

MEMORANDUM OF AGREEMENT (MOA)

among:

**U.S. Department of the Interior
Bureau of Land Management New Mexico State Office (BLM); and
New Mexico State Historic Preservation Officer (SHPO); and
Advisory Council on Historic Preservation (ACHP)**

concerning:

**Improved Strategies for Managing Historic Properties
within the Permian Basin, New Mexico**

This MOA codifies an alternative set of procedures by which the BLM will meet its Section 106 responsibilities for portions of southeast New Mexico. This alternative process evidences the BLM's commitment to adopt programmatic approaches towards compliance with Section 106 of the National Historic Preservation Act (NHPA).

These alternative Section 106 procedures are offered to the oil and gas industry of southeast New Mexico on a voluntary basis. Companies may choose not to participate at all in this program, or they may decide not to follow these alternative measures for particular projects. When industry elects not to follow these actions, they have the right to follow those Section 106 processes and consultation procedures detailed within the Protocol that allows the BLM to meet its requirements under the NHPA.

I. Purpose

The purpose of this MOA is to implement a creative, directed program to resolve adverse effects and, in particular, the cumulative and indirect effects of full-field oil and gas development in southeastern New Mexico and result in better decisions affecting the management of historic properties in the Permian Basin. High rates of erosion within the sand sheets of the region are compounding human-caused losses of artifacts, site features, and depositional integrity. The MOA seeks to acquire better knowledge about the prehistory of southeast New Mexico through the systematic application of a standard research design and a uniform field methodology. Information gained is intended to improve the management of cultural resources in southeast New Mexico and the Section 106 process. Periodic public conferences and popular and technical synthesis will ensure that the public appreciates what the study of cultural resources can say regarding cultural developments in this frontier region.

II. Basis for MOA

The parties acknowledge the following basis for this MOA:

A. Whereas, since the inception of the NHPA in 1966, archeological resource management in southeast New Mexico has been based on Class III inventories to identify historic properties, followed by a “flag-and-avoid” protocol that encourages project proponents to relocate proposed land-disturbing activities to areas without historic properties; and

B. Whereas, while this strategy was initially successful, it has now proven to be a poor management tool for addressing cumulative and indirect effects in the Permian Basin. “Flag-and-avoid” has not prevented unauthorized collections, the disappearance of diagnostic artifacts, the loss of context for surface artifact distributions, or the destruction of sites from trespassing vehicular traffic, inadvertent oil spills, and unauthorized ground disturbances. Land managers and archeologists alike find themselves in the position where no one has a good grasp of what data various kinds of sites contain and what questions important in history and prehistory those data might address. Accordingly, management decisions are hindered by the lack of knowledge of the information contained within these properties. This MOA acknowledges that these cumulative and indirect effects are taking place and creative, alternative, targeted mitigation strategies need to be devised for resolution of adverse effects; and

C. Whereas, a cultural resource technical program review conducted by the BLM and the SHPO for BLM lands in southeast New Mexico was released in March 1996, and the joint SHPO-BLM team advocated adoption of:

1. Other options besides site avoidance to avoid adverse effects, including testing and various levels of mitigation.
2. An agreement to designate where minimal or no Class III survey would be required, based on the number and density of past inventories, site density, predictive models, and intensity of development.
3. A commitment by all parties to devise progressive, creative strategies to enable the BLM to meet its Section 106 responsibilities that recognize the shortcomings of relying on avoidance as a management strategy; and

D. Whereas, the BLM New Mexico State Office and SHPO have worked closely together to advance research in southeast New Mexico since 1998, including: 1) establishing the Southeast New Mexico Roundtable Workshops; (SENMO) 2) the study titled *A Field Guide to the Geoarchaeology of the Mescalero Sands, Southeast New Mexico* (Hall 2002); and 3) the preparation of the *Southeast New Mexico Regional Research Design and Resource Management Strategy* (RRD) prepared by the Office of Contract Archeology, University of New Mexico (Hogan 2006); and

E. Whereas, in 2001, the Department of Energy funded a Preferred Upstream Management Practices (PUMP III) study titled *Adaptive Management & Planning for Cultural Resources in Oil & Gas Fields: New Mexico PUMP III Project* (Sebastian et al. 2005), which

offered a number of recommendations for more effective management of cultural resources and more meaningful information retrieval through their study; and

F. Whereas, threats to the long-term preservation of archeological properties in southeast New Mexico are coming from regional environmental changes as well; and

G. Whereas, the BLM is responsible, through appropriate planning, to preserve, protect, and minimize harm to the historic and archaeological properties under its care and administration pursuant to Sections 106 and 110 of the NHPA, as amended, and meets these responsibilities pursuant to the BLM National Programmatic Agreement, pertinent BLM manuals and handbooks, and follows the process detailed in the Protocol between the BLM and the SHPO; and

H. Whereas, the SHPO is charged with responsibilities to preserve, protect, and enhance the prehistoric, historic, and cultural heritage of New Mexico for the benefit of present and future generations under Federal and State laws and assists Federal agencies to meet their responsibilities pursuant to the NHPA, as amended, 16 U.S.C. 470(f); and

I. Whereas, in accordance with Section VI.G.4.a. of the Protocol, where the BLM and the SHPO cannot reach agreement regarding an acceptable response to a situation of adverse effect, the SHPO notified the ACHP, and the ACHP has elected to participate; and

