

MEMORANDUM OF UNDERSTANDING

between

THE SOUTH DAKOTA NATIONAL GUARD

and

THE DEPARTMENT OF THE INTERIOR (DOI)

on

NATIONAL GUARD SUPPORT

to

DRUG ERADICATION AND INTERDICTION OPERATIONS

1994

1. PURPOSE

A. This Memorandum of Understanding (MOU) sets forth policies and procedures agreed to by the Adjutant General of the **South Dakota National Guard (SDNG)** and the Department of the Interior (DOI) regarding National Guard support of DOI drug law enforcement operations in the State of South Dakota.

B. The purpose of this memorandum to establish policies and procedures under which the National Guard will provide assistance to drug interdiction and eradication efforts of the DOI in the State of South Dakota, as authorized by 21 U.S.C. Section 873 and 32 U.S.C. Section 112.

C. It is understood among parties to this agreement that DOI requests for National Guard assistance may include multi-agency, Federal, state and local cooperative law enforcement efforts.

2. POLICIES AND PROCEDURES

A. All missions described within the memorandum will be accomplished when the personnel of the South Dakota National Guard are not in Federal service and are under Title 32, U.S.C. 502f, while performing normal training missions or additional duty over and above normal training.

B. All DOI requests for NG operation support will be submitted through the Plans, Operations, Military Support Officer (POMSO)/Counterdrug Coordination Officer (CDC) at telephone number 399-6772/399-6723. Current address is 2823 West Main Street, Rapid City, South Dakota, 57702-8186. Enclosure 1 contains a sample format for such requests. DOI personnel should attempt to project anticipated support requirements so as to permit their inclusion in the Governor's Counterdrug Support Program. The National Guard shall not initiate counterdrug support operations without a documented request for support from the DOI.

C. National Guard personnel immediately provide all information relating to drug operations after completion of a mission to the appropriate DOI office. The initial report may be by telephone, followed by a memorandum.

1) Information flow for reporting information is as follows:

(a) National Guard personnel reports all information to the POMSO or CDC (or designated representative).

(b) POMSO or CDC (or designated representative) reports all information to the appropriate DOI office.

(c) POMSO or CDC will submit "Information Only Report" through channels to the Adjutant General.

(d) POMSO or CDC will submit required National Guard Bureau reports within the specified suspense time frame.

D. National Guard personnel will provide all information relating to drug operations to the Adjutant General in the form of a memorandum.

E. Information gathered by members of the National Guard will be treated in the same manner as classified military information within the National Guard. Information furnished by the National Guard to DOI will be treated as sensitive law enforcement information and will be protected from public disclosure or disclosure to unauthorized persons. Information reported for law enforcement purposes may be disclosed for civil or criminal judicial purposes, in accordance with national security and Privacy Act requirements.

F. Information that would reveal the identities of individual members of the National Guard involved in counter drug operations will be protected from disclosure outside the National Guard and law enforcement agencies to the extent consistent with law and with the requirements for prosecution of cases arising from such operations.

G. DOI will provide initial and follow-up training to the National Guard. The training will cover information appropriate to cooperative missions.

H. DOI will be responsible for follow-up action on information provided by the National Guard. The DOI contact point will be Ben Campbell, telephone number 208-387-8186.

I. Any request for assistance beyond the terms of this agreement will be made directly to the South Dakota National Guard State POMSO, LTC Dennis W. Pike, telephone number 605-399-6772. Current address is 2823 West Main Street, Rapid City, South Dakota, 57702-8186.

J. The loan of National Guard equipment and special mission requests will be in accordance with current National Guard policies, procedures, and regulations.

K. When transporting, DOI personnel, the National Guard will assure the Pilot-In-Command has a minimum of 500 hours pilot time experience. If available National Guard pilot personnel are unable to meet this requirement, the National Guard will refuse the mission request.

L. The National Guard may provide as appropriate and available one or more of the below listed Office of the Secretary of Defense (OSD) approved missions in response to a request for assistance from DOI:

#1. Ground Reconnaissance. Guard members reconnoiter an area (private land, abandoned property and public land), for cultivated marijuana or other drug operations. Marijuana can be eradicated if requested by LEA. This mission could lead to another mission for further surveillance.

#2. Ground Surveillance (Drug Interdiction). Guard members maintain area surveillance on isolated airstrips, drop zones, border crossing points, shore landing points, or other locations suspected as sites for drug smuggling or production activity.

