

APPROVED

MAR - 5 2018

**PROGRAMMATIC AGREEMENT
AMONG
THE U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT,
THE OKLAHOMA STATE HISTORIC PRESERVATION OFFICER, THE
OKLAHOMA ARCHEOLOGICAL SURVEY,
AND TULSA COUNTY, OKLAHOMA
REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL
HISTORIC PRESERVATION ACT FOR
THE ARKANSAS RIVER CORRIDOR FEASIBILITY STUDY
IN
TULSA COUNTY, OKLAHOMA**

WHEREAS, the Arkansas River Corridor Ecosystem Restoration Study was authorized by the Water Resources Development Act of 2007, Section 3132, allowing the U.S. Army Corps of Engineers (USACE) to participate in the ecosystem restoration, recreation, and flood damage components of the Arkansas River Corridor Master Plan dated October 2005; and

WHEREAS, Tulsa County is the non-Federal sponsor (NFS) with the USACE for construction and maintenance of this undertaking, and is providing the necessary lands, easements, relocations and rights-of-way; and

WHEREAS, the USACE proposes to implement the ecosystem restoration measures described in the attached Cultural Resources and Project Summary for the Programmatic Agreement, in order to restore the overall aquatic habitat and significant aquatic-related terrestrial resources within the Arkansas River Corridor in Tulsa County; and

WHEREAS, the Area of Potential Effects (APE) includes all areas of direct impacts and a 1,500-foot buffer for indirect impacts; and

WHEREAS, the SHPO and Oklahoma Archeological Survey (OAS) have entered into a cooperative agreement under which the State Archaeologist at the OAS provides special services to the SHPO in the Section 106 review process. OAS maintains the inventory of Oklahoma's archaeological resources and provides professional services to the SHPO in pre-contact archaeology. The State Archaeologist at the OAS reviews federal undertakings for possible impacts on pre-contact archaeological resources and provides written comments as the SHPO's official representative. Accordingly, the OAS has been invited to sign this Programmatic Agreement (PA); and

WHEREAS, USACE, has determined that ecosystem restoration proposed for the Arkansas River corridor within Tulsa County, Oklahoma (hereinafter, "undertaking") may have an effect on historic properties eligible for listing in the National Register of Historic Places (NRHP) (hereinafter, "historic properties"), and has consulted with the Oklahoma State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108) (NHPA), as amended, and its implementing regulations (36 CFR § 800); and

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WHEREAS, the USACE, OAS and the SHPO concur that additional cultural resource surveys are needed in proposed areas of ground disturbance, prior to project construction; and

WHEREAS, the USACE held a public meeting on February 27, 2017 in Tulsa, Oklahoma and no comments regarding cultural resources were received from the general public; and

WHEREAS, the USACE contacted nine Federally-recognized Native American Tribes during the feasibility study, resulting in two Tribes, the Seminole Nation of Oklahoma and the Osage Nation, expressing interest and thereby being invited to participate as concurring parties and neither Tribe electing to participate; and

WHEREAS, in accordance with 36 CFR § 800.6 and 36 CFR § 800.14(b)(1)(ii), execution of a PA is appropriate for this undertaking because effects on historic properties cannot be fully determined or resolved prior to the approval of the undertaking; and

WHEREAS, the USACE has invited the Advisory Council on Historic Preservation (ACHP) to participate and on September 29, 2017 the ACHP declined to enter into the Section 106 process.

NOW, THEREFORE, the USACE, Tulsa County, OAS, and the SHPO concur that the USACE will ensure that the following stipulations are implemented in order to account for the effects of the undertaking on historic properties, and to satisfy the USACE's Section 106 responsibilities for all individual aspects of the undertaking.

Stipulations

The USACE will ensure that the following measures are carried out:

I. Identification, Evaluation, Effect Determination, and Resolution

- A. **Scope of Undertaking.** This PA shall be applicable to all excavation, bank modification, planting areas, and any other ground disturbing activities related to the proposed Arkansas River Corridor Ecosystem Restoration project. The APE shall be established by the USACE in consultation with the OAS and SHPO, and shall include all areas to be directly and indirectly affected by the undertaking.
- B. **Qualifications and Standards.** The USACE shall ensure that all work conducted in conjunction with this PA is performed in a manner consistent with the Secretary of Interior's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716-44740; September 23, 1983), as amended, or the Secretary of the Interior's "Standards for the Treatment of Historic Properties" (36 CFR 68), as appropriate.

