



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CEMP-CR/CECC-R

JUN 10 2008

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Real Estate Policy Guidance Letter No. 26 – Easements to Support Water Supply Storage Agreements and Surplus Water Agreements

1. Purpose. To establish new policy on the timing of the issuance of easements for water supply storage agreements and surplus water agreements and the issuance of a special format for water pipeline easements that contains an explicit termination for noncompliance provision. For purposes of this guidance, "water supply agreement" is used to describe a water supply storage agreement, surplus water agreement, or any other agreement authorized by law between the Army Corps of Engineers and a non-Federal entity for the storage, withdrawal, or other authorized use of water or storage in a Corps project or facility.
2. Background. Under 10 USC 2668 and earlier statutes that have subsequently been repealed, the Army is authorized to grant easements for various purposes including water pipelines to support water supply agreements at various projects. These easements are granted for no consideration and may be perpetual, although subsequently repealed statutes did limit the term to 50 years. Recent litigation involving various water supply agreements highlight the need to revise the timing and content of easements entered into by the Corps for water pipelines and facilities. Based on a review of easements currently in litigation, the following scenarios were revealed.
 - a. Easements were executed for water intake facilities and water pipelines prior to execution of water supply agreements; however, the easements did not contain conditions which tie the easement to the water supply agreement nor a reservation of the right to terminate the easement if the water supply agreement was not entered into or was terminated by the parties.
 - b. Many of the easements clearly stated that only the right to construct, operate, and maintain water intake facilities and water pipelines was granted. Other easements specifically stated that the easement did not authorize the withdrawal of water and that a separate water supply agreement was required. However, in some instances, once the facilities and pipelines were constructed, withdrawal of water began without a water supply agreement and there was no apparent attempt to enforce the lack of authority for water withdrawal.

c. In some cases the easements implied that a water supply agreement existed, when in fact it did not, and in other cases the easements referenced a water supply agreement that was properly executed but is now in default or void and is no longer in effect.

d. Both the earlier and now rescinded ENG Form 1361, Easement for Right of Way (Pipeline), and the standard easement form for water pipelines, Figure 8-D-2 of ER 405-1-12, Chapter 8, dated 30 September 1994, describe conditions for termination of a water pipeline easement, including interference with the use or disposal of the land and the statutory termination clauses of failure to comply with the terms, non-use for a two-year period or abandonment. If an existing easement references a water supply agreement and contains a condition that requires compliance with the water supply agreement, this clause in the standard easement would allow termination of the easement in the event of noncompliance with any of the terms of the water supply agreement.

3. Policy. In order to correct these situations, promote preventative law and otherwise protect the interests of the United States, effective immediately, no easement that supports any type of water supply agreement will be executed prior to the water supply agreement being executed by all parties. In addition, a special format for water pipeline easements has been developed. This new format provides for an explicit reference to the water supply agreement and provides an explicit provision for termination for noncompliance with any of the terms and conditions of the water supply agreement. This revised format is attached and will be used for all future easements, including renewals, granted to support any type of water supply agreement. Finally, if an existing easement for water pipelines associated with a water supply agreement is supplemented, an explicit condition requiring compliance with the water supply agreement and the revised termination-for-noncompliance provision will be added to the easement.

4. Non-applicability. This memorandum does not apply to easements granted to municipal or other entities as part of just compensation for preexisting water rights and facilities under a relocation agreement or to individuals with documented water rights that pre-date the project.

5. Duration. The policies stated herein will remain in effect until amended or rescinded by Policy Memorandums, Policy Guidance Letters, Engineers Circulars or Engineer Regulations.