#3. Surface Transportation Support. Guard members transport LEA officers, persons in LEA custody, seized property or contraband to/from counterdrug operation sites. LEA officers must maintain custody of any evidence or suspects. Seized property includes vehicles, aircraft, watercraft, etc. This transportation assistance is limited to Continental United States, (CONUS).

#4. Aerial Reconnaissance. Guard members reconnoiter an area by air for cultivated marijuana, suspicious watercraft, aircraft, or motor vehicles.

#5. Aerial Surveillance. Guard members maintain area surveillance on isolated airstrips, drop zones, international border(s), coastal waterways, or other suspected drug operation sites/locations. (If RAID aircraft is used it will be considered a 5R mission.)

#6. Aerial Transportation Support. Guard members transport LEA officers, persons in LEA custody, seized property/contraband by air due to the remote location or because speed is essential. An LEA officer must be on board each aircraft and maintain custody of evidence. Support may include transport of LEA supplies/equipment for counterdrug support operations. This transportation assistance is limited to CONUS. Transportation Outside Continental United States (CONUS), will be handled on a special case basis.

#7. Ground Radar Support. Based on a LEA request for support, Guard members establish and operate ground radar sites capable of providing of air intercept control. Mission includes site security.

#8. Cargo Inspection (In/Out Bound). Guard members inspect cargo at border entry points. Cargo includes: unoccupied vehicles, containers, aircraft, watercraft, baggage, suspect mail, etc. Guard members will not make arrests, conduct searches, or seize evidence. LEA officers must be present at inspection sites, make seizures, and maintain custody of evidence and control of vehicle occupants.

#9. Training Program (NG & LEA). Guard members and LEA personnel conduct training such as aerial identification of cultivated marijuana, legal aspects of drug enforcement support, aircraft safety, aircraft operations, specialized equipment and other related topics. LEA's must pay for meals, lodging and transportation for LEA attendees/participants.

#10. Aerial Photo (Reconnaissance/Surveillance). Information gathering operations. The OV-1D Mohawk of the RF-4C is used to generate information about specific areas or sites. Supporting unit provides photo analysis and interpretation as required.

#11. Liaison, Planning, Coordination, and Reporting. The state establishes liaison with supported LEAs, plans and coordinates operations, resources manpower and equipment requirements for those operations, and gathers information for operational/financial reports.

#12. Greenhouse/Drug Law Detection/Eradication. Mission may involve surveillance or monitoring, eradication, destruction or dismantling of marijuana greenhouse/drug labs. This mission is designed for drug activities in enclosed areas or facilities, LEA officers accompany the operations, have obtained necessary authorizations (warrants, permits etc.), make necessary arrest/seizures and maintain custody of evidence after neutralization of chemical hazards by supported LEA. Chemical or other hazardous materials will not be handled by Guard personnel.

#13. Film Processing for Photo Reconnaissance. The supporting unit provides film processing, photo analysis and interpretation.

#14. Admin, Info, ADP, Logistics, and Maintenance Support. Guard members conduct various support operations when approved. Operation may include mandays to provide administrative, maintenance and logistics support (in MOS/AFSC related areas) to release commissioned LEA personnel for counterdrug duty. National Guard Bureau policy is that Guard members may translate typed conversations as a means to maintain interpreter proficiency and improve unit readiness. However, Guard personnel will not participate in active/real time conversation monitoring. LEA's must obtain appropriate legal authorization.

#15. Engineer Support. States may request authority to use National Guard engineer support for activities such as maintaining existing border roads, removal of abandoned vehicles suspected as drug drop-off or pick-up locations, or to destroy or deny access to (seal or raze) known "crack houses" or similar facilities such as drug labs, in support of local LEA counterdrug support operations. Local LEA and government must take possession and obtain clearances and/or permits for destruction, removal, disposal, or other environmental (EPA) hazards/concerns.

#16. Aerial Interdiction. Resources from various units/states may be brought into action in a joint Army National Guard (ARNG) and Air National Guard (ANG) "Hub" effort to detect, track, monitor, and transport LEA personnel to effect areas of drug smugglers/traffickers. Appropriate memorandums of agreement must exist between participating states. "Hub" operations will be based on LEA requests and multi-source intelligence; NG personnel will provide support and not perform arrests/searches/seizures.

3. **MEDIA COVERAGE**

Information released to the media concerning National Guard assistance to DOI or National Guard participating in drug enforcement missions will be coordinated between DOI Public Information Officer (PIO) and National Guard Public Affairs Officer (PAO). Participating National Guard personnel or specific units will not be identified by name, address or photograph unless cleared by the National Guard PAO. Public Affairs guidance is contained in Appendix 1.

