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Cultural and Historical Resource Protection Guidelines

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PREFACE

The requirements for cultural and historical resource protection for a Montana Strip Mine Permit (SMP) are rigorous and, for those of us who have to deal with them, complex. Because a Montana SMP is considered a surrogate federal "action" (see below), the cultural and historical review and protection process is carried out under the requirements of the National Historic Preservation Act (16 USC 470, as amended) and its pertinent regulations (36 CFR 800), as well as several other federal statutes and regulations.

Compliance with these provisions can be a complicated, costly and sometimes confusing process for an applicant or operator. Because of this, the Montana Department of Environmental Quality (MDEQ) has put together a step-by-step, "plain English" explanation of how the cultural resource protection process works (it does), and of who is responsible for what/when/how.

FOOTNOTE FOR THE 2008 EDITION: *This edition of the Cultural Resource Guidelines has been revised to reflect changes in 36CFR800, with explanatory language to assist operators in compliance. The major effects of the most recent changes have been to strengthen the definition of what constitutes a "Federal action", strengthen the public involvement provisions, clarify the Native American role in the consultation process, and change the definitions of what constitutes an "adverse effect" on archeological sites.*

From the operator's standpoint, the last change is probably the most visible. The old regulations provided an exemption from an "adverse effect" finding, for the destruction of archeological sites which would be excavated (data recovered) according to an approved plan. The revised regulations eliminate this exemption. Regardless of the recovery of data, destruction of archeological sites by mining must now be considered an "adverse effect", and treated accordingly.

The primary impact of this change is that treatment plans for archeological sites must now (as was formerly the case for historic sites) be subject to a formal Memorandum of Agreement (MOA) among DEQ, OSM and the SHPO. The Advisory Council must also be afforded the opportunity to participate (or not) in the drafting of the MOA, as must affected Native American or other public groups.

Obsolete portions have been eliminated. New additions are preceded by "Notes" in italics, for ease of review. bb

INTRODUCTION:

The National Historic Preservation Act (NHPA) requires that federal agencies evaluate how each of their projects or tasks (called "actions" or "undertakings") could affect cultural or historic resources. It requires that those resources be identified, and that those which are eligible for *or potentially eligible for* the National Register of Historic Places (NRHP) be protected, and treated so that adverse impacts (effects) are prevented or minimized. (See Appendix A, "National Register Eligibility", for details on how NRHP eligibility is evaluated.)

Section 106 of the NHPA mandates that the cultural resource evaluation be carried out in a specific sequence of steps, "in consultation" with the State Historic Preservation Officer (SHPO), as well as other "interested parties". This is to assure that the SHPO and other interested parties in the state have a say in the federal permitting process. Section 106 also requires that the Advisory Council on Historic Preservation (Council) has the opportunity to review and comment on a proposed action that will affect historic properties.

The U.S. Office of Surface Mining Reclamation and Enforcement (OSM) is the responsible federal agency for coal mine permits, under the federal Surface Mine Control and Reclamation Act (SMCRA). Since Montana's state coal permitting program is run with OSM approval, funding and oversight, the issuance of a Montana coal permit meets the requirements for a "federal undertaking", and is therefore subject to the Section 106 review process. To reflect this, both SMCRA and Section 17.24 of the Administrative Rules of Montana require that cultural resource evaluation be carried out according to Section 106.

THE GOAL OF THE PROCESS:

The goal of the Section 106 process is to identify cultural resources which will be impacted by a proposed action, to determine which ones may be eligible for the National Register, to treat potentially eligible sites or properties in such a way that they suffer no (or minimal) adverse effect....and to assure that the State (i.e., the SHPO) has a voice in this process.

The evaluation process aims, in effect, at answering a series of questions about a proposed mine permit:

- 1. What area will be affected by the proposed action? Both direct and indirect effects must be considered. The area of effect, therefore, may extend outside the actual permit boundary.***
- 2. What cultural/historic resources lie within the affected area?***
- 3. Are any of the resources eligible for the National Register? Why?***
- 4. For those eligible sites to be affected, are any of the effects of the proposed action adverse?***

5. *What measures can be taken (mitigation or "treatment") to offset or eliminate the adverse effects?*
6. *After these steps are taken, what is the net adverse effect?*

The ultimate solution, of course, would be to modify the proposed plans to completely *avoid* sensitive cultural or historic resources. This is *always* the *preferred* alternative. **Section 106 recognizes, however, that it will not always be possible or practical to do so. It also acknowledges that it may not be possible by any means to completely eliminate adverse effects for all properties, for economic or other reasons.**

Section 106 allows the responsible agency to proceed, as long as consultation has taken place and maximum practical efforts have been made to eliminate, reduce or minimize the adverse effects of the action.

In this respect, the Section 106 process does *not* place either the Council or the SHPO in a "regulatory" position with respect to the issuance of, or conditions to, a Montana SMP. MDEQ is the lead permitting agency, with OSM oversight. **As long as the consultation process has been followed in good faith, MDEQ (and OSM, in its oversight role) make the final decision(s) regarding permit issuance and compliance.**

FORCE:

Nothing in the NHPA specifically *forbids* adverse effects to historic properties, or *requires* a specific treatment, such as avoidance, for such properties. The primary effect of the NHPA is to require the identification of potentially affected properties resulting from federal (and related) actions, and to establish a consultation process which assures that the states and the public have a say. *The NHPA is not like the Endangered Species Act.* It is a *procedural* statute, rather than an action-forcing one.

It is, however, a relatively *powerful* procedural statute. The Advisory Council for Historic Preservation has approval powers over agency CRM (cultural resources management) programs, as well as oversight of (at least) major agency CRM decisions. While agencies are, in the end, free to make decisions regardless of the Advisory Council's opinions, they *must* follow the required process of consultation, or fall afoul of the NHPA. In practice, federal agencies usually make every effort, when controversies arise, to arrive at a compromise which is acceptable to the Council.