- C. Definitions. The definitions set forth in 36 CFR § 800.16 are incorporated herein by reference and apply throughout this PA.
- D. Identification of Historic Properties. Prior to the initiation of construction, the USACE shall identify historic properties located within the APE. These steps may include, but are not limited to, background research, consultation, oral history interviews, sample field investigations, and field survey. The level of effort for these activities shall be determined in consultation with the SHPO, OAS, and any Native American Indian Tribe or Tribes (Tribes) that attach religious and cultural significance to identified properties. All draft scopes of work and reports of survey or site testing investigations shall be submitted to the SHPO, OAS, and Tribes for review and comment. If previously recorded archaeology sites are revisited during cultural resource investigations, USACE will provide updated site forms to SHPO and OAS for those sites. If comments are not received by the USACE within thirty (30) days of receipt, the reports and their recommendations shall be considered adequate and the reports may be finalized. Comments received by the USACE from the SHPO, OAS, or Tribes shall be addressed in the final reports, which shall be provided to all consulting parties. If no historic properties are identified in the APE, the USACE shall document this finding pursuant to 36 CFR § 800.11(d), and provide this documentation to the SHPO and Tribes.
- E. Evaluation of National Register Eligibility. If historic resources are identified within the APE, the USACE shall determine their eligibility for the NRHP in accordance with the process described in 36 CFR § 800.4(c) and criteria established in 36 CFR 60. All draft reports of NRHP site testing or other NRHP investigations shall be submitted to the SHPO, OAS, and Tribes for review and comment. If comments are not received by the USACE within 30 days of receipt, the reports or investigations and their recommendations shall be considered adequate and the reports may be finalized. Comments received by the USACE from the SHPO, OAS, or Tribes shall be addressed in the final report, which shall be provided to all consulting parties. The determinations of significance shall be conducted in consultation with the SHPO, OAS, and Tribes. Should the USACE, SHPO, and OAS agree that a property is or is not eligible, then such consensus shall be deemed conclusive for the purpose of this PA. Should the USACE, SHPO, and OAS not agree regarding the eligibility of a property, the USACE shall obtain a determination of eligibility from the Keeper of the National Register pursuant to 36 CFR 63. For historic properties found not eligible for the NRHP, no further protection or consideration of the site will be afforded for compliance purposes.
- F. Assessment of Adverse Effects.
1. No Historic Properties Affected. The USACE shall evaluate the effect of the undertaking on each historic property in the APE. The USACE may conclude that no historic properties are affected by an undertaking if no historic

properties are present in the APE, or the undertaking will have no effect as defined in 36 CFR § 800.16(i). This finding shall be documented in compliance with 36 CFR § 800.11(d) and the documentation shall be provided to the SHPO, the Tribes and OAS and retained by the USACE for at least seven (7) years. The USACE shall provide information on the finding to the public upon request, consistent with the confidentiality requirements or 36 CFR § 800.11(c).

2. Finding of No Adverse Effect. The USACE, in consultation with the SHPO, OAS, and Tribes shall apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR § 800.5. The USACE may propose a finding of no adverse effect if the undertaking's effects do not meet the criteria of 36 CFR § 800.5(a)(1) or the undertaking is modified to avoid adverse effects in accordance with 36 CFR 68. The USACE shall provide to the SHPO, the Tribes and OAS documentation of this finding meeting the requirements of 36 CFR § 800.11(e). The SHPO, OAS and Tribes shall have 30 days in which to review the findings and provide a written response to the USACE. Failure of the SHPO, OAS, or Tribes to respond with 30 calendar days of receipt of the finding shall be considered agreement with the finding. The USACE shall maintain a record of the finding and provide information on the finding to the public upon request, consistent with the confidentiality requirements of 36 CFR § 800.11(c).
3. Resolution of Adverse Effect. If the USACE determines that the undertaking will have an adverse effect on historic properties as measured by criteria in 36 CFR § 800.5(a)(1), the USACE shall consult with the SHPO, OAS and Tribes to resolve adverse effects in accordance with 36 CFR § 800.6.
 - a) For historic properties that the USACE, the Tribes and the SHPO agree will be adversely affected, the USACE shall:
 - (1) Consult with the SHPO to identify other individuals or organizations to be invited to become consulting parties. If additional consulting parties are identified, the USACE shall provide them copies of documentation specified in 36 CFR § 800.11(e) subject to confidentiality provisions of 36 CFR § 800.11(c).
 - (2) Afford the public an opportunity to express their views on resolving adverse effects in a manner appropriate to the magnitude of the project and its likely effects on historic properties.
 - (3) Consult with the SHPO, OAS, Tribes, and any additional consulting parties to seek ways to avoid, minimize or mitigate adverse effects.
 - b) If the USACE, OAS, and the SHPO fail to agree on how adverse effects will be resolved, the USACE shall request that the Advisory Council on