4. **FUNDING**

Normally, the activities described herein will be supported from regular National Guard funds and no cross reimbursement will be required. However, any loan of equipment or special missions which may incur obligations for DOI funding must be funds authorized by the Adjutant General and DOI prior to obligation of funds and mission approval.

5. **SPECIFIC PROCEDURES**

A. The National Guard will consult DOI in the preparation of procedures for accomplishing these missions and will provide copies of all directives or other publications to DOI in advance of dissemination. Operations will not be planned so as to involve a substantial likelihood of the necessity for National Guard personnel conducting arrests, searches or seizures. Only in exigent circumstances and only when authorized by state law, will National Guard personnel make or assist directly in arrests, searches or seizures.

B. National Guard procedures for accomplishing these missions are defined in NGR 500-2 and Rules of Engagement Attachment. Rules of Engagement and Force Protection for National Guard personnel is contained in Appendix 2.

C. The National Guard will never be the lead agency nor will it be in charge of any missions (aside from the normal safety considerations and aircraft commanders responsibilities). All missions are conducted in support of a law enforcement agency.

D. DOI understands that DEA will act as the coordinating agent for all requests from Federal agencies. Any request submitted directly to the National Guard from a Federal agency other than the DOI will be rejected immediately.

E. DOI recognizes that the South Dakota National Guard also has a Memorandum of Understanding with the Drug Enforcement Administration (DEA) and the USDA Forest Service Rocky Mountain Region as well as a Joint Powers Agreement with the Division of Criminal Investigation (DCI).

F. National Guard personnel will always remain under the command and control of the senior National Guard officer present.

6. **TERM OF AGREEMENT**

This memorandum is in effect upon the last signature and will remain in effect unless rescinded by either party on a 30-day written notice or revised in writing by mutual consent.

Signed and Dated this 28th Day of January, 1994.

/s/ Major General Harold J. Sykora, Adjutant General
South Dakota National Guard

Signed and Dated this 8th Day of February, 1994.

/s/ Ben Campbell, Acting Director
Department of the Interior, Office of Aircraft Services

PUBLIC AFFAIRS GUIDANCE

1. General. Guidance provided in the referenced messages and publications remains valid and should be used to answer questions about National Guard Anti-Drug Support operations. Queries seeking more detailed information shall be referred to NGB IAW reference 1b. South Dakota Public Affairs Office (PAO) shall protect the identity of Guard personnel (photo/video) in Anti-Drug Support Operations. Point of contact for this action is MAJ Nancy Wetherill, 605-399-6721.

2. STATE PAO

a. The lead law enforcement agency Public Affairs Officer, coordinates news releases.

b. South Dakota NG PAO will use the following NGB coordinated statement in response to media/public inquiry on NG anti-drug support. "WE NEITHER CONFIRM NOR DENY PARTICIPATION IN ANTI-DRUG OPERATIONS."

c. If the lead law enforcement agency authorizes release, South Dakota NG PAO will use the following NGB coordinated statement: "THE NATIONAL GUARD IS PROVIDING SUPPORT TO (Lead law enforcement agency). WE WILL NOT GIVE SPECIFICS. QUESTIONS WILL BE REFERRED TO THE PUBLIC INFORMATION OFFICER FOR (Lead law enforcement agency)." The state PAO may provide information about the general nature of the support being provided and may identify the law enforcement agencies being supported. For example, news media representatives should be advised that the National Guard is providing support with aerial photography, transportation of law enforcement officers, aerial search for drug activity, or loan of equipment. The PAO will not reveal dates of specific operations or the identity of personnel or units participating. Operation security and the security of individuals will be kept in mind at all times when dealing with the media.

d. It will be so emphasized when support provided was a by-product of mission related training.

3. LEAD LAW ENFORCEMENT AGENCIES.

a. News releases will be the responsibility of the supported civil law enforcement agency and the South Dakota National Guard Public Affairs Office.

b. Individuals name and/or unit will not be identified.

d. Photos and/or video of National Guard personnel when identification can be made by either their name tag or by their facial features, will not be allowed.

e. Photos and/or video of National Guard equipment is authorized.

f. Lead law enforcement agencies may provide information about the general nature of the support being provided and may identify the law enforcement agencies being supported. For example, news media representatives should be advised that the National Guard is providing support with aerial photography, transportation of law enforcement officers, aerial search for drug activity, or loan of equipment. The PAO will not reveal dates of specific operations or the identity of personnel or units participating. Operation security and the security of individuals will be kept in mind at all times when dealing with the media.