J. Whereas, the BLM is responsible for government-to-government consultation with Indian Tribes and in development of this MOA has consulted with the Pueblo of Isleta, the Mescalero Apache Tribe, the Comanche Indian Tribe, the Kiowa Tribe of Oklahoma, Ysleta del Sur Pueblo, the Apache Tribe of Oklahoma, and the Hopi Tribe in order to solicit Tribal identification of sacred sites and traditional cultural properties that may exist within the Project Area and require protection; and

K. Whereas, the BLM has consulted with Indian Tribes cited above that have had cultural and historical ties to the Project Area covered by this MOA, has taken their concerns into account, and has invited the Tribes to sign the MOA and participate in its implementation as concurring parties; and

L. Whereas, interested members of the public, including the New Mexico Archeological Council (NMAC), the New Mexico Oil and Gas Association (NMOGA), and the Independent Petroleum Association, have been provided opportunities to comment on this MOA and have also been invited to sign it as concurring parties; and

M. Now, therefore, the Signatories agree to implement the following Section 106 procedures for participating projects in specified locations within southeast New Mexico. The BLM shall ensure that the stipulations described within this MOA are carried out.

III. Authorities

A. The NHPA of 1966, as amended, 16 U.S.C. 470 et seq;

B. The Programmatic Agreement among the BLM, the ACHP, and the National Conference of SHPOs Regarding the Manner in which BLM will meet its Responsibilities under the NHPA, March 26, 1997; and

C. The Protocol Agreement between New Mexico BLM and New Mexico SHPO, June 17, 2004.

IV. Scope of MOA

A. Project Area Covered by this MOA

1. The Project Area will consist of Federal oil and gas leases located within 28 7.5 minute U.S. Geological Survey quadrangles depicted on the map in Appendix A. This area was not defined by any specific project proponent; nor does it cover the area of potential effect tied to any specific undertaking.

2. Normal protocol procedures will apply to those portions of Federal mineral leases that extend beyond the boundary of the 28 quadrangles depicted in Appendix A.

B. Undertakings Covered by this MOA

1. The BLM will implement this MOA with regard to seismic exploration, oil and gas undertakings, and linear infrastructure developments, such as electric lines and pipelines associated with energy production within the Project Area on a project-by-project basis when energy industry applicants (applicants) elect to participate pursuant to Section V.A.1.-3.

2. Where applicants decline to contribute funds equivalent to what they normally would pay for archeological inventories, as detailed within Section V.A.1.-3., the BLM shall proceed in accordance with the procedures outlined within the Protocol.

V. Funding Sources and Allocations

This MOA is voluntary and has no committed source of funding; therefore, a variety of funding strategies will be followed in the hopes of implementing this comprehensive mitigation program within the Project Area.

A. Sources

1. The principal funding stream will derive from assessments that industry voluntarily agrees to pay in advance on a project-by-project basis into a mitigation fund managed by the BLM. The assessments will be for those projects that will no longer require archeological inventories within the Project Area. The cost to industry per project will include the average cost of a Class III pedestrian survey for oil and gas well pads and associated linear infrastructure and the types of Class II surveys traditionally required for seismic projects of a similar type and size. These costs include the expenses associated with the pedestrian surveys, including site recordation, site and project registration, and report preparation, plus the time value of not having to pay for project redesigns or reroutes necessitated by the identification, avoidance, or treatment of historic properties that could be affected by each new oil and gas or seismic operation within the Project Area.

2. A joint committee comprised of oil and gas companies, NMAC, the BLM, the SHPO, and a representative from NMOGA met and determined appropriate industry fees to be contributed into the mitigation fund in lieu of paying for Class III inventories of comparable size and types of development projects. This fee schedule, which includes an annual inflation adjustment factor, is provided as Appendix B.

3. Appendix C confirms that the applicant has elected to have the BLM follow the procedures specified within this MOA for the undertaking rather than the Protocol to meet the agency's Section 106 obligations. Appendix C consists of a form that the BLM will use to confirm an applicant's payment into the mitigation fund for specific projects in accordance with the funding strategy laid out in Appendix B. The form verifies that 1) after having paid into the mitigation fund for the project(s) specified, the BLM will not require Class III inventories for these specific Project Areas, and 2) such a commitment will be included in individual Application for Permit to Drill Conditions of Approval as well. As soon as the BLM receives and verifies that the appropriate level of funding has been provided by the applicant to the mitigation funds, the BLM will notify the applicant that they may commence work.

4. The BLM will also seek funding to carry out the comprehensive mitigation program described in this MOA from a variety of sources. The BLM will seek increases in program funding from the Washington Office for its cultural resources management program, oil and gas program, and pilot energy offices established by the Energy Policy Act of 2005. The BLM will also utilize funds held within the Roswell District management accounts established to handle trespass fines and settlements. It will seek additional grant funding from the Department of Energy and outside granting agencies.

5. The SHPO will seek funding to support the mitigation program of this MOA.

6. The BLM and the SHPO will ask several major oil and gas companies operating in southeast New Mexico to partner in this effort by providing funding to initiate and sustain the mitigation program alternatives.

