACE recreational facility, as directed or approved by USACE, or transfer it to the District Commander.[5] This non-standard language therefore allows the USACE District to bypass the fee deposit requirement of 16 U.S.C. § 460d-3 and to direct the reinvestment of 50 percent or more of the fees back into the USACE recreational facility through the CA.

d. While we appreciate and understand the financial utility and benefit to the Government of the SWF Arrangement, we believe that it goes beyond the legal authorities presently in place. USACE effectively controls the use and disposition of the fees collected by the CA under the SWF Arrangement. Funds that are collected from third parties and then remain under a Federal agency's constructive control, whether or not in the agency's physical

---

the control of the Department of the Army"), 16 U.S.C. § 460d-3 (discussing "developed recreation sites and facilities"), and 33 U.S.C. § 2325 (discussing "water resources project for recreation"), which may include parks or other types of recreational facilities at USACE-controlled or -operated lakes, reservoirs, and other water resources projects.

[3] Supra fn. 1 Slide 7.

[4] Id. Slide 10.

[5] Neither the lease nor cooperative agreement specify how the District Commander will process these receipts. However, under a standard lease executed under 16 U.S.C. § 460d, the District Commander would need to deposit these fees into the U.S. Treasury as miscellaneous receipts. See Ref. 1.e.

possession, are considered Federal funds subject to the same restrictions and limitations as if they were collected and possessed by the agency itself.

e. Section 460d-3 of Title 16, United States Code, governs the collection of fees for the use of USACE recreational facilities and requires that all such fees be deposited into the LWCF. Because the fees collected by the CA are subject to USACE's constructive direction and control, these fees fall subject to the restrictions and requirements of Section 460d-3. We have identified no other statutory authority that permits any alternative use of these fees. Specifically, we have identified no authority under which USACE may permit the CA to retain any portion of the fees collected for the use of a USACE recreational facility.[6] We have also identified no authority under which USACE may reinvest or direct, approve, or otherwise permit the expenditure or reinvestment of these fees by the CA into the USACE recreational facility.[7] Accordingly, if a USACE District does not deposit these fees into the LWCF and/or if a District uses, directs, or authorizes the use of these fees for operation, maintenance, construction, or other types of reinvestment into the USACE recreational facility, this will violate 16 U.S.C. § 460d-3, deprive the LWCF of receipts specifically called for by Congress, and constitute an improper augmentation of the appropriations provided to the Corps for those same purposes.

---

[6] The fees here discussed must be distinguished from the smaller subset of fees and other revenue that the CA collects from activities consistent with those listed in the applicable ERs—*e.g.*, fees or revenue gained from third parties for their participation in a special event hosted by the CA; fees for the use of a facility that was constructed and is operated by the CA, such as a gift shop; etc. While these activities or facilities may be physically located at or in a USACE recreational facility, the CA is not charging a fee "for the use of [USACE] developed recreation sites and facilities," as used in 16 U.S.C. § 460d-3, but rather for the use of the CA-developed or -provided site, facility, or activity. As discussed infra, the fees and revenues collected from CA-hosted activities or CA-constructed, -operated, and -maintained facilities should not be considered USACE funds and are not viewed as subject to the LWCF deposit requirement of 16 U.S.C. § 460d-3.

The SWF Agreement does not distinguish between these latter, acceptable types of fees and revenues and the broader category of fees and revenues that the CA would collect and retain for their operation of the entire USACE recreational facility under the SWF Arrangement. To the extent that these are distinguishable, the CA may permissibly continue to retain and expend for its own purposes the fees and revenue collected from CA-hosted activities or CA-constructed, -operated, and -maintained facilities. This memorandum should not be construed to prohibit a CA from collecting, generating, retaining, or expending fees or revenue from activities that are consistent with those envisioned under the original CA program and listed in the applicable ERs.

[7] As discussed infra, 33 U.S.C. § 2328 authorizes USACE to accept contributions of funds, materials, and services from CAs for the operation and maintenance of a USACE recreational facility. Under this authority, the CA may permissibly use the fees or revenues that it generates from CA-hosted activities or CA-from constructed, -operated, and -maintained facilities, see supra fn. 6, to provide material, services, and funds for O&M of the USACE recreational facility. However, 33 U.S.C. § 2328 does not authorize construction at the USACE recreational facility. Also, 33 U.S.C. § 2328 requires that any funds provided by the CA under this authority be deposited into the "Contributions and Advances, Rivers and Harbors, Corps of Engineers" account at the U.S. Treasury. Such funds would then be used consistent with USACE authorities and procurement laws and regulations.