4. NEWS MEDIA REQUESTS.

a. Media requests will be referred to the South Dakota NG PAO for coordination with lead supported agency. State NG PAO coordinates final approval/disapproval of news releases with NGB-PA.

b. News media representatives can accompany the National Guard on counterdrug support operations only with the approval of the LEA and notification of NGB-PA.

c. State NG PAO will coordinate news media requests to accompany Guard members on anti-drug operations with NGB-PA, and approved/disapproved only by NGB-PA and the State Aviation Officer.

d. Refer Freedom of Information requests to appropriate NG Freedom of Information/Privacy Act Officer for action.

5. OPERATIONAL ELEMENT PUBLIC AFFAIRS GUIDELINES.

a. National Guard personnel will respond to news media/public inquiries with a polite "NO COMMENT" and refer further inquiries to OIC/NCOIC or ranking member in the chain of command.

b. Use the following statement for media/public inquiry. Refer further inquiries to South Dakota NG PAO, MAJ Nancy Wetherill, 605-399-6721, or the lead law enforcement agency Public Affairs Officer.

"OPERATIONS SECURITY REQUIREMENTS PROHIBIT DISCUSSION OF MISSION PLANNING AND/OR ACTIVITIES. THIS STATEMENT NEITHER CONFIRMS NOR DENIES SUCH PLANNING AND/OR ACTIVITY IS TAKING PLACE."

c. Individuals/specific units will not be identified in news releases.

6. POINTS OF CONTACT. Contact SDPAO Major Nancy Wetherill Cml: (605)399-6721/6234/6200 or DSN: 747-8721/8234/8200 for further PA/media guidance.

SAFETY, RULES OF ENGAGEMENT, FORCE PROTECTION

a. Precommitment: Prior to deployment, all South Dakota NG personnel involved in CD support operations will receive pre-commitment briefing on the Rules of Engagement, Force Protection, and Safety procedures as outlined in NGR (AR) 500-2/NGR (AF) 55-6.

b. Force Protection: The "mission officer in charge or non-commissioned officer in charge" (MOIC/NCOIC) will ensure that pre-operation (liaison) coordination and planning with supported law enforcement agencies addresses the safety of National Guard personnel and equipment throughout the operation. Consideration will be given to potential threats to the National Guard and property for force protection purposes. The (MOIC/NCOIC) will also ensure that public affairs efforts, directed at complying with the right of the public to know, do not jeopardize the safety of National Guard personnel and equipment by disclosing personnel identification in photographs or video-recordings by the media.

c. Aircraft Safety: The operation of aircraft constitutes a significant potential hazard. Pilots in command (PIC) are responsible for the aircraft and the lives of passengers and crew. In addition to other guidance on aircraft safety, PIC will not fly into or land in known hostile fire areas and will ensure passengers are instructed in the principles of aircraft safety. Aircraft should maintain a minimum safe distance (no less than 200 meters) from any known hostile elements (out of effective small arms range) when initially inserting law enforcement personnel responsible to establish and secure landing zones for further operations. Aviation personnel will familiarize themselves with the Adjutant General's and State Aviation Officer's "Aviation Safety Philosophy" published in the SDARNG Aviation SOP.

d. Support Role: The role of the National Guard in drug interdiction & law enforcement support operations is to support LEAs. Generally, Guardsmen are not trained in law enforcement. The (MOIC/NCOIC) will ensure that their personnel are not placed in situations that could bring them in direct contact with suspects. The (MOIC/NCOIC) will also ensure that Guard members are not knowingly sent or directed to enter into a hostile environment where there is a probability of encountering small arms fire or life threatening situations. If life threatening situations occur, they must be handled according to application of force rules.

Operations where life threatening situations are likely, should be avoided where possible. Any final decision to go or not to go into a possible life threatening situation should be made using prudent judgment, keeping in mind that the safety of personnel is our greatest concern.

e. Arming of Troops: Since the National Guard is in a support role and not directly engaged in law enforcement, Guard members will not routinely be armed. Weapons and small arms ammunition, when issued, will only be used for personal protection. Arms and ammunition will be secured until issued. Rounds will be chambered only on order of the senior military member present and in conjunction with the supported LEA. Firearms will not be discharged from aircraft or motor vehicles.

f. Use of Force: Though National Guard members are not to be used to effect arrests or detention they may find themselves in a defensive situation. Guardsman may use force to defend themselves, other members of their team, law enforcement officers or innocent bystanders, but they may only use the minimum force necessary for that purpose. Deadly force is any force likely to cause serious injury or death. Force may only be used under the following circumstances:

1. Guardsmen have the right to use force to:

- (a) Defend themselves, other members of their team, law enforcement officers, or innocent bystanders.