FOR THE COMMANDER:


SCOTT WHITEFORD
Acting Director of Real Estate

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 26 – Easements to Support Water Supply Storage Agreements and Surplus Water Agreements

DISTRIBUTION:

COMMANDER,
GREAT LAKES AND OHIO RIVER DIVISION (CELRD-PDS-R)
MISSISSIPPI VALLEY DIVISION (CEMVD-TD-R)
NORTH ATLANTIC DIVISION (CENAD-PD-E)
NORTHWESTERN DIVISION (CENWD-PDS)
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CF:

COMMANDER,
DETROIT DISTRICT (CELRE-RE)
HUNTINGTON DISTRICT (CELRH-RE)
LOUISVILLE DISTRICT (CELRL-RE)
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HONOLULU DISTRICT (CEPOH-PP-DR)
JACKSONVILLE DISTRICT (CESAJ-RE)
MOBILE DISTRICT (CESAM-RE)
SAVANNAH DISTRICT (CESAS-RE)
ALBUQUERQUE DISTRICT (CESPA-RE)
LOS ANGELES DISTRICT (CESPL-RE)
(CONT)

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 26 – Easements to Support
Water Supply Storage Agreements and Surplus Water Agreements

CF: (CONT)

SACRAMENTO DISTRICT (CESPK-RE)

FORT WORTH DISTRICT (CESWF-RE)

GALVESTON DISTRICT (CESWG-RE)

LITTLE ROCK DISTRICT (CESWL-RE)

TULSA DISTRICT (CESWT-RE)

CECC-R

**EASEMENT FOR WATER PIPELINE AND WATER INTAKE STRUCTURES
IN SUPPORT OF A WATER SUPPLY AGREEMENT**

Directions and Editorial Note:

Water Supply Storage Agreements and Surplus Water Agreements are negotiated agreements executed under authority of the Water Supply Act of 1958, as amended (43 U.S.C. 390b) and Section 6 of the Flood Control Act of 1944 (33 U.S.C. 708). In addition, non-standard agreements for the use of water in Corps reservoirs may be authorized under other laws. Model agreements are available from the PCA web page (<http://www.usace.army.mil/cw/cecw-p/pca/ccpca.htm>). Article 1b(2) of the model water supply storage agreement states: "The grant of an easement for right-of-way, across, in and upon land of the Government at the Project shall be by a separate instrument in a form satisfactory to the Secretary of the Army, under the authority of and in accordance with the provisions of 10 U.S.C. 2668 and such other authorities as may be necessary. Subject to the conditions of such easement, the User shall have the right to use so much of the Project land as may reasonably be required in the exercise of the rights and privileges granted under this agreement."

This easement is for water pipelines and water intake structures where there is a Water Storage-Supply Agreement. Use the Agreement's actual title, if not "Water Supply Agreement." This format is an approved form.

Delete these directions and all Editorial Notes, optional information and notes on what to fill in from the final document. Places where information should be filled in are shown either as " _____ " or << >>. Editorial Notes and optional information are shown in [].

**DEPARTMENT OF THE ARMY
EASEMENT FOR WATER PIPELINE AND WATER INTAKE STRUCTURES
IN SUPPORT OF A WATER SUPPLY AGREEMENT**

LOCATED ON

<<PROJECT>>

<<COUNTY>> COUNTY, <<STATE>>

This easement is made on behalf of **THE UNITED STATES OF AMERICA** (the "United States"), between **THE SECRETARY OF THE ARMY**, acting by and through the Chief, Real Estate Division, U.S. Army Engineer District, <<DISTRICT>>, hereinafter referred to as the "**Grantor**", under and by virtue of the authority vested in Title 10, United States Code, Section 2668, having found that the granting of this easement will not be against the public interest, and pursuant to [a water supply - storage agreement, entered into on _____, under the authority of the Water Supply Act of 1958, as amended (43 U.S.C. 390b)] or [a surplus water agreement, entered into on _____, under the authority of Section 6 of the Flood Control Act of 1944 (33 U.S.C. 708)] or [a water supply agreement entered into on _____, under << cite authority>>]], (hereinafter referred to as the "Water Supply Agreement"), and the <<GRANTEE>>, <<CORPORATION>>, duly organized and existing under and by virtue of the laws of the State of <<STATE>>, with its principal office at <<ADDRESS>>, <<CITY>> <<STATE>> <<ZIP>>, hereinafter referred to as the "**Grantee**."