3. Discussion.

a. Existing Legal Framework.

i. Under 16 U.S.C. § 460d, USACE has broad authority to grant leases or licenses for the use of USACE recreation sites. See Ref. 1.e. (reproduced in full at Appendix 2). Enacted in 1944 and amended over time, the statute authorizes the Chief of Engineers, under the supervision of the Secretary of the Army, to grant leases or licenses at USACE water resources development projects under such terms and conditions as the Secretary deems reasonable. The statute also authorizes leases to non-profit organizations at reduced or nominal consideration for public park and recreation purposes, in recognition of the public service rendered by the non-profit organization on the leased premises. All monies received by USACE for leases or other privileges under 16 U.S.C. § 460d must be deposited into the U.S. Treasury as miscellaneous receipts. Id.[8]

ii. Although the USACE cooperating associations program is not specifically mentioned in 16 U.S.C. § 460d, USACE concluded in a 1976 legal opinion that the statute "provide[s] ample authority for Corps cooperation with voluntary citizens' associations to fulfill the purpose of the Corps projects." Ref. 1.f. This broad authority to work with a CA was based on the statutory language authorizing the Chief of Engineers to "maintain and operate public recreational facilities at water resources development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests." Id. Under the arrangement envisioned in the 1976 opinion, USACE would execute a license or a lease to a CA under the authority of 16 U.S.C. § 460d. The CA could then provide services or construct, operate, and maintain limited facilities at the USACE site, and could collect fees or other revenue from third parties who employ the CA's services or use the CA's facilities. Importantly, it must be noted that the 1975 opinion did not address the question of whether a CA could operate and charge fees for the use of a *USACE*-constructed, -provided and -maintained recreational facility.

iii. With regard to the fees or revenue collected by the CA under the concept envisioned in the 1976 opinion, the CA would only collect fees and generate revenue as a result of its own investment of resources or provision of services. For instance, the CA would generate revenue by selling items at a gift shop that the CA constructed, operated, and maintained, or by charging fees to participate in visitor activities offered by the CA. While the CA's facilities or activities may have been physically located at the USACE recreational facility, the CA did not charge a fee or generate revenue "for the use of [USACE] developed recreation sites and facilities," as used in 16 U.S.C. § 460d-3, but rather for the use of the CA-developed site, facility, or activity. The fees and other revenues collected by the CA were thus distinct from any

---

[8] Where Congress has allowed any alternative use of the monies collected through the lease of a USACE recreational facility, it has done so through specific authorizing language. E.g. 33 U.S.C. § 701c-3 (directing that 75 percent of the monies received by USACE for leases of lands acquired for flood control, navigation, and allied purposes be repaid to the State in which such property is located).

facilities provided or services rendered by USACE, and were not subject to USACE's actual or constructive control. Accordingly, although the 1976 legal opinion did not address this issue, it appears that the Office of the Chief Counsel did not view the fees collected or revenue generated by the CA as falling subject to the fee deposit requirements of 16 U.S.C. § 460d-3, which requires that any fees collected by USACE (or its agent) from third parties for the use of a USACE recreation site or facility be deposited into the LWCF at the U.S. Treasury. See Ref. 1.a. § 460d-3(b)(1).

iv. The approach endorsed by the 1976 Office of the Chief Counsel opinion was first incorporated into the USACE regulations through ER 1130-2-441. See Ref. 1.g. (superseded by Ref. 1.i). This regulation referenced various laws, including 16 U.S.C. § 460d, and various USACE regulations, including those for Real Estate, management of natural resources at Civil Works projects, visitor center programs, and interpretive services. The regulation defined CAs and cooperative agreements, noted that it is USACE policy to encourage CAs at USACE projects, and allowed USACE facilities to be provided to CAs at no cost, provided such use is incidental to the normal operation of the facility and contributes to the public. Based on the nature of the use of USACE land or facilities, the use of any necessary real estate would be permitted pursuant to a separate real estate document from the cooperating agreement (*e.g.*, a lease or license).

v. Paragraph 6.a. of ER 1130-2-441 listed the types of activities that may be performed by CAs. These activities aid operations-related natural resources management, interpretive, and visitor activities by:

(1) Supporting special events, interpretive, educational or scientific activities, exhibits, and programs, including presentations and demonstrations which further public understanding and appreciation of the mission of the Corps, and/or a particular water resources development project;

(2) Supporting natural resource management and/or public programs at or near Corps projects through conservation and education activities and special events; and also by providing scientific, logistical, maintenance and other support;

(3) Acquiring display materials, historical objects, equipment, supplies, materials, goods, or other items, or services appropriate for management, operation, interpretive, educational and visitor service functions;

(4) Providing services to visitors through the sale, production, promotion, and/or distribution of appropriate interpretive and educational items, such as publications, maps, visual aids, audio tapes, pamphlets, handicrafts, and other objects directly related to the recreation, scientific, interpretive, and educational goals and missions of a project, a group of projects, and/or the Corps as a whole; and

(5) Acting as a principal distribution medium for those educational and scientific publications of the government and trade which relate to the Corps and/or project mission, mandate, or management efforts and provide the public with inexpensive and technically accurate materials.

In addition, paragraph 6.c. of ER 1130-2-441 stated that a wide range of programs may be pursued under cooperative agreements, including: special event planning and sponsorship; habitat improvement; staff and volunteer training; scientific research; membership activities; archeological activities; trail construction and maintenance; interpretive programming; and support and technical assistance. Although this list of acceptable CA activities was not meant to be exhaustive, this regulation clearly envisioned that only activities of a similar scale or that resulted in similar enhancements beyond the baseline of O&M services as listed in the ER would be performed by the CA. The 1976 legal opinion did not endorse, and the ER did not approve, the wholesale joint use and management of an entire USACE recreational facility at a USACE water resources project site under the Cooperating Associations Program.

vi. This distinction was again reinforced in 1994 in the update to the Real Estate Handbook, ER 405-1-12. Ref. 1.h. para. 8-160.a. This publication lists "volunteers and sales of books and souvenirs" as examples of acceptable CA functions and describes the separate type of real estate instrument that may be required if the CA uses government facilities:

> The association will be granted a license, easement or lease, as appropriate in accordance with this chapter for the proposed use of government owned property. For example, if the association provides volunteer tour guides without any fixed space, no outgrant is required. A short term "Festival" could be covered by a Special Event Permit. A lease would be required for exclusive use of a fixed area for a gift shop or book store in the visitor center, for a specified area such as a historic interpretative site where entrance or user fees will be charged, or a museum area housing association artifacts. A license would be appropriate where the association will hold seminars every third Monday night or for display cases if the contents belong to the association.