(b) Protect property.

(c) Make arrests if they have arrest powers pursuant to para. 8 below, but they may only use the minimum force necessary for that purpose.

2. Deadly force (any force likely to cause serious injury or death) may only be used under the following circumstances.

(a) Lesser means have been exhausted or are unavailable.

(b) Risk of injury to innocent persons or bystanders is not increased by the use of deadly force.

3. Deadly force is the minimum force necessary to prevent death or serious injury to the Guard members, other members of their team, law enforcement officers, or innocent bystanders. As a rule, no physical action should be taken unless a person is in great danger of physical harm and then only when no law enforcement personnel are available or they themselves are in great peril, and lesser means of action have been exhausted when practical (i.e., mere presence, verbal warnings or threats, ruse, threatening gestures). At no time should deadly force be used to protect, or prevent the destruction of evidence, or effect an arrest or detain a person.

g. Powers of Arrest: Because of the uncertainties involved in determining whether the criteria for a citizen's arrest have been made, National Guard members engaged in drug enforcement/interdiction efforts will not make citizens arrests. If necessary, use of deadly force guidance (para. 7) applies when effectuating an arrest. All citizens have the power to make arrests. A citizen's arrest of another person may be made only:

(a) For a public offense (crime) committed in the arresting party's presence or;

(b) For a felony (serious crime punishable by imprisonment for a year or more) which has been in fact committed, even if not in the arresting party's presence if, and only if, the arresting party has probable cause to believe the person being arrested committed the felony.

Note: The discharge of any firearm, even if the intent is only to wound and not to kill, is always considered deadly force.

h. Rules of Evidence: Court system rules provide that exhibits cannot be offered into evidence in legal proceedings unless a chain of custody can be shown. This is especially true for items subject to adulteration. To ensure admissibility of evidence, only law enforcement officers should seize or possess any items that are, or may become, evidence.

i. Tort Liability: The Federal Tort Claims Act (FTCA) is applicable to Guard members engaged in drug interdiction & law enforcement support operations in a Title 32 U.S.C. 502f status. Personnel whose property is lost, damaged, or destroyed, or who suffers personal injury or death as a result of a negligent act or omission of a Guard member acting within the scope of his employment may file a claim against the United States under the FTCA. Guard members performing approved support (listed in state counterdrug support plans and approved by Office of the Secretary of Defense (OSD)) requested by LEAs, are immune from suit except for Constitutional torts (i.e., when a negligent act or omission constitutes a violation of the Constitutional rights of the injured party, including persons suspected of criminal activity); and certain intentional torts, such as assault and battery, and false arrest or imprisonment. Guard members engaged in counterdrug support activities in a state active duty status are entitled to whatever protections and immunities are afforded by state law. Civil rights violations will frequently result in lawsuits against individuals because such violations are never within the scope of duty of a government official/employee.

The definition of "civil rights" is hopelessly broad (right of privacy, right to be free from unreasonable searches and seizures, etc). Nonetheless, this exposure can be virtually eliminated by avoiding the use of citizen arrest powers or other "police officer" activity.

Sample LEA Request Support Form

(LEA LETTERHEAD)

Date

Office of the Adjutant General
SDPOTO-MS-CD
2823 West Main Street
Rapid City, SC 57702-8186

CPT Kliewer:

This is an official notification that (Requesting Agency) requests military support in conducting counterdrug operations. The operation will occur in _____ County, and is scheduled to begin (date) and end (date).

Please provide the following military support activities:

(Use SECDEF approved mission # descriptions.)

(Requesting agency) will obtain any specific legal authorization (i.e., warrants, etc.) that may be required, maintain communications with military support elements during the operation, and respond to any emergency situation. A memorandum of understanding between our organizations will control all activities.

The point of contact for this request and the proposed operation is: CPT Michael E. Kliewer, Counterdrug Coordination Officer, Cml: 605-399-6723.

(Requesting Official's Signature)

Official's Typed Name

I certify that I have reviewed the Memorandum of Understanding between the South Dakota National Guard and the Department of the Interior, (DOI), on National Guard Support to Drug Eradication and Interdiction Operations for the State of South Dakota for the fiscal year ending September 30, 1994, and that all operations and activities proposed for federal funding under the plan are consistent with and not prohibited by State law.

Signed and Dated this 27th Day of January, 1994.

/s/ Jack A. Hubbard, Deputy Attorney General
for Mark Barnett, Attorney General
State of South Dakota