Historic Preservation (the Council) join the consultation and provide the Council and all consulting parties with documentation pursuant to 36 CFR § 800.11(g).

- c) If the Council agrees to join the consultation, the USACE shall proceed in accordance with 36 CFR § 800.9.
- d) If, after consulting to resolve adverse effects, the Council, the USACE, OAS, or the SHPO determines that further consultation will not be productive, then any party may terminate consultation in accordance with the notification requirements and processes prescribed in 36 CFR § 800.7.

II. Post Review Changes and Discoveries

- A. Changes in the Undertaking. If construction on the undertaking has not commenced and the USACE determines that it will not conduct the undertaking as originally coordinated, the USACE shall reopen consultation pursuant to Stipulation I. D-F.
- B. Unanticipated Discoveries or Effects. Pursuant to 36 CFR § 800.13(b)(3), if historic properties are discovered or unanticipated effects on historic properties are found after construction on an undertaking has commenced, the USACE shall immediately halt work in the affected area and notify the SHPO, OAS, and Tribes of the discovery. Comments received from the SHPO and Tribes within 48 hours of the notification shall be taken into account by the USACE in the assessment of NRHP eligibility of affected properties, and in the development and implementation of a mitigation strategy to resolve any adverse effects. The USACE may assume SHPO concurrence in its eligibility assessment and treatment plan unless otherwise notified by the SHPO, OAS, or Tribes within 48 hours of notification. USACE shall provide the SHPO and Tribes a report of the USACE actions when they are completed.

III. Curation and Disposition of Recovered Materials, Records, and Reports

- A. Curation. The USACE shall ensure that all archeological materials and associated records owned by the State of Oklahoma or the NFS, which result from identification, evaluation, and treatment efforts conducted under this PA, are accessioned into a curation facility in accordance with the standards of 36 CFR 79, except as specified in Stipulation IV for human remains. The curation of items owned by the State of Oklahoma or the NFS shall be maintained in perpetuity by the NFS. Archeological items and materials from privately owned lands shall be returned to their owners upon completion of analyses required for Section 106 compliance under this PA.
- B. Reports. The USACE shall provide copies of final technical reports of investigations and mitigation to the consulting parties and the SHPO, as well as

additional copies for public distribution as appropriate. All consulting parties shall withhold site location information or other data that may be of a confidential or sensitive nature pursuant to 36 CFR § 800.11(c).

IV. Treatment of Native American Human Remains

- A. Prior Consultation. If the USACE's investigations, conducted pursuant to Stipulation I of this PA, indicate a high likelihood that Native American Indian human remains may be encountered, the USACE shall develop a treatment plan for these remains in consultation with the SHPO, OAS, and Tribes. The USACE shall ensure that Tribes indicating an interest in the undertaking are afforded a reasonable opportunity to identify concerns, provide advice on identification and evaluation, and participation in the resolution of adverse effects in compliance with the terms of this PA.

- B. Inadvertent Discovery. In accordance with the NHPA, the ACHP policy statement regarding treatment of burial sites, human remains, and funerary objects, and State of Oklahoma statutes protecting human skeletal remains, procedures for inadvertent discovery of human remains during historic properties investigations or construction activities conducted pursuant to this PA are as follows:
 - 1. Prior to construction, USACE shall provide a communication plan identifying points of contact and procedures to follow in the event of an inadvertent discovery to the contractor and to the USACE construction field representative.