Id. para. 8-160.c. Again, this regulation discusses only activities and enhancement of a similar scale as those specifically listed in ER 1130-2-441—*e.g.*, the provision of tour guides, short term festivals, a fixed area for a gift shop, etc.—and not wholesale use or -management of the USACE-constructed and -maintained recreational facility. This regulation also makes clear that no user fees may be charged by the CA for the use of facilities developed in whole or in part with Federal funds if USACE is prohibited by law from charging a fee for those facilities. Id. Figure 8-C-7 para. 9 ("However, no user fees may be charged by the Lessee for use of facilities developed in whole or in part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law.").

vii. This focus on activities of a similar nature and scale as those listed in ER 1130-2-411 was then categorically reaffirmed through the issuance of ER 1130-2-500. While ER 1130-2-500 technically supersedes ER 1130-2-411, it lists the very same activities as ER 1130-2-411 that the CA may permissibly perform under the Cooperating Associations Program. See Ref. 1.i. Ch. 9. As with the previous regulations, ER 1130-2-500 does not approve the wholesale joint use and management of an entire USACE recreational facility at a USACE water resources project site under the Cooperating Associations Program. See id.

b. The SWF Arrangement.

i. The SWF Arrangement creates a joint management scheme for USACE recreational facilities. It involves two documents—a cooperative agreement ("SWF Cooperative Agreement") and a lease under the authority of 16 U.S.C. §460d ("SWF Lease").

ii. Under this arrangement, USACE budgets for, receives, and expends appropriated O&M funds to maintain the USACE recreational facilities. Ref. 1.c. para. 2.C. The costs financed by USACE with O&M funds include major and minor maintenance work and repairs, janitorial services, utility costs, and Park Rangers.

iii. Simultaneously, USACE grants a non-exclusive lease to the CA. This lease may be for only the recreation facilities on the USACE property or may extend to all of the property at the USACE water resources project. The SWF Lease generally follows the policies set forth above for the Model CA Lease, and includes a base term of five years with four possible extensions of five years each. However, the SWF Lease also includes three clauses not present in the Model CA Lease, including an "accounts, records, and receipts" clause, a "reinvestment of revenue" clause, and an "other partnership programs" clause. Ref. 1.d. paras. 34-36; see also Ref. 1.c. para. 3.C(4) (parallel SWF Cooperative Agreement provision to the SWF Lease "accounts, records, and receipts" clause), para. 3.B(9) (same regarding "reinvestment of revenue" clause), and Whereas Clause 6 (same regarding "other partnership programs" clause).

iv. Under the "accounts, records, and receipts" clause, the CA may use funds that it collects on the leased premises for the administration, maintenance, operation, and development of recreation facilities at the USACE lake where collected. Ref. 1.d. para. 34; Ref. 1.c. para. 3.C(4). Means by which the CA may earn these funds under this non-standard SWF Lease clause include, "but [are] not limited to, entrance, admission and user fees and rental or other consideration received from its concessionaires." It is unclear whether the CA distinguishes the funds that it collects based on the source from which they were collected—for instance, whether the CA distinguishes between (a) the fees or revenues collected from third parties for their entrance, admission, participation, or use of a USACE facility for which USACE continues to receive and expend O&M dollars, and (b) the fees or revenues collected from third parties for their use of facilities or participation in activities akin to those specifically identified in the cooperating association regulations[9]—or whether the CA treats all of these fees and revenues as one gross receipt. Every five years, any funds not reinvested for the administration,

[9] For a discussion this distinction, see supra fn. 6.

maintenance, operation, and development of recreation facilities are paid to the District Commander.[10] Again, it is unclear whether the fees transferred to the District Commander includes entrance or admission fees that USACE would be prohibited from collecting itself.[11]

v. Under the non-standard "reinvestment of revenue" clause of the SWF Lease, USACE permits the CA to divert up to 50 percent of the fees that it collects and revenues that it generates for its own "administrative purposes on or off the [USACE] premises where collected." Ref. 1.d. para. 35; Ref. 1.c. para. 3.B(9). The CA must use the remainder for maintenance, enhancement, development of facilities, interpretive services, or other management of the USACE lake where collected, as authorized or directed by USACE. This provision lists examples of acceptable uses for the remainder, including "maintenance, repair and replacement of existing facilities" and "planning, development, and construction of new facilities."

vi. Under the non-standard "other partnership programs" clause, of the SWF Lease, the CA may contribute funds, including cash, materials, personal property, equipment, or services, under the Contributions Program or the Challenge Cost-Share Program (now referred to as the Challenge Partnership Program). Ref. 1.d. para. 36. However, the lease provides that all contributed property, facilities, and improvements placed on Government lands under either of these programs becomes the property of the Government. Title to improvements made by the lessee that are not associated with either of these two programs remains vested in the CA under the terms of the lease. Under the terms of the lease, the CA must maintain improvements to the satisfaction of USACE and shall be removed at the expiration or termination of the lease.