B. Allocation

1. Seventy-five percent of funds obtained from applicants shall be devoted to excavations and testing of high-priority sites as explained in Section VI.F.1. below.
2. Twenty-five percent of funds obtained from applicants shall be devoted to mitigation action VI.F.2.-8. below.
3. Adjustments to the allocation formula described in 1. and 2. above can be made following the annual consultation meetings described in Section VII.B. below if agreed to by all signatory parties. Changes in the allocation formula may be justified based on accomplishments within any of the mitigation measures listed in Section VI.F. or on indications that progress in certain mitigation actions is needed before other studies can succeed.

VI. Section 106 Procedures Under This MOA

Basic procedures that the BLM will follow to meet its Section 106 obligations within the Project Area are summarized in a flowchart in Appendix D. These steps are described in detail below:

A. Avoidance of Previously Identified Historic Properties

1. The BLM will require the applicants to avoid previously identified historic properties as described in subparts 2.-6. below in the same manner as is currently required under traditional “flag and avoid” procedures. Namely:
 2. The BLM will require the applicants to avoid those historic properties already identified and determined by the BLM, or the BLM and the SHPO through a consensus determination, to be eligible for listing in the National Register of Historic Places (historic properties) and those properties whose National Register eligibility is undetermined.
 3. If a future undertaking is unable to avoid adverse effects to previously identified historic properties, the BLM will require the applicant to carry out an appropriate mitigation program, paid for by the applicant and separate from the mitigation fund, as determined by the BLM Data Recovery Review Team. For prehistoric and protohistoric resources, the mitigation program will take into account, at a minimum, site types, research domains, and field methods developed in the RRD or mitigation priorities in Section VI.F. The mitigation program’s treatment of adverse effects to National Register eligible historic-era resources within the Project Area will require that cultural resource permittees hired by the applicant develop and implement site-specific research designs independent of the RRD or treat the site within property-specific contexts developed in accordance with Section VI.F.2.
 4. If a future undertaking is unable to avoid previously identified properties of undetermined eligibility, the BLM will require applicants to provide sufficient additional information from test excavations and other appropriate studies for the BLM to make National

Register eligibility determinations following the procedures outlined in the Protocol. Any sites found to be eligible will be added to the database of sites that must be avoided or mitigated within the Project Area. Determinations of National Register eligibility under Criterion D will take into consideration the potential of the property to address high-priority research questions articulated in the RRD and any supplementary documents, such as historic contexts or earlier research designs. If determined eligible, the applicant will be required to pay for and carry out an appropriate mitigation program as defined in Section VI.F. separate from the mitigation fund.

5. The BLM may require that applicants hire qualified archeologists to monitor the effects of construction and land disturbance, if new oil and gas developments or seismic activities in areas adjacent to identified historic properties or properties whose eligibility remains undetermined could disturb the properties. Adverse effects shall be avoided. If adverse effects cannot be avoided, the BLM shall require the applicant to pay for and carry out an appropriate mitigation program separate from the mitigation fund.

6. The BLM and the SHPO will work with the NMOGA to develop and implement more effective strategies to protect and avoid historic properties on Federal leases generally but within rights-of-ways specifically after the identification process has been completed.

7. The BLM will not require applicants to avoid cultural resources that have been determined by the BLM, or the BLM and the SHPO through a consensus determination, not to be eligible for listing in the National Register of Historic Places.

B. Identification of Historic Properties and Compliance with the National Environmental Policy Act (NEPA)

1. When an applicant elects to participate in the MOA, standard Class III inventories will no longer be required pursuant to the Protocol for seismic exploration and oil and gas developments within the Project Area.

2. The BLM will continue to consult with Indian Tribes to identify traditional cultural properties, sacred sites, or use areas within the Project Area when new Federal leases are proposed and when the Carlsbad or Roswell Field Office Resource Management Plans are updated. Should any of these cultural resources be identified, the BLM will record them and determine their National Register eligibility in consultation with the concerned Indian Tribe. The BLM will also determine if any proposed undertakings in their vicinity could affect them. Any such sites found to be National Register eligible will be added to the database of sites that must be avoided or mitigated within the Project Area. If proposed undertakings could adversely affect these historic properties, the BLM will consult with the Indian Tribe to devise appropriate mitigation strategies. Mitigation may include but not be limited to the mitigation approaches described within Section VI.F.

3. Environmental Assessments prepared for oil and gas projects within the Project Area will reference this MOA as evidence that cultural resources were considered and will be treated in accordance with its terms. Such NEPA documentation will acknowledge that adverse effects to historic properties will occur but will be at least partially mitigated through the treatments

described in the MOA. Mitigation actions carried out pursuant to the terms of the MOA will be considered a categorical exclusion under NEPA.

C. Discoveries

1. If during the course of construction activities an applicant discovers new, previously unrecorded cultural resources, not including any skeletal remains that might be human or any funerary objects, the applicant will not be required to avoid them and may proceed without any authorization from the BLM.

2. However, if any skeletal remains that might be human or funerary objects are discovered by any activities during an undertaking, the applicant will cease activities in the area of discovery, protect the remains, and notify the BLM within 24 hours. The BLM will determine the appropriate treatment of the remains; if they are cultural items subject to the Native American Graves Protection and Repatriation Act (NAGPRA), the BLM will do so in consultation with culturally affiliated Indian Tribe(s) and lineal descendants. Applicants will be required to pay for treatment of the cultural items independent and outside of the mitigation fund.

3. The BLM shall carry out the above procedures in accordance with the requirements of NAGPRA as applicable.

4. Once the BLM has verified that the requirements of NAGPRA have been met, the BLM will authorize the applicant to proceed.

5. The BLM, at any time and without prior notice, may monitor ongoing construction for compliance with this stipulation.

D. Determinations of National Register Eligibility

1. Determinations of site eligibility resulting from any new surveys carried out as a form of mitigation within the Project Area will follow the procedures outlined within Protocol Section VI.E.

2. Determination of a property's qualifications for inclusion in the National Register under Eligibility Criterion D ("have yielded or have the potential to yield, information important in prehistory or history") will be based upon the potential of properties to address, at a minimum, high-priority research questions articulated in the RRD and any supplementary documents, such as historic contexts or earlier research designs.

3. Any sites found to be eligible will be added to the database of sites that must be avoided or mitigated within the Project Area.

E. Decisions Regarding Mitigation Program Priorities

1. The principal focus of treatment measures will be on the excavation, testing, and other forms of data recovery at high-priority sites within the Project Area. The BLM and the SHPO

will coordinate annually to discuss the status of treatment measures, contributed mitigation accounts, and their respective efforts to obtain State and Federal funding to contribute to the mitigation program.

2. The BLM will establish an **Advisory Workgroup** (Workgroup) made up of the BLM State Archeologist, BLM Data Recovery Review Team, BLM Pecos District cultural resource staff, SHPO, ACHP, NMAC, academic archaeologists with research interests in southeast New Mexico, representatives of Native American Tribes, and representatives of the oil and gas industry to provide advice and assistance regarding the design and implementation of the mitigation measures described in Section VI.F.

3. Within 90 days of execution of the MOA, the BLM will host the first meeting of the Advisory Workgroup. The purpose of the meeting will be to clarify MOA procedures; reach a common understanding of the role of the Workgroup in site selection and input into treatment measures that will be contracted; and discuss Workgroup participation in Task Order formulation, administration, and report review. At the first Workgroup meeting and at every subsequent meeting, the priorities, timelines, and benchmarks for all treatment measures will be discussed. These priorities will be revisited as progress is made and results are forthcoming for the different treatment measures carried out.

4. When sufficient funding has amassed in the mitigation fund provided by the oil and gas industry or made available through separate BLM funding sources to treat one of more sites or to carry out some of the mitigation measures discussed in Section VI.F., the BLM will convene a meeting of the Workgroup. These meetings will be held semi-annually or annually, unless insufficient funding is available.

5. The BLM will provide copies of proposed mitigation measures to be achieved through individual contracted Task Orders, as discussed with the Workgroup, to the SHPO, who will be afforded 30 days to provide comments. If the SHPO objects to the scope and adequacy of the treatment measures, the BLM and SHPO shall consult to reach an agreement. If agreement is not reached within 30 days, the BLM may choose to continue to work with the SHPO or the documentation shall be provided by the BLM to the ACHP for their comments. ACHP comments shall be provided to BLM within 30 days. The BLM will take the ACHP's comments into consideration in making a final decision on the treatment measures.

6. Based on the input provided in subparts 2.-5. above, the budget that is available, and the labor and analyses costs tied to a BLM on-call contract, the BLM Data Recovery Review Team and cultural staff from the Pecos District will prepare a final Task Order and will award and administer the contract for mitigation or special studies.

F. Mitigation of Adverse Effects and Improvements in the Management of Cultural Resources

The BLM will carry out one or more of the following treatment measures periodically after funds contributed by the applicants according to Section V.A.1.-2. have accumulated to the point where contracts for these measures can be awarded. The treatments have been designed to address the cumulative effects of full-field oil and gas development and the loss of cultural resources resulting from the authorization of new oil and gas facilities without the requirement for new inventories and protection or mitigation of effects of the undertakings on those resources. While it is expected that the principal focus will be on the excavation, testing, and other mitigative measures appropriate to surface sites, both the BLM and the SHPO acknowledge the need to improve a broad range of archeological practices in the Section 106 process within the Project Area.

1. Excavation and Testing.

a. The BLM Data Recovery Review Team will:

(1) Consult with the Workgroup to select historic properties for excavation or testing when it appears that their study can address, at a minimum, high-priority research questions identified in the RRD and supplementary documents; assist in understanding the surface-subsurface relationships and the information content available from intensive study of surface and near-surface contexts involving the study of thin shallow cultural deposits so common in the archaeological record of southeastern New Mexico; and further the ability of the BLM and SHPO to make accurate determinations of eligibility. Site selection will take into account 1) the data potential at candidate site(s), 2) progress that is being made to address the high-priority research questions from the RRD and supplementary documents, and 3) conditions of site integrity. Investigations will focus on those resources in southeast New Mexico that are best able to address questions concerning cultural transformation, adaptation, and interaction.

(2) Write mitigation programs so that new insights will be gained into the physical integrity of archeological sites within sand sheets. As the role and importance of particular site types in past human adaptation to the environments in the region becomes known, the BLM will be positioned to make informed decisions regarding site protection, interpretation, and public use. It is expected that the mitigation program will include and incorporate test excavations of sites and site-specific geomorphological assessments, utilizing trenching and other appropriate investigative techniques. It is also expected that this effort will focus on learning how to best extract the information content from thin shallow cultural deposits.

b. The excavation and testing will focus on:

(1) The relationship between surface and subsurface components of archeological sites. This research will involve comparison of original inventory site record forms data with more detailed surface recordation and artifact analyses from excavations. The purpose of the studies will be to improve our ability to assess site data potential from observations made during

site recordation. Results of this research will be utilized to improve inventory procedures and site recordation requirements throughout southeast New Mexico.