NOW THEREFORE:

The Grantor, for good and valuable consideration set forth below, the receipt and sufficiency of all of which are hereby acknowledged, upon and subject to the terms, covenants and conditions set forth in this easement, does hereby:

Grant and convey to Grantee, an easement for the construction, installation, operation, maintenance, repair and replacement of a [____ inch] water pipeline and [raw] water intake structures, hereinafter referred to as the "Facilities", over, across, in and upon lands of the United States as identified in EXHIBIT(S) "A" and "B", hereinafter referred to as the "Premises", and which are attached hereto and made a part hereof; and

Grant and convey unto the Grantee, its successors and assigns, all of the Grantor's right, title and interest in and to all improvements and fixtures of whatever nature currently located on the Premises.

The Grantor hereby makes no claim of title during the term of this easement to any Facilities of whatever nature located, constructed, or placed on the Premises by the Grantee.

THIS EASEMENT is granted subject to the following conditions.

1. TERM

[Editorial Note: The Term should coincide with the term of the Water Supply Agreement. A permanent Agreement would have a perpetual easement. A term of years should be the same in both, with the ending date the same. There is no longer a 50 year statutory term limit.]

This easement is hereby granted [in perpetuity] or [for a term of [REDACTED] years, beginning [REDACTED], and ending [REDACTED]] so long as the Grantee remains in compliance with any or all of the conditions of this easement and the Water Supply Agreement remains in effect.

[Editorial Note: for a temporary construction easement outside the right-of-way add the following sentence:

A temporary easement for construction is hereby granted for a term of [REDACTED] years beginning [REDACTED] and ending [REDACTED], or upon notification that construction and restoration is complete, whichever is earlier.

2. CONSIDERATION

The consideration for this easement shall be the construction, operation, maintenance, repair and replacement of the facilities on the premises for the benefit of the general public in accordance with the terms and conditions hereinafter set forth, and the terms and conditions of the Water Supply Agreement.

3. NOTICES

All correspondence and notices to be given pursuant to this easement shall be in writing and addressed, if to the Grantee, to [REDACTED], [REDACTED] and, if to the Grantor, to the U. S. Army Engineer District, [REDACTED], Attention: Chief, Real Estate Division, <<ADDRESS, STATE, ZIP>>, or as may from time to time otherwise be directed by the parties. Notices shall be mailed by certified mail, postage prepaid, return receipt requested, addressed to the addresses above. The effective date of the notice shall be the earlier of the actual date of receipt or the date the addressee is notified of the attempted delivery of the certified mail, whether or not the addressee actually accepts delivery.

4. AUTHORIZED REPRESENTATIVES

Except as otherwise specifically provided, any reference herein to "Grantor" or "Chief, Real Estate Division" shall include their duly authorized representatives. Any reference to "Grantee" shall include assignees, transferees and their duly authorized representatives.

5. SUPERVISION BY THE GRANTOR

The construction, operation, maintenance, repair or replacement of said facilities, including culverts and other drainage facilities, shall be performed at no cost or expense to the United States and subject to the approval of the Grantor. Upon the completion of any of the above activities, the Grantee shall immediately restore the premises to the satisfaction of the Grantor. The use and occupation of the premises for the purposes herein granted shall be subject to such rules and regulations as said officer prescribes in writing from time to time and the terms and conditions of the Water Supply Agreement.

6. APPLICABLE LAWS AND REGULATIONS

The Grantee shall comply with all applicable Federal, state, county and municipal laws, ordinances and regulations wherein the premises are located.

[Editorial Note: Condition 7 should be tailored to the specific type of water agreement and the terms of the agreement]

7. WATER SUPPLY AGREEMENT

a. The Grantee has entered into the referenced Water Supply Agreement with the Grantor which authorizes water storage and withdrawal. In accordance with the Water Supply Agreement, the Grantee has acquired rights to store and withdraw water in and from the **PROJECT** and has agreed to pay the applicable costs for such rights. The Grantee must comply with the terms and conditions of the Water Supply Agreement.

b. The Grantee agrees to operate all water intake and other facilities and all electrical equipment will be installed, operated and maintained in compliance with all applicable Federal, state, county and municipal laws, ordinances and regulations wherein the premises are located, including, but not limited to, the provisions of the latest edition of the National Electrical Safety Code (NESC) and the Environmental Protection Agency regulations on Polychlorinated Biphenyls (PCB's).

c. Any electrical service to submerged motors or those located above water shall be by means of a sealed, water-proof, multiple conductor cable with controls and switches located on land. The location of such motors and the electrical feeders shall be clearly marked to be visible to boaters and swimmers. Additionally, signs warning "DANGER-HIGH VOLTAGE-

Unauthorized Access Prohibited" shall be erected to be visible from the land and water approaches to the equipment.

d. The granting of this easement does not, expressly or by implication, authorize withdrawal, or any increase in withdrawal, of water from [REDACTED]. The easement does not represent a water supply agreement nor grant any future right to reservoir storage for water supply purposes.