---

[10] The SWF Lease borrowed this provision (with two major distinctions) from the standard leases to states and non-state governmental agencies ("state and local") for public park and recreation purposes. (The provision is also a provision of the SWF Cooperative Agreement, Ref. 1.b., para. 6(c)(4). with a few minor deletions). Under these two standard leases, state and local agencies may utilize monies received from the operations conducted on the premises for the administration, maintenance, operation, and development of the leased premises (not the entire lake as in the SWF Arrangement). Any such money not utilized within a 5-year period must be returned to the District Engineer for deposit into the Treasury as miscellaneous receipts, as directed under 16 U.S.C. § 460d. State and local agencies must establish and maintain accurate records and are subject to audit by the District Engineer. The two standard leases do not have a condition allowing the deduction of membership fees from the monies to be returned to the premises.

State and local agencies are authorized to charge entrance and use fees; however, no user fees may be charged for the use of facilities developed in whole or in part with Federal funds if USACE is prohibited by law from charging fees for those facilities. State and local agencies are authorized to put monies received on the leased premises back into the leased premises. Under the auspices and funding of state and local agencies, recreation opportunities and facilities are provided to the public at no cost to the Federal government. The consideration under these leases is the operation and maintenance of the leased premises; no USACE O&M money is spent on these state and local agency leases (other than for compliance inspections).

[11] 16 U.S.C. § 460d-3 prohibits USACE from charging entrance or admission fees for USACE recreational facilities, and paragraph 3.B(8) of the SWF Cooperative agreements prohibits the CA from charging a fee or user charge "if a user charge by the Corps would be prohibited under law." This would appear to prohibit the CA from charging entrance or admission fees, or from transferring any such fees to the District Commander. At the same time, paragraph 3.C(4) of the SWF Cooperative Agreement specifically permits the CA to charge "entrance, admission, [and] user fees." Nothing in the SWF Cooperative Agreement or SWF Lease indicates that any such fees would be excluded from the fees transferred to the District Commander after five years.

c. Authority and Fiscal Law Concerns Regarding the SWF Arrangement's Deviations from the Existing Legal Framework.

i. The non-standard clauses in the SWF Lease and the parallel provisions in the SWF Cooperative Agreement allow a District to indirectly expend funds through the CA in a way that is not specifically authorized by statute and in a way the District could not retain and directly spend them itself. For the reasons that follow, we believe this goes beyond the legal authorities that purportedly authorize this approach.

ii. Under 16 U.S.C. § 460d-3, USACE is prohibited from collecting entrance or admission fees at public recreation areas located at USACE lakes and reservoirs. Ref. 1.a. § 460d-3(a). Also, while USACE may collect fees for the use of developed recreation sites and facilities, such as campsites, beaches, and boat ramps, USACE may not retain or expend these fees. See id. § 460d-3(b)(1), (b)(4). Instead, all fees collected for the use of a developed USACE recreation site must be deposited into the LWCF at the U.S. Treasury. Id. § 460d-3(b)(4). Nothing in 16 U.S.C. § 460d-3 or elsewhere authorizes any other use of these fees.

iii. The SWF Arrangement presumes that these statutory restrictions and requirements apply only to fees directly collected by USACE, its agent, or an entity otherwise acting on USACE's behalf, and not to fees or revenues collected by the CA under the SWF Lease. Because the CA is an independent entity and is purportedly not serving as USACE's agent or on USACE's behalf, so the theory goes, the CA may charge any entrance or general admission fee to third parties entering USACE properties leased under the SWF Arrangement, and these entrance fees, admission fees, user fees, and any other revenue collected by the CA are not subject to the LWCF deposit requirements of 16 U.S.C. § 460d-3. [12] Instead, the only restriction on the CA's use of these fees and revenue under the SWF Arrangement is that they must comport with EP 1130-2-500, which specifically permits CAs to charge for activities and services and retain the revenues. See Ref. 1.i. para. 9-3.1. Proceeding with this theory, 33 U.S.C. § 2328—which permits the Secretary of the Army to accept contributions of funds, materials, and services from non-Federal public and private entities for the operation and maintenance of USACE recreation facilities—then allows the CA to reinvest what would then ostensibly be the CA's own funds (*i.e.*, the collected entrance, admission, user, and other such fees) for the continued operation, maintenance, repair, or replacement of the USACE recreation facilities.[13] See Ref. 1.j. (reproduced in full at Appendix 3).

iv. Under the proper circumstances, this theory would be correct. If the admission fees and recreation user fees were truly the exclusive property of the CA, collected by the CA under valid legal authority, then they would not be subject to the LWCF deposit requirements of 16 U.S.C. § 460d-3. The CA could also permissibly reinvest these fees for the

---

[12] See CESWF-OC, White Paper: Authorities for Cooperating Agreements Entered Into Between the US Army Corps of Engineers Forth Worth District and Cooperating Associations, at *3, dated 23 February 2010.

