ATTORNEYS
Heather R. Kendall-Miller
Natalie A. Landreth
Erin C. Dougherty

Native American Rights Fund

801 B Street, Suite 401, Anchorage, AK 99501 (907) 276-0680 FAX (907) 276-2466

EXECUTIVE DIRECTOR
John E. Echohawk

MAIN OFFICE
1506 Broadway
Boulder, CO 80302-6926
(303) 447-8760
FAX (303) 443-7776

WASHINGTON OFFICE
1712 N Street N.W.
Washington, D.C. 20036-2976
(202) 785-4166
FAX (202) 822-0068

WEBSITE ADDRESS
www.narf.org

October 17, 2012

Marcia Heer
Alaska District, U.S. Army Corps of Engineers, Project Manager
Terri Stinnett-Herczeg, Acting Chief, Regulatory Division
Robert Stolzman, Assistant District Counsel
Department of the Army
U.S. Army Engineer District, Alaska
P.O. Box 6898 (CEPOA-RD),
JBER, AK 99516-0898

Re: Native Village of Tyonek and the Ch'u'itna Coal Project
Regulatory Division POA-2006-753

Dear Ms. Stinnett-Herczeg:

I am in receipt of your letter of October 12, 2012 to President Standifer III stating your view that the Native Village of Tyonek (NVT) and its representatives went beyond the terms of the Memorandum Of Agreement (MOU) by retaining an expert to offer comments on the Draft Functional Wetland Assessment Chapter.

Before I address the specific points raised in your October 15 letter, I note that there were a number of inaccuracies in the statements made that reflect a curious misunderstanding regarding government-to-government consultation and the specific terms of the MOU.

You state that the NVT had the "opportunity to participate" on the functional assessment subgroup but "declined" from active participation. I am not aware of any invitation to participate or the Tribe's declination. Nevertheless, this point is irrelevant. By the terms of the MOU (section III. 4.), "*The Corps shall fully engage the Cooperating Agencies . . . whenever a decision is to be made regarding substantive work or material to be included in the preparation of the SEIS.*"

Moreover, pursuant to section III. 5., the Cooperating Agencies, as approved by the Corps, has the right to *"have access to and the opportunity to review all materials, procedures, and underlying data used by the Contractor in developing any and all reports, including, but not limited to filed reports, subcontractor reports, and interviews with concerned private and public parties, whether or not such information be reflected in the draft or final report submitted to the Corps or the Cooperating Agencies."*

On August 20, 2012, I specifically requested, by e:mail correspondence with Marcia Heer (see attached e:mail string), the opportunity to have the Tribe review and comment on the chapters being developed by the various sub-groups, including the Functional Wetland Assessment, the Ground Modeling Plan, and the Water Management Drafts.

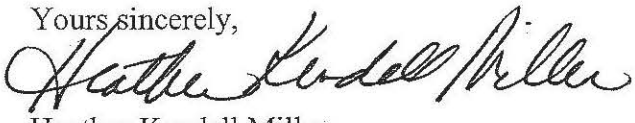
Marcia has since averred by telephone conversation that NVT 1) I failed to make a specific request to USACE to have a representative of NVT sit on the working group for purposes of being able to offer comments during the official comment period; 2) NVT lacks technical expertise. But neither of these reasons is a condition under the MOU for denying NVT access to information or prohibiting it from giving input during the official subgroup comment period.

Since you appear to adopt Ms. Heer's view that NVT acted beyond the scope of the MOU, and given the threatening and heavy-handed tone of your letter, I have recommended to President Standifer that he request that the issue be elevated to the Corps District Commander for resolution as provided under Section V. 1. of the MOU.

We also take issue with your accusation that NVT's expert, Jim Powell of Center for Science in Public Participation (CSP2), works for a Non-Governmental Organization (NGO) and that its NGO status presents "concern" for the USACE because "the SEIS development process currently is not open for public review and comment." On this point, you and Ms. Heer are absolutely mistaken. As the attached non-disclosure statement written by CSP2 Executive Director, David M. Chambers illustrates (see attached non-disclosure letter), CSP2 is not an entity to whom something confidential was improperly released. On the contrary, CPS2 is a non-profit 501(c)(3) corporation with a staff of academically qualified professionals that provide consultation services to clients under terms of agreement that make all work product confidential and proprietary. Jim Powell was retained as an expert by NVT and disclosure to NVT and its retained experts is entirely proper. I emphasize that USACE has no authority for claiming that it can dictate who or whom the Tribe elects to retain as an employee or expert, especially when such standard is not applied equally across the board to all other cooperating agencies.

Lastly, your five examples of misconduct by tribal representatives, *i.e.,* myself and Rob Rosenfeld, are misplaced. The concerns related to Mr. Rosenfeld have long been resolved as he is not participating in the Cooperating Agency meetings. With respect to the assertion that I violated the MOU by not contacting USACE before inviting NPS to consult on the cultural resources issues, that issue as well was clarified by letter of July 12, 2012 stating that NVT possesses dual roles with respect to the regulatory processes that are under way. With regard to Section 106 of the National Historic Preservation Act (NHPA), nothing in that Act or its implementing regulations require a Tribe to go through the USACE before making contact with an agency to discuss the Section 106 process. If your regulatory division believes otherwise, this issue presents another reason to elevate our dispute to the Corps District Commander for resolution as provided under Section V. 1. of the MOU.

Yours sincerely,



Heather Kendall Miller
Native American Rights Fund

cc: