

MEMORANDUM OF UNDERSTANDING
Between
United States Corps of Engineers, Memphis District
and
Otoe-Missouria Tribe of Indians of Oklahoma
For Consultation and Cooperation
Pursuant to Appropriate Federal Acts and Orders

WHEREAS, the U.S. Army Corps of Engineers, Memphis District (Memphis District) wishes also to establish a Government to Government relationship with the Otoe-Missouria Tribe of Indians of Oklahoma for consultation and cooperation regarding other Federal Acts and Orders including but not limited to the Archaeological Resource Protection Act, 16 U.S.C. § 470aa et seq. (hereinafter “ARPA”), the National Historic Preservation Act, 16 U.S.C. § 470 et seq. (hereinafter “NHPA”), and the National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331, 4332 (hereinafter “NEPA”), and Presidential Executive Order 13007; and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §3001 seq. (hereinafter “NAGPRA”); and

WHEREAS, the parties herein intend to provide procedures for consultation and communication, protection of information, and better performance of their duties as stewards of federal land; and,

WHEREAS, the United States Corps of Engineers, Memphis District (Memphis District) has federal stewardship and management responsibilities for certain lands; and,

WHEREAS, such activities may have an effect on properties included or potentially eligible for the National Register of Historic Places that are of religious or cultural significance to the Otoe-Missouria Tribe of Indians of Oklahoma; and

WHEREAS, Memphis District has consulted with the Otoe-Missouria Tribe of Indians of Oklahoma, a federally recognized tribe, on a government-to-government basis; and,

WHEREAS, the signatories to this Memorandum of Understanding (MOU) recognize that the Otoe-Missouria Tribe of Indians of Oklahoma possesses the unique experience and oral history to identify and evaluate historic properties of religious and cultural significance; and

WHEREAS, through the use of this MOU, the signatories intend to keep the lines of communication open as partners and stewards of the land; and,

WHEREAS, no portion of this MOU should be interpreted to limit the rights, duties, or responsibilities as may be implemented under federal statutes, regulations, policies, Executive Memoranda or Executive Orders and related documents;

NOW, HEREOFRE, Memphis District and the Otoe-Missouria Tribe of Indians of Oklahoma agree that the communication between the parties shall be as follows:

I. ROUTINE COMMUNICATION

A. The parties intend to continue consultation as ongoing stewards of the land. The parties have periodically scheduled face-to-face meetings. However, it is necessary that consultation continue in the absence of, or in between, such meetings to continue the relationship between the parties or deal with immediate issues. This section does not alter this intent, but defines the means of interim communications and less formal consultation for those periods on which more formal consultation is impractical.

B. The parties agree that the preferred method of communication between periodic meetings shall be electronic mail, facsimile, or telephone. In the event this means fails, the parties shall use the U.S. Mail system.

C. Without limiting any right to communicate after this period, the parties intend to reply within thirty (30) days to an issue that is raised during routine communication. In the absence of a reply, the parties intend to reasonably move forward as though no objections or expressions of concern were received. Again, this simply states the intent of the parties to reasonably act, but in no way limits rights that may be present in law.

D. The parties agree to maintain the confidentiality of all information pertaining to cultural properties where possible, but limited to the boundaries of applicable law. The parties shall take all reasonable measures to preclude disclosure of confidential Native American cultural properties.

E. Memphis District and the Otoe-Missouria Tribe of Indians of Oklahoma shall provide the appropriate information for each representative of their entity. For nation-to-nation consultation, Memphis District Commander and the Tribal Chairman shall be the respective representatives. For interim, ongoing, and non-formal face-to-face meetings, and between more formal consultations, each party shall provide a point of contact. This information is provided in Attachments A and B. The Commander and Tribal Chairman or designated tribal representative shall advise the other of changes due to elections or other changes in their respective organizations affecting the representative or point of contact.

F. The Otoe-Missouria Tribe of Indians of Oklahoma does not waive any rights to review information available by law. However, for economy of assets, not all information must be regularly sent to the Otoe-Missouria Tribe of Indians of Oklahoma. The parties agree that the following information does not require notification from Memphis District to the Otoe-Missouria Tribe of Indians of Oklahoma.