[13] See CECC-SWD, Subject: SWF White Paper on Cooperative Provisions of Lease and Cooperative Agreement – Lake Lewisville, at *3-4.

continued operation and maintenance of the USACE recreational facility under 33 U.S.C. § 2328.[14] See id.

v. However, with specific regard to the SWF Arrangement, this theory presupposes that the fees are the property of the CA and that the CA may thus use and expend the fees as it chooses. In our view, they are not. Per the terms of the SWF Cooperative Agreement and the SWF Lease, USACE directs how the CA shall dispose of the fees, mandates that the CA use at least half of the fees to pay expenses that USACE would otherwise pay with appropriated funds or return the fees to USACE, and requires that the CA obtain USACE approval both in calculating revenues and in making the required expenditures. For example:

- "Monies received by the Foundation from operations conducted on the premises shall be utilized by the Foundation (with Corps approval) to fulfill its obligations under this Cooperative Agreement." Ref. 1.c. para. 3.B(9).

- "The Foundation may use a maximum of 50% of net revenue collected (net revenue include[s] collections after deducting NRRS overhead / revenue adjustments, Gate Attendant contract costs (commensurable to Corps contract costs and as approved by the Corps) . . . and other required costs as determined by the Corps) on Corps property for Foundation administrative purposes on or off the Lake premises where collected." Ref. 1.c. para. 3.B(9)a.

- "Any funds remaining from revenue collection on Corps property after paying for Foundation administrative purposes up to the 50% limit provided above shall be utilized for maintenance, enhancement, interpretative programs, and/or other management of the Lake where collected, as authorized by the Corps." Ref. 1.c. para. 3.B(9)b.

- "All remaining funds must be utilized for maintenance, enhancement, interpretative services, and/or other management of the Lake area where collected." Ref. 1.d. para. 35.

It is clear from these excerpts that USACE retains constructive control over the use and disposition of the entrance, admission, user, and other such fees, even when in the CA's possession; USACE requires that at least half of these funds be reinvested into the recreational facility, exercises direction and approval authority over how these funds shall be reinvested, and then uses the funds for expenses that are already partially financed or would otherwise be financed with the District's appropriated funds.[15]

---

[14] While the CA may use these fees to perform operations and maintenance work under the authority of 33 U.S.C. § 2328, this provision does not authorize construction. The CA may only use the fees to perform construction work at the USACE recreational facility under the authority of 16 U.S.C. § 460d. However, if the CA performs construction under this authority, all monies received by the United States or falling subject to USACE's constructive control and disposition through the use of such facility must be deposited into miscellaneous receipts per 16 U.S.C. § 460d.

[15] To the extent that these provisions roughly mirror the terms of previous, acceptable cooperative agreements and/or leases, the key difference is the control that USACE exerts over the use and disposition of the funds under the

vi. The Comptroller General has found that when a Federal agency "effectively control[s] the use and disposition" of funds that were collected and held by a third party and then directs that the funds be used to pay agency costs that would otherwise be paid from the agency's appropriations, those funds "would clearly be money for the Government . . . in spite of the fact that [the agency] would not receive the money directly." See Maritime Administration – Disposition of Funds Recovered from Private Party Damage to Government Building, B-287738 (May 16, 2002) (internal quotations omitted). Accordingly, the admission fees, entrance fees, recreation user fees, and other such fees[16] collected by the CA under the SWF Arrangement must be treated as USACE funds, and in our view are thus subject to all of the restrictions and requirements of 16 U.S.C. § 460d-3—including the prohibition against the collection of admission or entrance fees and the requirement that any fees collected under the authority of 16 U.S.C. § 460d-3 be deposited into the LWCF.

vii. USACE may not indirectly collect or expend fees through the CA in a way that USACE could not do so itself. Given that these fees will ultimately fall subject to USACE's constructive control and disposition under the SWF Arrangement, the CA therefore may not collect admission or entrance fees for the use of USACE recreational facilities without running afoul of the clear statutory prohibition against the collection of such fees in 16 U.S.C. § 460d-3. See Ref. 1.a. (prohibiting the collection of fees for entrance or admission to a USACE recreational facility), Ref. 1.d. para. 34 (permitting the collection of entrance or admission fees for USACE recreational facilities). Nor may the CA reinvest these fees for the continued administration, maintenance, construction, operation, or development of the USACE recreational facility. In our view, the continued reinvestment of what should probably be treated as USACE funds into the USACE recreational facility violates 16 U.S.C. § 460d-3, deprives the LWCF of deposits mandated by Congress, and constitutes an impermissible augmentation of USACE appropriations.

viii. A recent Comptroller General decision is instructive. In that case, a private party damaged property belonging to the U.S. Maritime Administration (MARAD). See B-287738, supra. Under the miscellaneous receipts statute, 31 U.S.C. 3302(b), MARAD would be required to deposit any damages that it received from the private party into the miscellaneous receipts account at the U.S. Treasury. MARAD questioned whether it could bypass this requirement by having the private party pay the damages into an escrow account from which MARAD's repair contractor could finance its costs, reasoning that the miscellaneous receipts statute would not apply because MARAD would never have actual possession of the funds.

ix. The Comptroller General rejected this approach. The Comptroller General first found that because MARAD directed and authorized the use and disposition of these funds, they must be viewed as MARAD funds regardless of whether they were in MARAD's physical

---

SWF Arrangement. As emphasized above, the SWF Arrangement contains numerous provisions under which the CA may spend the funds that it collects only as authorized and/or directed by USACE. USACE exerts no similar control over the funds collected by the CA under previous, acceptable cooperative agreements and/or leases.