(2) Using site-specific testing and excavation data, along with other studies, to evaluate large-scale geomorphological mapping units (Hall 2002; Hall 2006) to predict the presence and integrity of intact, buried cultural deposits. The purpose of these studies will be to make recommendations on the best and most cost-effective way to obtain geomorphological data to assist in designing future inventories in southeast New Mexico. Any geomorphological

studies carried out in association with archeological excavations will be carefully placed so that results are not compromised by the archeological deposits.

(3) Information available from surface and near-surface contexts involving the study of thin shallow cultural deposits. This will require reconceptualizing sites in the region in line with a more mobile template. This program will consider recording information at these sites in a different manner, asking different questions about the sites, and applying new analysis procedures to them so that these more surficial properties can also contribute significantly to our understanding of human use and adaptation in this region.

(4) Effective utilization of lithic source analysis, chronological and chronometric studies, ceramic and petrographic analysis, faunal studies, archeobotanical investigations, and analyses of other types to support an understanding of historic processes that operated in southeast New Mexico.

2. Historic Contexts. Historic components make up less than 3 percent of the archeological components of the Project Area. Adverse effects to historic-era properties will principally be addressed through development of historic contexts and will be based on archival research and oral history interviews as appropriate. Historic context studies provide an overview, references to current research involving the sites, and standards for recordation, photography, and mapping. They clarify the role and impact particular types of historic-era properties had in southeast New Mexico.

a. The BLM and the SHPO are administering a BLM-funded historic context for ranches and homesteads. Documentation of ranches and homesteads will follow the recommendations contained within the historic context report once it is finalized.

b. Additional context studies will be developed for historic oil and gas, industrial potash, or Native American sites.

c. The BLM Data Recovery Team, following consultation with the Workgroup as provided in Section VI.E.2.-3., may design mitigation programs for historic-era properties that may include archival research, oral interviews, testing, or excavation.

3. Additional Surveys. The BLM Data Recovery Team, following consultation with the Workgroup as provided in Section VI.E.2.-3., will decide whether additional Class II, Class III,

or thematic surveys are needed to fill in gaps in inventory coverage within the research sampling units identified in the RRD.

4. Large-Scale Geomorphological Mapping. Large-scale geomorphological mapping at a 1:24,000 scale, beyond the Loco Hills study, beginning with a pilot study in an appropriate area will be implemented. A combination of aerial photographic interpretation and mapping followed by field checks will help determine the areas most likely to contain intact, buried cultural deposits. Such data can be an important factor in selecting sites for excavation or testing. The study may include geomorphological investigations as part of requirements for pipeline projects or other large-scale undertakings.

5. Predictive Models. Site density/predictive models were developed for the PUMP III study. These site density models predict the number of sites per acre, based on a limited set of gross environmental variables. The BLM Data Recovery Team, following consultation with the Workgroup, as provided in Section VI.E., will award contracts to refine these models to reflect how different types of sites by different time periods are distributed across the landscape in the Project Area. These more refined models will be more useful for planning developments within the Project Area to avoid impacting historic properties and for use and testing in surrounding regions to devise appropriate survey strategies and to assess the likely affects of proposed developments. The models will attempt to distinguish between common and rare resources and will differentiate prehistoric sites from resources of other time periods.

6. New Standards for Survey.

a. The BLM will work cooperatively with the SHPO to consider and implement improvements in survey and site documentation procedures, including:

- (1) Site boundary definitions;
- (2) Mapping features;
- (3) Descriptions and recordation of features and artifact assemblages;
- (4) Test excavations to identify potential for buried cultural deposits;
- (5) Site-specific geomorphological assessments of integrity of cultural deposits;
- (6) Determination of site eligibility; and

(7) Any other needed improvements in site survey techniques or recordation procedures revealed through this mitigation program.

b. Because the targeted program of excavation, testing, and other forms of intensive investigation will shed light on how survey and site recordation standards need to be improved, the BLM will share these data with the SHPO, including staff from the Archaeological Records Management Section and other members of the Workgroup.

c. The SHPO will consult with the BLM, NMAC, BLM cultural resource use permittees, the Workgroup, and other interested parties to consider improved survey and site documentation standards prior to implementation.

7. Training. Before requiring any new standards for inventory, site recording, or evaluative techniques, the BLM in cooperation with the SHPO will contract for training programs to familiarize cultural resource permittees, contractors, and applicants with proposed new requirements. The BLM in consultation with the Workgroup will craft the contract specifications and evaluate the training proposals. Qualified instructors with appropriate local experience familiar with the regional archeology will present one or more workshops.

8. Data Management. The SHPO and the BLM will explore new procedures for real-time electronic submission of inventory data, site records, reports, and associated records into the NMCRIS

VII. Annual Reports and Assessment

A. Assessments of the results of this alternative Section 106 process, including progress made regarding each of the treatment measures described in Section VI.F., will be reported by both the BLM and the SHPO in their annual reports to each other as called for in the Protocol. A copy of each of these reports shall be provided concurrently to the ACHP and NMAC.

B. Within 2 months of submission of both the BLM and the SHPO annual reports, the signatory parties shall confer to review the effectiveness of the MOA and its terms. Such meetings shall be held at the BLM Carlsbad Field Office or at a mutually agreed upon location.