8. CONDITION OF PREMISES

The Grantee acknowledges that it has inspected the premises, knows the condition, and understands that the same is granted without any representation or warranties whatsoever and without any obligation on the part of the Grantor.

9. INSPECTION AND REPAIRS

The Grantee shall inspect the facilities at reasonable intervals and immediately repair any defects found by such inspection or when required by the Grantor to repair any such defects.

10. PROTECTION OF GOVERNMENT PROPERTY

The Grantee shall be responsible for any damage that may be caused to the property of the United States by the activities of the Grantee under this easement and shall exercise due diligence in the protection of all property located on the premises against fire or damage from any and all other causes. Any property of the United States damaged or destroyed by the Grantee incident to the exercise of the privileges herein granted shall be promptly repaired or replaced by the Grantee to a condition satisfactory to the Grantor, or at the election of the Grantor, reimbursement made therefor by the Grantee in an amount necessary to restore or replace the property to a condition satisfactory to the Grantor.

11. RIGHT TO ENTER

The right is reserved to the Grantor, the United States, its officers, agents, and employees to enter upon the premises at any time and for any purpose necessary or convenient in connection with government purposes, to make inspections, to remove timber or other material, except property of the Grantee, to flood the premises, to manipulate the level of the lake or pool in any manner whatsoever and/or to make any other use of the lands as may be necessary in connection with government purposes, and the Grantee shall have no claim for damages on account thereof against the Grantor, the United States or any officer, agent, or employee thereof.

12. TRANSFERS AND ASSIGNMENTS

Without prior written approval by the Grantor, the Grantee shall neither transfer nor assign this easement or any part thereof nor grant any interest, privilege or license whatsoever in

connection with this easement. The provisions and conditions of this easement shall extend to and be binding upon and shall inure to the benefit of the representatives, successors and assigns of the Grantee.

13. INDEMNITY

The United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the exercise of the privileges herein granted, or for damages to the property or injuries to the person of the Grantee's officers, agents, or employees or others who may be on the premises at their invitation or the invitation of any one of them, and the Grantee shall hold the United States harmless from any and all such claims not including damages due to the fault or negligence of the United States or its contractors.

14. SUBJECT TO EASEMENTS

This easement is subject to all other existing easements, or those subsequently granted as well as established access routes for roadways and utilities located, or to be located, on the premises, provided that the proposed grant of any new easement or route will be coordinated with the Grantee, and easements will not be granted which will, in the opinion of the Grantor, interfere with the use of the premises by the Grantee.

15. REQUIRED SERVICES

The grantee shall furnish through said facilities such services as may be required from time to time for governmental purposes, provided that payment for such service will be made by the United States at rates which shall be mutually agreeable but which shall never exceed the most favorable rates granted by the grantee for similar service.

16. RELOCATION OF FACILITIES

In the event all or any portion of the premises occupied by the said facilities shall be needed by the United States, or in the event the existence of said facilities is determined to be detrimental to governmental activities, the Grantee shall from time to time, upon notice to do so, and as often as so notified, remove said facilities to such other location on the premises as may be designated by Grantor. In the event said facilities shall not be removed or relocated within ninety (90) days after such notice, the Grantor may cause such relocation at the sole expense of the Grantee.

17. TERMINATION

a. This easement may be terminated by the Grantor upon 30 days written notice to the Grantee if the Grantor shall determine that the right-of-way hereby granted interferes with the use or disposal of said land by the United States, or it may be revoked by the Grantor for failure of

the Grantee to comply with any or all of the conditions of this easement; for non-use for a period of two (2) years; or for abandonment.

b. This easement may be terminated if the Grantee fails to comply with the terms and conditions of, or is in default under, the Water Supply Agreement. In addition, if the Water Supply Agreement is terminated, expires or becomes void, then this easement may be terminated. This easement may also be terminated for failure of the Grantee to comply with Condition 7, ***WATER SUPPLY AGREEMENT***.