[16] But see supra fn. 6 (discussing the smaller subset of fees that the CA may permissibly collect and which are not subject to the LWCF deposit requirement).

possession. The Comptroller General then observed that Congress appropriates funds to MARAD for operations and maintenance work, including the type of repair work to be undertaken on MARAD's damaged property. In those situations where Congress has permitted an agency to accept additional third party funds for this repair work, it has done so through clear statutory language. Absent such authority, to credit those funds "to the agency operating account would constitute an unlawful augmentation of the agency's appropriation." The Comptroller General thus concluded that because the funds were MARAD funds and, as proposed by MARAD, would be used to finance costs that MARAD would otherwise pay from its operating budget, this proposed use would both violate the miscellaneous receipts statute and constitute an unlawful augmentation of MARAD's operating budget.

x. The same rationale applies here. As described above, because USACE exercises such control over the use and disposition of these fees, they must be viewed as USACE funds regardless of whether they are in USACE's possession. Just as Congress appropriated operating funds to MARAD to conduct its repair work, it appropriates funds to USACE to conduct operations and maintenance work and perform construction at USACE recreational facilities. Similarly, while Congress has provided statutory authority allowing USACE or its agent to collect recreation user fees from third parties at USACE recreational facilities, Congress has directed that these funds be deposited into the LWCF—just as Congress directed that MARAD's damages be deposited into miscellaneous receipts. Congress has not elsewhere authorized USACE to directly or indirectly retain or expend these fees. Accordingly, just as in the MARAD case, the use of these fee-generated USACE funds for operations, maintenance, or construction work at USACE recreational facilities would violate 16 U.S.C. § 460d-3 and constitute an unlawful augmentation of the relevant USACE District's budget.

xi. It has been suggested that 16 U.S.C. § 460d and 33 U.S.C. § 2328 allow the CA to reinvest the fees into the USACE recreational area, and that such reinvestment therefore does not constitute an unlawful augmentation of the District's budget.[17] As applied to the SWF Arrangement, this is incorrect. Admittedly, 16 U.S.C. § 460d specifically authorizes the CA to maintain and operate USACE-constructed, -maintained, and -operated recreational facilities. Moreover, 33 U.S.C. § 2328 specifically authorizes USACE to accept funds, materials, and services from non-Federal entities ("NFE") for the shared operation and maintenance of a USACE park. However, these authorities only apply to the extent that the funds provided by the CA for the operation and maintenance costs actually belong to the CA. As discussed above, the fees collected under the SWF Arrangement should not be viewed as CA funds; they should be viewed as USACE funds. Neither statute authorizes USACE to direct the expenditure (through the CA's directed reinvestment) of funds that (i) already belong to the Government by virtue of USACE's constructive control over them, (ii) were essentially held in escrow by the NFE, and (iii) should therefore have been deposited into the LWCF. In other words, 16 U.S.C. § 460d and 33 U.S.C. § 2328 authorize USACE to accept contributions of NFE

---

[17] See SWD Legal Opinion, supra fn. 13 ("Given these cases, it would be somewhat difficult to conclude that the funds collected by the cooperative association are not monies collected by the government even though there is no case precisely on point. However, these cases do not apply if there is special authority for the agency to accept and use the funds.").

funds for operation and maintenance costs; they do not authorize an NFE to collect, hold, and spend USACE's own funds in a way that USACE could not collect, hold, and spend them itself, as is the case under the SWF Arrangement.

xii. It has also been observed that the CA has "considerable discretion" over the portion of the admission fees and recreation user fees that the CA retains for its own "administrative purposes." It has thus been suggested that USACE does not have constructive control over this portion of the fees, and that at least this portion of the fees should not be viewed as USACE funds subject to the above discussion.[18] However, the CA only has discretion over this portion of the fees because USACE affords it such discretion under the SWF Lease. See Ref. 1.d. para. 35. Indeed, the provision of the SWF Lease that allows the CA to retain up to 50 percent of the fees only has meaning if these fees actually belonged to USACE, and not to the CA, when first collected by the CA; otherwise, if the fees did originally belong to the CA, then the CA would be free to simply retain and expend the fees as it sees fit without the need to spell this out in the SWF Lease. The fact that USACE allows the CA to retain and expend a portion of these funds for the CA's own administrative purposes therefore does not render the funds any less subject to USACE's constructive control and direction.

xiii. Further, even if we were to view the fees as belonging to the CA at the time of collection, rather than viewing them as USACE funds by virtue of USACE's constructive control, this arrangement would still need to be supported by some statutory authority. We have identified no authority under which USACE may allow the CA to (i) operate a USACE recreational facility for which USACE continues to receive and expend appropriated funds, (ii) collect fees from third party users of that recreational facility, and (iii) then treat any portion of those fees as its own.

xiv. To the extent that previous cooperative agreements may have allowed CAs to generate revenue from the use of a USACE constructed and maintained facility, such previous uses are vastly different from that proposed under the SWF Arrangement. First, as discussed above, the Cooperating Association Program has consistently focused on activities of a similar scale and scope as the defined enhancements in the ERs, not wholesale operation of a USACE recreational facility. To our knowledge, there is no precedent or authority allowing a CA to operate an entire USACE recreational facility, collect fees from third parties for the use of that USACE recreational facility, treat any portion of those collected fees as its own, or expend any portion of the fees as directed by USACE.