 - 2. If human skeletal remains, funerary objects, or items of cultural patrimony are encountered during construction, the USACE shall ensure that all ground disturbing activities cease in the vicinity of the discovery. A buffer zone shall be established and reasonable effort shall be made to ensure that the site is secured from further disturbance or vandalism.

 - 3. The USACE shall immediately notify local law enforcement officials via telephone, and within 48 hours of the discovery, shall initiate consultation with the SHPO, OAS, and appropriate tribal personnel to develop a strategy to resolve adverse effects.

- C. Dispute Resolution. If, during consultation conducted under paragraphs A and B of Stipulation IV, all consulting parties cannot agree upon a consensus plan for resolving adverse effects, the matter shall be referred to the Council for resolution in accordance with the procedures outlines in 36 CFR § 800.9.

V. PA Amendments, Disputes and Termination

- A. Amendments. Any party to the PA may propose to the other parties that it be amended, whereupon the parties will consult in accordance with 36 CFR § 800.6(c)(7) to consider such an amendment.
- B. Disputes. Disputes regarding the completion of the terms of this agreement shall be resolved by the signatories. If the signatories cannot agree regarding a dispute, any one of the signatories may request the participation of the Council in resolving the dispute in accordance with the procedures outlined in 36 CFR § 800.9. The USACE shall forward to the Council and all consulting parties within fifteen (15) days of such a request all documentation relevant to the dispute, including the USACE's proposed resolution of the dispute. The Council will respond to the request within thirty (30) days of receiving all documentation. The USACE will take any recommendations or comments from the Council into account in resolving the dispute. In the event that the Council fails to respond to the request within thirty (30) days of receiving all documentation, the USACE may assume the Council's concurrence with its proposed resolution and proceed with resolving the dispute.
- C. Termination of PA. Any party to this PA may terminate it by providing a sixty (60) day notice to the other parties, provided that the parties will consult during the period prior to the termination to seek agreement on amendments or other actions that will avoid termination. In the event of termination of this PA the USACE shall comply with the provisions of 36 CFR § 800, Subpart B.

VI. Term of this Agreement

- A. This PA remains in force for a period of ten (10) years from the date of its execution by all signatories, unless terminated pursuant to Stipulation V.C. Sixty (60) days prior to the conclusion of the ten (10) year period, the USACE shall notify all parties in writing of the end of the ten year period to determine if they have any objections to extending the term of this PA. If there are no objections received prior to expiration, the PA will continue to remain in force for a new ten (10) year period.

Execution of this PA and implementation of its terms evidences that the USACE has afforded the Council an opportunity to comment on the undertaking and its effects on historic properties, and that the USACE has taken into account those effects and fulfilled Section 106 responsibilities regarding the undertaking.

Signature Page for the U.S. Army Corps of Engineers

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PROJECT
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Signatory:

Christopher A. Hussin

12 MARCH 2018

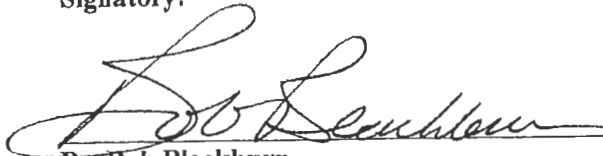
**Colonel Christopher A. Hussin
District Engineer, USACE Tulsa District**

Date

Signature Page for State Historic Preservation Officer

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Signatory:



**Dr. Bob Blackburn
State Historic Preservation Officer**

Feb. 15, 2018
Date

Signature Page for Oklahoma Archeological Survey

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Signatory:



**Dr. Kary L. Stackelbeck
State Archaeologist, Oklahoma Archeological Survey**

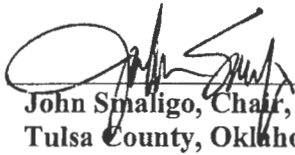
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Date

Signature Page for Tulsa County, Oklahoma


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Signatory:


John Smaligo, Chair, Tulsa County Board of Commissioners
Tulsa County, Oklahoma

3/5/18
Date

Michael M. Willis
**APPROVED AS TO FORM
ASSISTANT DISTRICT ATTORNEY**

Attest:
MICHAEL WILLIS, Tulsa County Clerk 
County Clerk