VIII. Native American Tribal Government Participation

A. The BLM will continue to consult with Native American Tribes regarding the MOA procedures and invite their continued participation.

B. The BLM will continue to consult with Tribes to identify traditional cultural properties, sacred sites, or use areas that may not have been identified by prior Class II or Class III archeological inventories within the 28-quad Project Area.

C. The BLM will consult with Tribes regarding programs of data recovery as provided in the Protocol.

D. All consultations will follow the guidance provided within the BLM Manual 8120, Tribal Consultation under Cultural Resources Authorities and BLM Manual Handbook H-8120-1, Guidelines for Conducting Tribal Consultation.

E. The BLM will provide the Tribes with a copy of the annual report, submitted to SHPO and the ACHP that includes a summary of the results of the alternative Section 106 process.

IX. Public Participation

A. The BLM and the SHPO will consult with the NMAC, NMOGA, and SENMO members on the results of this program as results become available.

B. The BLM and the SHPO will sponsor an annual colloquium, beginning within 2 years of signing of the MOA, to discuss work performed under the MOA and other cultural resources studies relevant to cultural resources work in the Project Area.

C. The BLM and the SHPO will fund and organize a public conference in southeast New Mexico to explain the results of the mitigation program to local communities, the public, industry employees, public officials, and amateur archeological societies. This public conference will be held as soon as substantial results are available to share with the public, but, in any event, no later than the fifth year of this program.

X. Periodic Program Assessment

A. The BLM will award a task order by the end of the fifth year of the MOA to revise the RRD and to synthesize all data produced through this program via its on-call contract. The contract will assess progress in addressing questions posed in the RRD based on the results of the excavation, testing, data recovery of other forms, and improved survey data. Such a refinement of the research design will reflect current theory and other relevant work in the region. The updating will recast and reprioritize research questions, modify definitions and site typologies, and modify testing and excavation fieldwork standards. This synthesis will be printed and distributed as part of the *New Mexico BLM Cultural Resources Publication Series*. Copies of the report will be provided to the signatories.

B. Within 1 year of completion of each synthesis, the SHPO, in cooperation with the BLM, will prepare and disseminate a popular summary of the research results for a public audience. It will condense key results of this data-recovery program in nonscientific, layman terms. Popular summaries will acknowledge the contributions of the oil and gas industry and will explain to local communities how the scientific study of southeast New Mexico archeology is advancing our understanding of cultural adaptation. Copies of the report will be provided to the signatories.

C. As funding permits, new heritage education curriculum materials, based on the results of the data recovery and other studies, will be developed by the SHPO in cooperation with the BLM.

D. If the financial contributions accumulated in the mitigation fund after 5 years are judged by the BLM and the SHPO to be insufficient to initiate significant programs of mitigation, then these parties will withdraw from this MOA and terminate it. The BLM and the SHPO will then consult to determine the most appropriate use of the limited funds remaining in the mitigation account and will contract for the use of such funds in a manner that best advances the management of heritage resources in the Project Area. Should the parties be in disagreement, Section XI. Dispute Resolution will take effect.

E. During the fifth year of the MOA, the BLM and the SHPO will convene an evaluation meeting with all consulting parties to the MOA to assess its effectiveness. Based on the results of the evaluation, the BLM, SHPO, and ACHP may or may not 1) modify procedures herein; 2) extend the MOA for a defined period or time; or 3) make the MOA provisions permanent through an amendment to the Protocol. Without explicit written agreement between the signatory parties at the end of the formal assessment 5 years after this MOA is executed, the MOA will terminate.

F. Five years after this MOA has been executed, the BLM will prepare or award a task order to prepare a report that identifies ways the BLM can improve management of historic properties in the Project Area. The report will be based upon the results of studies performed under the MOA or relevant to the Project Area and will be made available to the signatories. Recommendations of this report will be taken into account by both the BLM and the SHPO in determining whether to extend the MOA and when negotiating new versions of their Protocol Agreement.

XI. Dispute Resolution

Should any disputes arise concerning the implementation of this MOA, the issues will be addressed and resolved in accordance with Section XIII. of the Protocol.

XII. Amendments and Termination

A. Any signatory to this MOA may request that it be amended by informing the other parties in writing of the reason for the request and the proposed amendment language, whereupon the Signatories will consult to negotiate language acceptable to all parties. Amendments shall be considered operable upon the date of acceptance by all signatory parties.

B. Any signatory may terminate this MOA by providing a 60-day notice to the other signatories provided that they consult during this period to seek agreement on modifications to the MOA. If the Signatories are unable to resolve the differences within that period (or longer period if agreed to by all Signatories), the MOA will be terminated and Section 106 compliance procedures for the Project Area will revert back to standard compliance processes provided for in the Protocol.

C. If this MOA is terminated, any on-going contracts will be completed and their final reports produced. Then, any funding remaining will be used in accordance with Section X.D.

XIII. Definitions

A. *Cultural resources* mean a definite location of human activity, occupation, or use identifiable through field inventory (survey), historical documentation, or oral evidence. The term includes archeological, historic, or architectural sites, structures, or places with important public and scientific uses, and may include definite locations (sites or places) of traditional cultural or religious importance to specified social and/or cultural groups. Cultural resources are concrete, material places and things that are located, classified, ranked, and managed through the

system of identifying, protecting, and utilizing for public benefit. They may be but are not necessarily eligible for the National Register.

