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Statement 2024-01-L&P

ICWP Principle Statement on U.S. Army Corps of Engineers' Project Partnership Agreements

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Statement of the Issue:

The Corps' cost-share agreements for water resource projects have become legally and financially burdensome for the non-federal sponsors. Specifically, the Corps now requires the non-federal sponsors to fully indemnify the Corps and to assume undefined and unbounded operations and maintenance obligations. These agreements reflect a departure from past Corps policies that historically balanced the responsibilities between the federal government and nonfederal sponsors. They conflict with many states' constitutions and statute as well as nonprofit organizations' policies, often adding complications to project implementation or eliminating important water resource project opportunities.

Why Important to ICWP membership:

The Corps approach to cost share is now impeding those important projects from advancing because of burdensome legal and financial requirements. ICWP member organizations often serve as cost-share sponsors and are required to accept unrealistic legal obligations to do so.

Challenges related to PPAs not only affect the states, but local governments and nonprofit organizations as well. This is problematic for all types of cost-shared water resource projects throughout the country and differs from early PPA requirements.

The Corps' indemnification policy requires the states and nonprofits to assume complete and full liability for any damages that are the fault of the Corps or its contractors. More than 20 states have a provision in their constitutions prohibiting an incurrence of an obligation without an encumbrance against an appropriation. Full indemnification conflicts with the law because it is a promise of an indeterminate amount of money for an indeterminate reason at an undetermined time in the future. States also often have tort law that specify their requirements and associated compensation and limit the extent to which states are responsible for others' actions, including their state personnel.

Given that the Corps has ultimate decision-making authority (and varies in its consultation

with non-federal sponsors in making decisions) throughout project planning, design, and construction, this approach is not reasonable and unfairly disadvantages the non-federal sponsor. A shared approach to liability where each party is responsible for their fault is a reasonable request.

ICWP Recommended Action/Position:

- ICWP requests that Congress resolve legal challenges to USACE's ecosystem restoration project partnership agreements (PPAs) by allowing for more shared approach to liability.
- ICWP requests that the Corps provide the necessary specificity to estimate OMRR&R costs in project agreements and a reasonable approach to terminating the non-federal sponsor's OMRR&R obligations, as was provided in the past. The Corps' existing PPA template requires OMRR&R in perpetuity.
- As Congress and the federal government continue to prioritize non-federal cost shared projects, we believe that these challenges to PPA execution must be resolved in order for existing and newly authorized projects to be successfully and efficiently implemented.