

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES ARMY CORPS OF ENGINEERS, MEMPHIS DISTRICT
AND THE
OSAGE TRIBE OF INDIANS
PURSUANT TO THE NATIONAL HISTORIC PRESERVATION ACT
AND OTHER AUTHORITIES**

WHEREAS, the United States Army Corps of Engineers, Memphis District (MVM) conducts activities including but not limited to navigation, flood damage reduction, environmental missions, wetlands protection, and waterways regulation in portions of the states of Arkansas, Illinois, Kentucky, Mississippi, Missouri, and Tennessee; **AND**,

WHEREAS, the Osage Tribe of Indians is a federally recognized sovereign Indian Nation, which has a government-to-government relationship with the United States and an interest in lands within the MVM's authority [*Appendix A: Osage Ancestral & Treaty Lands by State and County*]; **AND**,

WHEREAS, the Osage Tribe has consulted with the MVM in the past and desires to strengthen this relationship; **AND**,

WHEREAS, the MVM and the Osage Tribe acknowledge that undertakings and activities of the MVM may affect properties included in or eligible for inclusion in the National Register of Historic Places (National Register) including historic properties such as but not limited to American Indian Cultural Sites (AICS), which include Traditional Cultural Properties (TCP), properties that are of religious and cultural significance, and Sacred Sites including burials that may contain human remains and/or associated cultural items; **AND**,

WHEREAS, the Osage Tribe alone has the special expertise to identify and evaluate historic properties, TCPs, Sacred Sites, or other cultural resources which are of religious and cultural significance to the Osage; **AND**,

WHEREAS, the MVM and the Osage Tribe agree to collaborate cooperatively in identifying and protecting historic properties on lands that may be affected by the MVM's civil works projects and its regulation of wetlands and waterways and other related activities, and comply with all federal and state legal requirements; **AND**,

WHEREAS, the MVM and the Osage Tribe have consulted on a government-to-government basis in accordance with the National Historic Preservation Act, as amended, (NHPA), Executive Order 13175: *Consultation and Coordination with American Indian Tribal Governments*, and other applicable authorities and both parties agree to be signatories to this Memorandum of Understanding (MOU), developed pursuant to 36CFR 800.2(c)(2)(ii)(E); **AND**,

NOW, THEREFORE, the MVM and the Osage Tribe in good faith agree that this MOU and the following stipulations shall guide the development of future formal agreements for the mitigation of adverse effects, and for protecting, managing, and preserving affiliated historic properties relevant to the MVM as required for meeting its responsibilities under Section 106 of NHPA, as amended, and for all other applicable authorities.

STIPULATIONS

GENERAL STIPULATIONS

1. The stipulations in this MOU and those developed pursuant to this MOU by and in agreement with the MVM, the Osage Tribe, the appropriate State Historic Preservation Officer(s) (SHPO(s)) and other consulting parties may be incorporated into agreements including Programmatic Agreements (PA), Memoranda of Agreements (MOA) or other project specific documents, MVM Standard Operating Procedures, and management plans as appropriate, including MVM Cultural Resources Management Plans (CRMP), as well as other relevant documents, and shall follow and adhere to federal, state, and MVM regulations and guidelines.
2. Nothing in this MOU circumvents or alters the MVM's responsibility to consult with other federally-recognized tribes, the appropriate SHPO, or the Advisory Council on Historic Preservation (ACHP) or other parties as required by the NHPA, as amended, and other applicable authorities.

CONSULTATION

3. Consultation should begin early in the planning process and continue throughout a Section 106 undertaking. A letter of notification, in and of itself, from the MVM to a tribe is not consultation. Consultation is a mutual dialogue between the MVM and the tribe regarding historic properties that may be affected by an undertaking. If there are historic properties that are of religious and cultural significance to the tribe, then consultation may be extended to include future management, protection, and preservation of AICS.
 - (a) The MVM shall consult the Osage Tribe on a government-to-government basis in recognition of its sovereign status early in the planning process and throughout Section 106 review regarding any activity or undertaking that might affect historic properties including AICS.
 - (b) The MVM and Osage Tribe shall establish written procedures and protocols for consultation. Consultations may include face-to-face meetings, as well as communications by mail, electronic mail, facsimile, and telephone. Times and places of meetings, as well as agendas for meetings, will be developed with mutual acceptance.
 - (c) Each party to this MOU shall designate and mutually recognize a point of contact for carrying out any communication and consultation necessary for the implementation of this agreement. Should the MVM or the Osage Tribe change its point of contact forthwith each agrees to communicate to the other party its new point of contact.
 - (d) The MVM shall ensure that the Osage Tribe is consulted throughout a specific undertaking and that the tribe is afforded, in accordance with applicable federal, state, and local authorities, the opportunity to conduct religious/traditional ceremonies with regard to a specific location or with regard to American Indian human remains and funerary objects as well as any other cultural items from sacred or religious contexts.
 - (e) Upon mutual agreement, the MVM shall hold an annual consultation meeting, preferably in the spring, with the Osage Tribe and other federally recognized tribes that have cultural interests within the MVM. The MVM shall provide an updated list of those tribes to all participating tribes. The purpose of this meeting is to consult and provide the tribes with a summary of MVM's project activities as well as to inform the tribes of future projects and/or undertakings.
 - (f) The MVM recognizes that facilitating effective tribal consultation may require providing travel support for tribal officials. Future formal agreements, such as those listed in Stipulation 1, will specify how this support may occur.
 - (g) The MVM shall ensure that consultation with other consulting parties, including local governments, shall not include the dissemination of information that might risk harm to an AICS or that might impede the use of that site by the Osage Tribe in accordance with Section 304 of the NHPA and other applicable authorities.