B. *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. The term includes artifacts, records, and remains that are related to and located within such properties and also includes properties of traditional religious and cultural importance to an Indian Tribe that meet the National Register criteria. The term “eligible for inclusion in the National Register” includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register criteria and all other properties that have been determined by the BLM, or the BLM and the SHPO through a consensus determination, to be eligible for listing in the National Register.

C. *Class II survey or inventory* means a sample survey that covers less than 100 percent of the target area. They are usually statistically based samples designed to help characterize the probable density, diversity, and distribution of archeological properties in a large area by interpreting the results of surveying limited and discontinuous portions of the target area.

D. *Class III survey or inventory* means a continuous, intensive survey of an entire target area, aimed at locating and recording all archeological properties that have surface indications, by walking close-interval parallel transects until the area has been thoroughly examined.

E. *Historical-era resources* mean cultural resources that post-date A.D. 1600 in southeast New Mexico.

F. *Time value* means the financial savings that would occur to industry from not having to include considerations pertaining to cultural resources in their decision-making processes. These indirect savings include, but are not limited to, not having to fund reroutes and the redesign of projects; paying for equipment down-time; funding follow-up surveys of alternative locations; unorthodox drilling procedures; less than optimum seismic data when grid patterns are adjusted to avoid sites; and unpredictable schedules.

G. *BLM Data Recovery Team (DRRT)* means the five-person group of senior cultural heritage specialists authorized through agreement between the BLM and the SHPO to review and approve programs of data recovery. The DRRT will comment on and suggest improvements to major testing and data recovery proposals proposed by cultural resource permittees and will communicate any needed changes to the BLM Field Office archeologists within 15 working days after receipt of all materials. Upon acceptance by the BLM Field Office of the recommendations of the DRRT, the data recovery proposal is provided by the Field Office to the SHPO for information purposes only.

XIV. Signatures

Separate pages to follow for each party.

A. Signatory Party:

Bureau of Land Management, New Mexico

By: Linda S. Ruddle

Date: May 5, 2008

Title: State Director

A. Signatory Party:

New Mexico State Historic Preservation Officer

By: *Laura Stieb*

Date: *05 May 2008*

Title: *NM SHPO*

A. Signatory Party:

Advisory Council on Historic Preservation

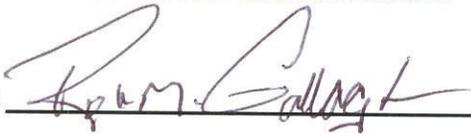
By: John W. Fowler

Date: 5/8/08

Title: EXECUTIVE DIRECTOR

B. Concurring Party:

New Mexico Oil and Gas Association

By: 