xv. Second, the nature and use of the property involved distinguishes these previous cooperative agreements from the SWF Arrangement. USACE has historically allowed CAs to retain and expend fees and other revenue that the CAs collected in return for providing visitor services at the USACE park or by operating facilities that the CA constructed, operates, and maintains at the USACE park. Indeed, this was envisioned at the start of the Cooperating Association Program through the allowance of such activities as CA bookstores and gift shops. See Ref. 1.f. However, while these activities or facilities may have been physically located at or

---

18 CESWF-OC White Paper, supra fn. 11, at *3.

in a USACE recreational facility, the CA did not charge a fee or generate revenue "for the use of [USACE] developed recreation sites and facilities," as used in 16 U.S.C. § 460d-3, but rather for the use of the CA-developed site, facility, or activity.[19] The revenues generated by the CAs through these activities were thus the result of the CA's own provision of funds and services, and not of the taxpayers' investment in the USACE recreational facility.

xvi. The same is not true of the SWF Arrangement. It is our understanding that under the SWF Arrangement, the CA generates the bulk of its revenue by charging a fee "for the use of [USACE] developed recreation sites and facilities." For instance, the SWF Arrangement requires USACE to use appropriated funds to maintain a USACE-constructed boat ramp or campground, but then allows the CA to operate the boat ramp or campground, charge fees from the users (either in the form of a user fee, a "gate fee" for access to the ramp or campground, or by other means), and retain a portion of these fees as its own. By the plain language of 16 U.S.C. § 460d-3, these funds must be deposited into the LWCF.

xvii. Moreover, while previous cooperating agreements allowed the CA to realize earnings only from its own investment, the SWF Arrangement allows the CA to also realize the earnings from the taxpayers' continued investment of funds into the USACE recreational facility. We have identified no legal authority for this arrangement. The only legal authority that speaks to the collection of fees for the use of a USACE recreational area is 16 U.S.C. § 460d-3. This provision vests authority to collect recreation user fees at USACE recreational areas in the Secretary of the Army, acting through the Chief of Engineers, and sets strict requirements on how these fees will then be processed. See Ref. 1.a. Nowhere does this provision authorize a CA to collect, retain, or reinvest fees at a USACE- constructed and -funded site or authorize the Secretary of the Army or Chief of Engineers to delegate such authority outside of the Federal government to the non-Federal CA. See id. Given (i) the presence of a specific statute discussing who may collect fees for the use of a USACE recreational area and the manner in which these fees must then be processed and (ii) the absence of a specific statute authorizing the SWF Arrangement, we must presume that 16 U.S.C. § 460d-3 occupies the field with regard to the fees generated from a USACE recreational facility that was constructed by USACE and is maintained by USACE with appropriated funds.[20]

xviii. For these reasons, it is our view that the CA may not charge admission or entrance fees for entrance into the USACE recreational facility. It is our further view that the CA also may not reinvest these USACE funds for the continued administration, maintenance, operation, construction, or development of the USACE recreational facility. Absent corrective legislation or certain modifications to the agreements, the continued reinvestment of the admission fees and recreation user fees into the USACE recreational facility violates 16 U.S.C. § 460d-3, deprives the LWCF of Congressionally mandated deposits, and constitutes an impermissible augmentation of the USACE budget.

---

[19] See supra fn. 6.

[20] As compared to a recreational facility that has been fully leased or out-granted to a non-Federal entity, as discussed in supra fn. 11, and for which USACE neither receives nor exercises constructive control over the funds generated as a result of this lease.

4. Necessary Actions to Correct the Authority and Fiscal Flaws with the SWF Arrangement.

a. USACE may only pursue leases and cooperative agreements within the existing legal authorities or by seeking legislation that would specifically permit the SWF Arrangement.

b. It is our understanding that several USACE Districts have already executed cooperative agreements and leases generally employing the SWF Arrangement. However, we have not received information as to how these cooperative agreements and leases are specifically structured, the types of fees collected by the CAs, how the Districts and CAs process the fees, and other information critical to determining the legal acceptability of these arrangements. We therefore recommend that each District that has entered into cooperative agreements and leases following approach of the SWF Arrangement carefully review the District's agreements and leases to ensure that they are consistent with the principles set forth in this opinion.

c. To the extent that any District has entered into a cooperative agreement or lease that is inconsistent with this opinion, we believe that these agreements and leases must revised or terminated. Should the CA wish to continue its relationship with USACE following termination of an existing cooperative agreement or lease, we recommend that the relevant District execute a new cooperative agreement and lease or license for activities of a similar scale and scope as those listed in—and consistent with the authority and fiscal restrictions described in—paragraph 3.a., supra. Under any such successor lease or license and agreement, the CA may collect, retain, and expend fees and other revenue only as permitted by 16 U.S.C. § 460d, 33 U.S.C. § 2328, and USACE's implementing regulations. See supra fn.6. Any fees collected by USACE or over which USACE exercises authority or control must be deposited into the LWCF. We stand ready to assist your office and these Districts in revising these agreements and leases to bring them into accordance with the advice provided herein.

d. It is our further understanding that at least one Congressional representative has submitted a request to USACE for a legislative drafting service that, if enacted, would provide firm statutory basis for the SWF Arrangement. We will provide a legislative proposal next week that will respond to this request and which, if enacted, would provide a statutory authority for the SWF Arrangement. As described above, however, we lack information on how other Districts might have implemented the SWF Arrangement or other arrangements. Accordingly, this legislative proposal may not resolve the legal issues for the arrangements entered into by other Districts. We have therefore requested information from the Operations and Regulatory Community of Practice regarding the partnership arrangements employed elsewhere in USACE so we may craft a follow-on legislative proposal if necessary.