18. SOIL AND WATER CONSERVATION

The Grantee shall maintain, in a manner satisfactory to Grantor, all soil and water conservation structures that may be in existence upon said premises at the beginning of or that may be constructed by the Grantee during the term of this easement, and the Grantee shall take appropriate measures to prevent or control soil erosion within the right-of-way herein granted. Any soil erosion occurring outside the premises resulting from the activities of the Grantee shall be corrected by the Grantee as directed by the Grantor.

19. ENVIRONMENTAL PROTECTION

a. Within the limits of their respective legal powers, the parties hereto shall protect the premises against pollution of its air, ground, and water. The Grantee shall promptly comply with any laws, regulations, conditions or instructions affecting the activity hereby authorized if and when issued by the Environmental Protection Agency, or any Federal, state, interstate or local governmental agency having jurisdiction to abate or prevent pollution. The disposal of any toxic or hazardous materials within the premises is strictly prohibited. Such regulations, conditions, or instructions in effect or prescribed by the said Environmental Protection Agency or any Federal, state, interstate or local governmental agency are hereby made a condition of this easement. The Grantee shall not discharge waste or effluent from the premises in such a manner that the discharge will contaminate streams or other bodies of water or otherwise become a public nuisance.

b. The use of any pesticides or herbicides within the premises shall be in conformance with all applicable Federal, state and local laws and regulations. The Grantee must obtain approval in writing from the Grantor before any pesticides or herbicides are applied to the premises.

c. The Grantee will use all reasonable means available to protect the environment and natural resources, and where damage nonetheless occurs arising from the Grantee's activities, the Grantee shall be liable to restore the damaged resources.

[Editorial Note: Optional. An environmental site assessment is not required by CERCLA for easements. The current Army name for the environmental assessment required by CERCLA is an Environmental Condition of Property (ECP) report. If the district elects to do an

assessment to document the current condition of the premises, then use the following Condition. For more details on civil works projects see ER 200-2-3]

20. ENVIRONMENTAL SITE ASSESSMENT

An environmental site assessment documenting the known history of the property with regard to the storage, release or disposal of hazardous substances thereon, is attached hereto and made a part hereof as EXHIBIT "B". Upon expiration, revocation or termination of this easement, another environmental site assessment shall be prepared which will document the environmental condition of the property at that time. A comparison of the two assessments will assist the Grantor in determining any environmental restoration requirements. Any such requirements will be completed by the Grantee in accordance with Condition 23, **RESTORATION**.

21. HISTORIC PRESERVATION

The Grantee shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archeological, architectural or other cultural artifacts, relics, remains or objects of antiquity. In the event such items are discovered on the premises, the Grantee shall immediately notify the Grantor and protect the site and material from further disturbance until the Grantor gives clearance to proceed.

22. NON-DISCRIMINATION

a. The Grantee shall not discriminate against any person or persons because of race, color, age, sex, handicap, national origin or religion.

b. The Grantee, by acceptance of this easement, is receiving a type of Federal assistance and, therefore, hereby gives assurance that it will comply with the provisions of Title VI of the Civil Rights Act of 1964 as amended (42 U.S.C. Section 2000d); the Age Discrimination Act of 1975 (42 U.S.C. Section 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. Section 794); and all requirements imposed by or pursuant to the Directive of the Department of Defense (32 CFR Part 300) issued as Department of Defense Directive 5500.11 and 1020.1, and Army Regulation 600-7. This assurance shall be binding on the Grantee, its agents, successors, transferees, and assignees.

23. RESTORATION

On or before the expiration or termination of this easement, the Grantee shall, without expense to the United States, and within such time as the Grantor may indicate, remove said facilities and restore the premises to the satisfaction of the Grantor. In the event the Grantee shall fail to remove said facilities and restore the premises, the Grantor shall have the option to take over said facilities without compensation, or to remove said facilities and perform the

restoration at the expense of the Grantee, and the Grantee shall have no claim for damages against the United States or its officers or agents for such action.