Date: 5-5-08

Title: President

B. Concurring Party:

New Mexico Archeological Council

By: Tim Mafel

Date: 5/19/08

Title: PRESIDENT

B. Concurring Party:

Hopi Tribe

By: _____

Date: _____

Title: _____

B. Concurring Party:

Independent Petroleum Association of New Mexico

By: _____

Date: _____

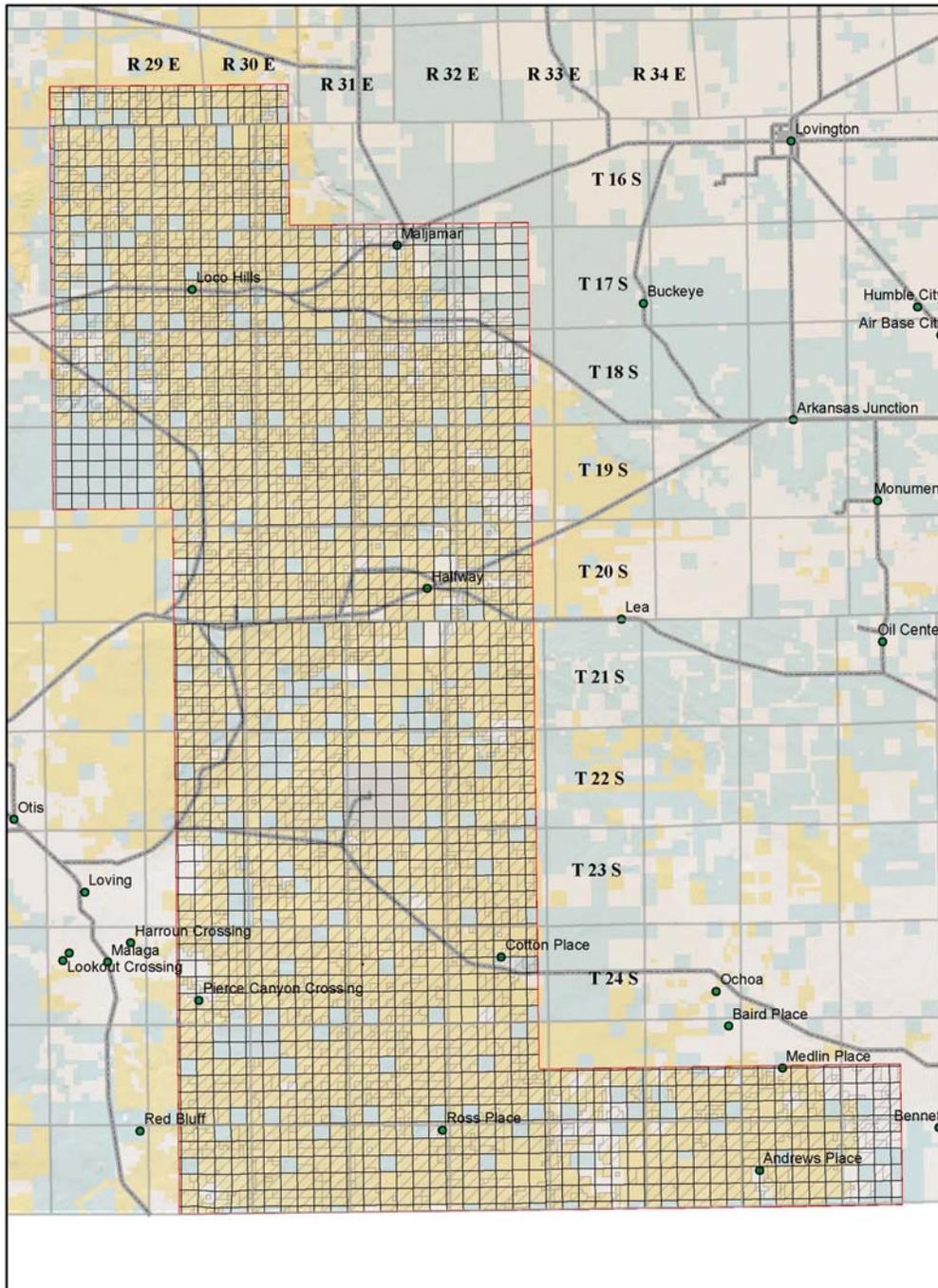
Title: _____

APPENDIX A

Map of Project Area

This map depicts the 28 USGS quadrangle maps within which the Section 106 procedures described by this MOA will apply. This area is outlined in red on the map. The legal descriptions of Township and Range are indicated on the map and local towns are plotted for orientation. The area is located in southeast New Mexico in Lea County.

PERMIAN BASIN PROJECT AREA
Federal Leases



Appendix B
Funding Formulas

Application for Permit to Drill (wells and immediate environment)

- \$1,300/well for the pad and a ¼ mile of road
- Anything over ¼ mile of road is \$0.15/linear foot
- Both prices above include the recording of sites and administrative expenses

Pipeline Projects

- \$1,200 for up to 1 mile of pipe (price includes a \$1,000 base rate + \$100 charge for recording sites + \$100 for administration, travel, taxes, etc.)
- Anything over 1 mile will be rounded up to the nearest ¼ mile and the rate will be an additional \$250 per ¼ mile

Electric Projects

- \$600 for up to 1 mile of electric line (this includes a \$500 base rate plus a \$100 charge for recording sites)
- Anything over 1 mile will be charged \$0.17/linear foot

Seismic Projects

- \$400/mile (this includes a base rate + costs for site recording, reroutes, and administration)
- Projects will be rounded up to the nearest mile

Inflation Adjustment

- Unit prices will be increased 3 percent per year for each year this MOA is in effect
- Inflation adjustments to unit prices will occur at the anniversary date of the last signature to this MOA

Appendix C

Confirmation of Payment Form

Form NM 8140-9
(March 2008)

**United States Department of the Interior
Bureau of Land Management
New Mexico State Office**

Permian Basin Cultural Resource Mitigation Fund

The company shown below has agreed to contribute funding to the Permian Basin Cultural Resource Fund in lieu of being required to conduct a Class III survey for cultural resources associated with their project. This form verifies that the company has elected to have the Bureau of Land Management (BLM) follow the procedures specified within the Memorandum of Agreement (MOA) concerning improved strategies for managing historic properties within the Permian Basin, New Mexico, for the undertaking rather than the Protocol to meet the agency's Section 106 obligations.

Company Name: _____

Address: _____

Project description:

_____.

T._____, R._____, Section _____ NMPM, _____ County, New Mexico

Amount of contribution: \$_____

Provisions of the MOA:

A. No new Class III inventories are required of industry within the Project Area for those projects where industry elects to contribute to the mitigation fund.

B. The amount of funds contributed was derived from the rate schedule established within Appendix B of the MOA. The amount of the funding contribution acknowledged on this form reflects those rates.

C. The BLM will utilize the funding to carry out a program of mitigation at high-priority sites whose study is needed to answer key questions identified within the Regional Research Design.

D. Donating to the fund is voluntary. Industry acknowledges that it is aware it has the right to pay for Class III survey rather than contributing to the mitigation fund, and that it must avoid or fund data recovery at those sites already recorded that are eligible for nomination to the National Register or whose eligibility is unknown and that any such payments are independent of the mitigation funds established by this MOA.

E. Previously recorded archeological sites determined eligible for nomination to the National Register or whose eligibility remains undetermined must be avoided or mitigated.

F. If any skeletal remains that might be human or funerary objects are discovered by any activities, the land-use applicant will cease activities in the area of discovery, protect the remains, and notify the BLM within 24 hours. The BLM will determine the appropriate treatment of the remains in consultation with culturally affiliated Indian Tribe(s) and lineal descendents. Applicants will be required to pay for treatment of the cultural items independent and outside of the mitigation fund.

Company-Authorized Officer

Date

BLM-Authorized Officer

Date

Appendix D

Flowchart for Basic MOA Procedures

BASIC PERMIAN BASIN MOA PROCEDURES