- (h) As AICS are non-renewable resources, the MVM shall make a reasonable and good faith effort to inform the public and private landowners regarding stewardship, site protection and preservation, which may include but not be limited to tax incentives or related benefits, lectures, exhibits, site-specific consultation, brochures, and videos (see also Stipulations 3(g), 5(c)).

RESPONSIBILITIES

4. The MVM shall determine whether a proposed action is an undertaking, and therefore, subject to the Section 106 review process.

5. The MVM shall offer project or other activity information to the Osage Tribe and solicit the tribe's input regarding MVM's activities of planning, design, construction, and operations/maintenance. The tribe will be offered the same types of information, and at the same timing, as that normally circulated among MVM project team members. For MVM's plans and on-going activities *specific* to identifying and otherwise treating historic properties and AICS, MVM shall solicit, consider, and respond to the comments of the Osage Tribe, or consultation will not be considered complete. The following responsibilities reflect the mutual agreement of the MVM and the Osage Tribe.

- (a) The MVM shall in good faith and within its legal authority ensure that appropriate time schedules and work effort are adequate for identifying, investigating and testing historic properties for compliance with the NHPA, as amended.
 - (b) The MVM shall ensure that cultural resource investigation and personnel meet applicable federal and state standards. When the MVM requests assistance from the Osage Tribe to aid in the identification, evaluation, assessment of effects, and treatment of historic properties of traditional, religious and/or cultural importance, its representatives, Traditional Cultural Authorities or other religious/traditional practitioners need not meet federal and/or state standards.
 - (c) The MVM shall present timely reports summarizing project activities to the Osage Tribe when any undertaking or action, including cultural resource investigations, may directly or indirectly involve an AICS(s).
 - (d) The MVM shall provide to the Osage Tribe an annual report summarizing any coordination activities regarding historic properties, including present and ongoing cultural resource surveys and other activities conducted by the MVM. Confidential site locations and all other pertinent information including but not limited to site treatment plans, including the disposition or curation of cultural items, shall be included (see also 3(g)(h), 5(e)).
 - (e) Precise archeological site location data shall only be provided to designated officials of the MVM, the SHPO(s), affiliated tribes, and other relevant parties, in a separate attachment to the report and shall otherwise be withheld from disclosure pursuant to Section 304 of the NHPA, Executive Order 13007 and other applicable authorities
 - (f) If an agreement is applicable for the mitigation of adverse effects under NHPA or for other remedies concerning AICS, the MVM shall invite the Osage Tribe to be a signatory to the appropriate agreement and/or document.
 - (g) If the MVM inadvertently discovers American Indian human remains or indications of a burial, or seeks to intentionally excavate American Indian human remains all applicable federal and state laws shall be followed, including consultation with affiliated tribe(s).
6. The MVM and the appropriate SHPO in consultation with the Osage Tribe shall assess the affects of a proposed undertaking pursuant to 36 CFR 800 and determine if the proposed undertaking alters, directly or indirectly, any characteristics that qualify the property for inclusion in the National Register and are of religious and cultural significance to the tribe. Alterations that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association may be considered adverse effects.

7. The Osage Tribe shall not act as a representative of any other federally recognized Indian Tribe without that tribe's express authorization in writing. Copies of such authorization shall be provided to the MVM and appropriate SHPO.

8. The MVM shall provide a copy of this MOU to the Corps of Engineers Headquarters Tribal Liaison and the following commands: Mississippi Valley Division, and the Little Rock, Mobile, Nashville, St. Louis, and Vicksburg Districts.