5. Conclusion.

a. Because USACE effectively controls the use and disposition of the entrance, admission, user, and other such fees collected by the CA, we believe that these fees must be treated as USACE funds. We have identified no authority under which USACE may permit the CA to charge, retain, and expend for its own administrative purposes these fees collected at a USACE recreational facility. Further, we have identified no legal authority under which

SUBJECT: Leases and Cooperative Agreements with Cooperating Associations

USACE may reinvest—either directly or indirectly through the CA—recreation user fees into the USACE recreational facility. All such fees must instead be deposited into the LWCF. A District's failure to deposit these fees into the LWCF and/or use of these fees for operation, maintenance, construction, or other types of reinvestment into the USACE recreational facility violates 16 U.S.C. § 460d-3, deprives the LWCF of Congressionally mandated deposits, and constitutes an improper augmentation of the appropriations provided to the District for those same purposes. Each USACE District should therefore review its cooperative agreements and leases to ensure they are consistent with the principles set forth in this agreement. To the extent that a District has entered into a cooperative agreement or lease that is inconsistent with this opinion, we believe that these agreements and leases must revised or terminated.

b. If you have any questions or concerns, you may contact me at (202) 761-0018, CPT Steve Rice at (202) 761-8561.

EARL H. STOCKDALE
Chief Counsel

Appendix 1

16 U.S.C. § 460d-3.

(a) Prohibition on admissions fees. No entrance or admission fees shall be collected after March 31, 1970, by any officer or employee of the United States at public recreation areas located at lakes and reservoirs under the jurisdiction of the Corps of Engineers, United States Army.

(b) Fees for use of developed recreation sites and facilities.

(1) Establishment and collection.

Notwithstanding section 460l-6a(b) of this title, the Secretary of the Army is authorized, subject to paragraphs (2) and (3), to establish and collect fees for the use of developed recreation sites and facilities, including campsites, swimming beaches, and boat launching ramps but excluding a site or facility which includes only a boat launch ramp and a courtesy dock.

(2) Exemption of certain facilities.

The Secretary shall not establish or collect fees under this subsection for the use or provision of drinking water, wayside exhibits, roads, scenic drives, overlook sites, picnic tables, toilet facilities, surface water areas, undeveloped or lightly developed shoreland, or general visitor information.

(3) Per vehicle limit.

The fee under this subsection for use of a site or facility (other than an overnight camping site or facility or any other site or facility at which a fee is charged for use of the site or facility as of August 10, 1993) for persons entering the site or facility by private, noncommercial vehicle transporting not more than 8 persons (including the driver) shall not exceed $3 per day per vehicle. Such maximum amount may be adjusted annually by the Secretary for changes in the Consumer Price Index of All Urban Consumers published by the Bureau of Labor Statistics of the Department of Labor.

(4) Deposit into Treasury account.

All fees collected under this subsection shall be deposited into the Treasury account for the Corps of Engineers established by section 460l-6a(i) of this title and, subject to the availability of appropriations, shall be used for the purposes specified in section 460l-6a(i)(3) (!1) of this title at the water resources development project at which the fees were collected.

Appendix 2

16 U.S.C. § 460d.

The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests.

The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, at water resource development projects for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: Provided, That leases to nonprofit organizations for recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: Provided further, That preference shall be given to Federal, State, or local governmental agencies, and licenses or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a project area for any public purpose, when the Secretary of the Army determines such action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable: And provided further, That in any such lease or license to a Federal, State, or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests, and other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance, and utilization of such lands.

Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may determine appropriate.

The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary, including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers.

Any violation of such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any persons charged with the violation of such rules and regulations may be tried and sentenced in accordance with the provisions of section 3401 of title 18. All persons designated by the Chief of Engineers for that purpose shall

have the authority to issue a citation for violation of the regulations adopted by the Secretary of the Army, requiring the appearance of any person charged with violation to appear before the United States magistrate judge, within whose jurisdiction the water resource development project is located, for trial; and upon sworn information of any competent person any United States magistrate judge in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said regulations.

No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

All moneys received by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

Appendix 3

33 U.S.C. § 2328.

(a) In general.

The Secretary is authorized to develop and implement a program to share the cost of managing recreation facilities and natural resources at water resource development projects under the Secretary's jurisdiction.

(b) Cooperative agreements.

To implement the program under this section, the Secretary is authorized to enter into cooperative agreements with non-Federal public and private entities to provide for operation and management of recreation facilities and natural resources at civil works projects under the Secretary's jurisdiction where such facilities and resources are being maintained at complete Federal expense.

(c) Contributions.

For purposes of carrying out this section the Secretary may accept contributions of funds, materials, and services from non-Federal public and private entities. Any funds received by the Secretary under this section shall be deposited into the account in the Treasury of the United States entitled "Contributions and Advances, Rivers and Harbors, Corps of Engineers (8862)" and shall be available until expended to carry out the purposes of this section.