24. DISCLAIMER

This instrument is effective only insofar as the rights of the United States in the property are concerned, and the Grantee shall obtain such permission as may be required on account of any other existing rights. It is understood that the granting of this easement does not eliminate the necessity of obtaining any Department of the Army permit which may be required pursuant to the provisions of Section 10 of the Rivers and Harbors Act of 3 March 1899 (33 U.S.C. Section 403), Section 404 of the Clean Water Act (33 U.S.C. Section 1344) or any other permit or license which may be required by Federal, state or local statute in connection with use of the premises.

25. DESCRIPTION

Editorial Note: for temporary construction outside the easement area or for easements where a description may be modified add this Condition (or similar condition):]

Upon the completion of construction and satisfactory restoration of the temporary easement area, the Grantee, will provide as-built drawings and description. This easement will be amended to correct EXHIBIT "A" based on the as-built drawings and description.

[Editorial Note: if the width of right-of-way is not specified add this Condition:]

The right-of-way herein granted shall be limited to the area actually occupied by the pipeline/facilities with rights of ingress and egress for installation, operation and maintenance.

27. SPECIAL CONDITIONS

<<< ADD ANY SPECIAL OPERATIONAL CONDITIONS AS REQUIRED >>>

<<< ADD ANY SPECIFIC ENVIRONMENTAL, CULTURAL AND OPERATIONAL REQUIREMENTS AS REQUIRED >>>

[Editorial Note: If a Corporation, the Grantee must furnish a Corporate Certificate, signed by the appropriate corporate officer, other than the person executing the outgrant as follows:]

CORPORATE CERTIFICATE

I _____ (name) certify that I am the _____ (title) of _____ <<CORPORATION>>, that _____ (signator of outgrant) who signed the foregoing instrument on behalf of the corporation was then _____ (title of signator of outgrant) of the corporation. I further certify that the said officer was acting within the scope of powers delegated to this officer by the governing body of the corporation in executing said instrument.

<<GRANTEE>>

Date: _____

Corporate Secretary or
Appropriate Officer

(AFFIX CORPORATE SEAL)

[Editorial Note: The Grantee must furnish a Certificate of Authority, signed by the appropriate official, other than the person executing the outgrant, as follows:]

CERTIFICATE OF AUTHORITY

I _____ (name) certify that I am the _____ (title) of _____ <<CORPORATION>>, that _____ (signator of outgrant) who signed the foregoing instrument on behalf of the Grantee was then _____ (title of signator of outgrant) of _____ <<CORPORATION>>. I further certify that the said officer was acting within the scope of powers delegated to this governing body of the Grantee in executing said instrument.

<<GRANTEE>>

Date: _____

Clerk or Appropriate Official

(AFFIX SEAL)



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

CEMP-CR

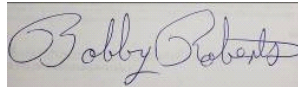
20 May 2020

MEMORANDUM FOR RECORD

SUBJECT: Deputy Director Real Estate Request for Policy Guidance Letter# 26, Easements to Support Water Supply Storage Agreements and Surplus Water Agreements Posted.

1. I am validating the content of Real Estate PGL-26, dated 10 June, 2008, is current and accurate. Request the document be posted "as is" until USACE Real Estate staff, working with the publication staff, can update the document to meet publications standards. We intend to make this a priority once the Covid-19 restrictions are lifted with a goal of 3 to 4 months from the date Covid-19 restrictions are lifted.
2. The Records and Information Management Office of the USACE CIO/G-6 (CEIT-OPI-RE) requested a memorandum for record verifying that PGL-26, Easements to Support Water Supply Storage Agreements and Surplus Water Agreements, is current and valid.
3. Please contact me at 202-761-0057, or bobby.roberts@usace.army.mil if you need any additional information on this matter.

X



6/13/2020

Signed by: ROBERTS.BOBBY.L.1221736571

Bobby Roberts
Chief, Operations Branch & Deputy Director
Real Estate, USACE