1. While retained in its regular records, and available for review, the Otoe-Missouria Tribe of Indians of Oklahoma does not require notice or the following information to be provided as a matter of course.

a. Any proposed undertakings, which may be “categorically excluded” in accordance with the National Environment Policy Act (NEPA) and Army Regulation (ER) 200-2-2, and would not involve the disturbance of any soil, which has not been previously disturbed, unless the undertaking may affect a known property included or potentially eligible for the National Register of Historic Places that is of religious or cultural significance to the Otoe-Missouria Tribe of Indians of Oklahoma;

b. Any proposed undertaking in which the area of potential effect has been surveyed for historic properties and no eligible or potentially eligible properties, or human remains or cultural items as defined in the Native American Graves Protection and Repatriation Act (NAGPRA), were identified.

c. Any proposed undertaking in which the area of potential effect cannot possibly (due to age or location of the land surface) have significant historic properties on it.

2. Aside from activities exempted by subsections F(1), the following information shall be forwarded to the Otoe-Missouria Tribe of Indians of Oklahoma by the communication agreed up on.

a. Any proposed undertaking for which the preparation of an environmental assessment (EA) or environmental impact statement (EIS) is required.

b. Any proposed undertaking that will disturb any soil, which has not been previously disturbed, and has not been surveyed for historic properties.

c. Any proposed undertaking that may affect a known property included or potentially eligible for the National Register of Historic Places that is of religious or cultural significance to the Otoe-Missouria Tribe of Indians of Oklahoma, or may affect human remains or cultural items as defined in NAGPRA.

d. Any discovery of a historic property that predates European contact, made as a result of a soil disturbing activity. This will provide the Otoe-Missouria Tribe of Indians of Oklahoma an opportunity to consult on whether the discovered materials are of cultural significance.

3. The following information will be provided by U.S. Mail at all times.

Confirmation of formal face-to-face consultation between the Commander and the Tribal Chairman.

II. SPECIAL COMMUNICATION

A. Procedures for Inadvertent Discoveries of, or Intentional Excavation of, human remains or cultural items from Federal lands, as defined in NAGPRA, are as follows.

1. The Otoe-Missouria Tribe of Indians of Oklahoma shall be notified first by electronic mail, facsimile, or telephone, and also by U.S. Mail. This provides a documented accounting of the notice.
2. The parties understand that by the sensitivity and timeliness of responding to Inadvertent Discoveries telephone communication is a necessity.
3. Memphis District shall take all reasonable means to protect and safeguard the human remains or cultural items.
4. Claims for any repatriation as a result of the Inadvertent Discovery shall be resolved in accordance with 43 C.F.R. §10.10; 10.14.

B. Procedures for the discovery of human remains are as follows.

1. The individuals making the discovery shall first contact the appropriate law enforcement agency and immediately notify the Commander. If the remains constitute a crime scene, all applicable laws and procedures apply.
2. In the event of an inadvertent discovery and the discovery is not a crime scene, all ground disturbing activities at the cultural site shall cease and the Otoe-Missouria Tribe of Indians of Oklahoma shall be notified immediately.

III. OTHER

- A. Nothing in this MOU shall be interpreted to alter the requirements of the National Historic Preservation Act (NHPA) or NAGPRA, or their implementing regulations. In the event any portion of this MOU is deemed contradictory to law or regulations, only that contradictory portion becomes Void. The sole contradictory issue does not vitiate the entire agreement. The parties should consult to resolve that contradictory issue with the intent to reform that portion to make it compliant with the applicable law or regulation, and the remaining portions of the MOU remain in full force and effect.
- B. Nothing in this MOU shall be construed as limiting or affecting the legal authority of either party, nor does it commit either party to exceed their appropriations. Commitments made from this MOU are subject to the availability of funds.
- C. This MOU is executed as of the last date shown below and expires no later than five years thereafter. The parties may renew or extend this MOU by appropriated signature by all parties. This MOU can be unilaterally terminated by either party upon a 90-day written notice to the Commander or Tribal Chairman, respectively.
- D. Terms used in this MOU are defined according to federal authority. Where federal authority may provide conflicting definitions, the prevailing document's definition is used. By means of example a statutory definition is binding over a regulatory definition.

E. Contact information for the Otoe-Missouria Tribe of Indians of Oklahoma is found at Attachment A. Contact information for the Commander is found in Attachment B.

By: _____
Charles O. Smithers III (Date)
Colonel, Corps of Engineers
District Engineer

By: _____
Mr. C. Michael Harwell (Date)
Tribal Chairman
Otoe-Missouria Tribe of Indians of
Oklahoma

ATTACHMENT A

Designated Point of Contact for the Otoe-Missouria Tribe of Indians of Oklahoma:

ATTACHMENT B

Designated Point of Contact for the Memphis District:

Mr. Jimmy McNeil
Tribal Liaison
Memphis District
Corps of Engineers
167 North Main Street, B-202
Memphis, TN 38103-1894
901-544-0710
jimmy.d.mcneil@mvm02.usace.army.mil