9. A PA developed pursuant to this MOU, and under authority of NHPA, shall include, but not be limited to the following topics:

- (a) Consultation
- (b) Initiating the Section 106 process
- (c) Cultural resource investigation, which includes research design, identification, data collection, evaluation, and curation
- (d) Assessing affects
- (e) Resolution of adverse effects, including mitigation plans
- (f) Archeological permits
- (g) Preservation and protection
- (h) Documenting and reporting requirements
- (i) Inadvertent discoveries
- (j) Intentional excavation
- (k) Scientific analysis of American Indian human remains, and
- (l) Reinterment

10. The MVM and the Osage Tribe shall establish procedures and guidelines with regard to NEPA and Section 106 coordination. At a minimum, the following shall be addressed: Environmental Assessments (EAs) and Environmental Impact Statements (EISs), the NEPA Scoping process, the Area of Potential Effects (APEs), Maps, Mitigation, detailed description of the affected environment, and consultation to identify historic properties. This information will be incorporated into relevant agreements as listed in Stipulation 1.

11. Definitions

Unless otherwise provided herein, the MVM and Osage Tribe agree on the following definitions:

- (a) American Indian Cultural Sites (AICS) mean historic properties, including but not limited to, archeological sites, locations, and other historic properties in which features are culturally important or items that are of American Indian origin, or in which there are American Indian burials, or Traditional Cultural Properties and/or Sacred Sites that are of religious and cultural significance to federally-recognized tribes.
- (b) Consultation means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement regarding matters arising in the Section 106-review process. Consultation is an important part of a cooperative effort and has as much to do with obtaining information as with providing information. Notification that informs parties of a pending agency action late in the planning process does not equate to consultation.
- (b) Cultural Resource Management Plan (CRMP) means a management plan which is in accordance with the provisions of the Archaeological Resources Protection Act of 1979, as amended, and the NHPA of 1966, as amended, and complies with Engineer Regulation (ER) 1130-2-540.
- (c) Historic Properties means any pre-European contact or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register, including artifacts, records, and material remains related to such a property or resource. For the purpose of this MOU, historic properties that are significant to the Osage Tribe are referred to as AICS and as such may be eligible for inclusion in the National Register.

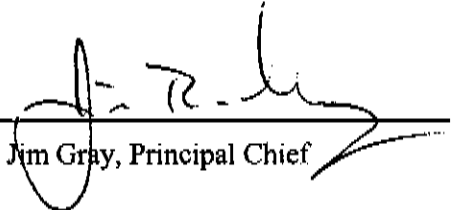
- (d) Sacred sites means those historic properties, which may include AICS and TCPs, that are sacred to the Osage and can only be designated on a case-by-case basis by the Osage Tribe's official designee(s), including but not limited to a Traditional Cultural Authority.
- (e) Traditional Cultural Authority means an official designee(s) of the Osage Tribe who is responsible for assessing and defining the religious and cultural significance of an AICS affiliated to the tribe.
- (f) Traditional Cultural Property (TCP) means those properties whether tangible or intangible that are of religious and cultural significance to a specific tribe on lands used or controlled by the MVM. TCPs are determined in consultation with the Osage Tribe.
- (g) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of the district, including those carried out by or on behalf of the MVM; those carried out with federal financial assistance; those requiring a federal permit, license, or approval (following 16 U.S.C. 470 et seq., Section 301 (7)(A-D) as amended through 2000, and 36 CFR Part 800.16(y) incorporating amendments effective August 5, 2004).

MODIFICATION, TERMINATION, AND OTHER CONDITIONS

- 12. This MOU shall take effect on the date it is signed by the MVM District Commander. The MOU shall remain in effect for a period of 5 years and may be extended for a second period of 5 years with written concurrence of the signatories, unless either party terminates it.
- 13. This MOU may be modified or amended at any time by mutual agreement of both parties in writing and may be terminated by either party upon sixty (60) days notice to the other signatory party by regular mail, certified with return receipt requested. After such notification, but prior to the date of termination both parties shall within ten (10) working days of notification, set an agreed upon date to consult and seek a mutually satisfactory solution to avoid termination.
- 14. If at any time during implementation of this MOU, either party raises an objection, both agree to appropriate consideration and consultation intended to resolve that objection.
- 15. If any provisions of this MOU are determined to be inconsistent with existing laws or regulations or directives governing the signatories, then the provisions of this MOU not affected by a finding of inconsistency shall remain in full force and effect.
- 16. This MOU is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the parties to the MOU shall be handled in accordance with applicable laws, regulations, and procedures.
- 17. Nothing in this agreement prohibits or reduces either signatory's right to full lawful remedy or recourse for failure to comply with any and all terms agreed to herein.

IT IS HEREBY AGREED, that the United States Army Corps of Engineers, Memphis District and the Osage Tribe of Indians shall in good faith jointly cooperate to achieve the principles and purposes set forth in this Memorandum of Understanding.

Signed this 30th day of June 2005



Jim Gray, Principal Chief

Osage Tribal Council
Osage Tribe of Indians

Signed this 20th day of ~~June 2005~~ ^{April 2006}



Colonel Charles O. Smithers III

District Engineer
U.S. Army Corps of Engineers, Memphis District