



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

SACW

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

SUBJECT: Approved Jurisdictional Determinations (AJDs) for the Rosemont and Twin Pines Parcels

1. References:

- a. Memorandum for the Heads of Executive Departments and Agencies dated January 26, 2021 from President Joseph R. Biden, subject: Tribal Consultation and Strengthening Nation-to-Nation Relationships.
- b. Memorandum for Commanding General, U.S. Army Corps of Engineers dated April 20, 2021, from the Acting Assistant Secretary of the Army (Civil Works), subject: Rescission of Previous Guidance – Tribal Consultation Associated with a Draft Approved Jurisdictional Determination (AJD).
- c. Letter to Mr. Stuart Gillespie of Earthjustice dated January 8, 2021, from the Los Angeles District Commander of the U.S. Army Corps of Engineers, subject: Tribal Consultation Concerning HudBay Mineral's Approved Jurisdictional Determination Requests (AJDs) Relating to the Rosemont Copper Mine.
- d. Letter to Col. Daniel Hibner, Savannah District Commander of the U.S. Army Corps of Engineers dated April 10, 2020, from Mr. Turner Hunt, Muscogee Creek Nation (MCN) Historic and Cultural Preservation Department.

2. Background. The U.S. Army Corps of Engineers (Corps) makes formal determinations stating the presence or absence of "waters of the United States" on a parcel through the issuance of an AJD. See 33 CFR 331.2. The Corps applies the criteria set forth in the rule defining "waters of the United States" when determining whether a parcel contains jurisdictional waters. See 33 CFR 328.3. The Navigable Waters Protection Rule (NWPR) was issued on April 21, 2020, to define "waters of the United States." (85 FR 22250). On August 30, 2021, the NWPR was vacated nationwide (*Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*).

In his January 26, 2021 memorandum, President Biden reaffirmed the Federal government's enduring commitment to consultation as a means of strengthening the sovereign relationship between the United States and our Tribal Nations (reference 1.a.). The memorandum directs all Federal agencies to engage in regular, meaningful,

SACW

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and robust consultation with Tribal Nations on Federal actions that have Tribal implications. The Army's Civil Works program has a long history of consultation with Tribal Nations on its projects, rules, and regulatory permit actions, and the Army Civil Works program is committed to maintaining and enhancing its record on consultation.

The Acting Assistant Secretary of the Army for Civil Works issued a memorandum on April 20, 2021 (reference 1.b.). The April 20 memorandum rescinded a previous memorandum that precluded tribal consultation associated with a draft AJD.

3. Rosemont Parcels AJD. On January 8, 2021, the Los Angeles District (LA District) of the Corps sent a letter to Mr. Stuart Gillespie of Earthjustice which rescinded the offer of government-to-government consultation with the Tohono O'odham Nation, the Pascua Yaqui Tribe, and the Hopi Tribe on the AJD requests received for the Rosemont parcels pursuant to the memorandum rescinded by reference 1.b. (reference 1.d.). On March 14, 2021, the LA District issued an AJD for the Rosemont parcels which determined that all ephemeral waters present on the site were excluded per regulation codified by the NWPR.

4. Twin Pines Parcel AJDs. In a letter dated April 10, 2020, MCN stated that they had not been officially consulted on the Twin Pines parcel AJD as required (reference 1.e.). Additionally, the MCN later asked the Savannah District of the Corps (Savannah District) in a March 2021 email about the process to consult on JDs. The Savannah District provided a copy of the memo dated January 4, 2021, which had precluded tribal consultation associated with a draft AJD and was later rescinded on April 20, 2021 (reference 1.b.). The Savannah District provided two AJDs on October 15, 2020, and March 24, 2021. These two AJDs concluded that 556 acres of wetlands were excluded under the NWPR.

5. This memorandum directs the Corps to immediately notify the AJD recipients for the Rosemont and Twin Pines parcels that they cannot rely on those AJDs to accurately delineate jurisdictional waters under the current regulatory regime and that their NWPR AJDs are not valid because the government-to-government consultations for the Federal actions regarding the determinations of jurisdictional status of waters on the parcels were not conducted as requested by the Tribes. As noted earlier, the Corps previously determined that the government-to-government consultation request for the Rosemont AJD was to be honored and the MCN previously inquired about government-to-government consultation for the Twin Pines AJDs. Given the specific circumstances associated with these AJDs, it is my policy decision that the Corps should have honored these government-to-government consultation requests.

SACW

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The Corps is also directed to notify the Rosemont and Twin Pines project proponents of their option to request a new AJD. Any newly issued AJD must follow the applicable regulatory regime for the definition of “waters of the United States” at the time of AJD issuance. With the vacatur of the NWPR, AJD requests are currently being completed consistent with the pre-2015 regulatory regime. If a new AJD request is received, the Corps shall extend government-to-government consultation requests to the Tohono O’odham Nation, the Pascua Yaqui Tribe, and the Hopi Tribe for the Rosemont parcels and the MCN for the Twin Pines parcel, as well as any other Tribal Nations who may be implicated by the respective AJDs. If consultation is initiated, no new AJD will be issued until the conclusion of such consultation.

6. Upon conclusion of any tribal consultations that may occur, and prior to the District making any decisions on the path forward for any AJD requested, the Corps shall provide an update to the ASA(CW) in the form of a briefing on the consultation process conducted with the Tribes.

7. These circumstances are unique to the Rosemont and Twin Pines parcels AJDs. Accordingly, the direction in this memorandum is limited to these AJDs and is not intended to establish or rescind any separate, nationwide policy guidance.

8. Questions regarding this matter may be directed to Stacey Jensen, Assistant for Regulatory and Tribal Affairs, Office of the Assistant Secretary of the Army (Civil Works), at (703) 459-6026 or [stacey.m.jensen.civ@army.mil](mailto:stacey.m.jensen.civ@army.mil).

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(Civil Works)

cf: DCG-CEO  
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