THE APPLICANT'S ROLE:

The responsibility for the cultural/historical resource protection process for coal mines belongs to MDEQ and OSM. The burden of *supporting* that process with data collection and analyses falls upon applicants and permittees, as it does in other disciplinary areas such as vegetation, soils or wildlife.

An applicant for, or holder of, a Montana SMP is obligated to support the evaluation and protection efforts as summarized below:

- **The applicant must carry out, using qualified, experienced consultants, contractors or employees and acceptable methodology, an inventory for cultural and historic resources** within the area to be affected by the proposed operation (unless such an inventory has already been completed)¹. The inventory must include evaluations of the NRHP-eligibility *or potential eligibility* of all such sites.²
- **The applicant must design and carry out appropriate mitigation/treatment measures** for affected NRHP-eligible (or potentially eligible) resources, in order to offset possible adverse impacts.³
- These efforts (identification, evaluation and treatment) must be carried out with the approval of, and under the oversight of MDEQ, acting in consultation with the Montana SHPO.
- Once a permit is issued, *the holder of a Montana SMP is under an ongoing obligation to identify and protect unexpected or incidental finds of cultural resources.*

[The applicant's choice of a contractor for the cultural resource work can save a certain amount of grief. There are a number of qualified contractors both in and outside of Montana. Both the SHPO and BLM keep lists of qualified contractors. **MDEQ recommends that an applicant, especially one new to the permitting process, select a contractor who is familiar with the Section 106 process**, preferably (but not necessarily) one who has worked previously in Montana. This way, the contractor can be effectively utilized to help "get you through the 106 process".]

THE RESOURCES:

The term "Cultural Resources" covers three broad categories of properties. The first is **prehistoric sites**. These are primarily archeological sites, of value for their ability to provide information about early North American life ways. Other prehistoric features may include rock art sites, stone alignments, and the like.

The second category is **historic sites**. In the rural Montana coalfields, these are primarily homestead structures, in various states of repair or disrepair. Other historic entities could include old trails or roads, canals, mine buildings and so on.

The third category is commonly called "**Traditional Cultural Properties**" or "TCP's". These are sites or features which are valued for their association with specific traditional Native American lifestyles, or spiritual practices or values. (See Appendix "E", Native American

1 ARM 17.24.304(2)

2 Full NHPA protection is extended to potentially eligible sites, as well as eligible sites, until eligibility is formally resolved.

3 ARM 17.24.318

Consultation, for more detail on this aspect.)

Relatively recent developments have created a fourth, related category of resources: "**Historic Landscapes**". This concept is directed towards protecting the integrity of resources where the *visual setting* may be an important, integral part of the resource. (See Appendix "B", Historic Landscapes, for details on this item.)

THE CULTURAL RESOURCE CONSULTATION PROCESS:

The cultural resource protection provisions of Section 106 focus on sites which (a) are eligible or potentially eligible for the National Register of Historic Places, and (b) would be impacted by the proposed action. As noted previously, evaluating the effect of a proposed mine on cultural resources involves the following steps:

- Identifying the area of potential impact or "effect",
- Identifying the list of potential interested parties
- Identifying cultural or historic resources within the proposed area of effect,
- Determining if any of those resources are eligible (or potentially eligible) for the National Register of Historic Places,
- Developing measures (treatments) for each *eligible, affected* resource which can offset or reduce the adverse impacts to the eligible features,
- Projecting the net "effect" on the resources after mitigation, and
- Carrying out the approved measures.

These steps are all carried out in consultation with the SHPO and, as appropriate, the Council, applicant, other agencies, affected Native American groups and the public.

*NOTE: Technically, the formal Section 106 consultation is supposed to be carried out between the lead federal agency (OSM), the SHPO and (where applicable) the Council. **Under Montana's approved regulatory program with OSM, all of the primary consultation with the SHPO is done by MDEQ, subject to OSM oversight.** When MDEQ issues its findings as a result of the consultation, it passes them through OSM for concurrence, and thence to the SHPO for their concurrence. For this reason, OSM should be considered to be involved at every "node" in the consultation process, although their actual participation takes the form of an oversight role.*

1. BEFORE THE FIELD SURVEY:

Prior to permit application, the company or its consultant must notify MDEQ of its permit application plans, and discuss them with MDEQ's Cultural Resource Specialist. MDEQ will notify the State Historic Preservation Office, to begin consultation. **Where the proposed actions will impact lands under state, tribal or federal control, directly or indirectly, the pertinent land management agencies must be included in the consultation process.**⁴ Specific examples include the BLM, USFS, BIA, and Indian tribal organizations, and the Trust Lands Division of the Montana Department of Natural Resources and Conservation.

MDEQ's Cultural Resource specialist will consult with the SHPO at this point to determine the following items for the proposed action:

- ***The actual area to be impacted by the various aspects of the mining or prospecting permit application, called the "Area of Probable Effect" (APE).*** This will at a minimum consist of areas to be actively disturbed by mining (i.e., pits, haul-roads, facilities, etc.), as well as a "buffer-zone", usually 1/2-mile beyond the disturbance limit, where blasting activities could accelerate deterioration of features like rock art sites, rock shelters, or standing homesteads.

In the case of an underground mine, subsidence effects need to be considered in determining the APE. Predictions of severe subsidence or ground failure zones could necessitate a Class III inventory for such areas (see next section).

The potential for the existence of a historic "landscape", or for a visual intrusion into a pristine historic setting, could necessitate the expansion of the "buffer-zone" survey. To the degree possible, this potential should be defined *early* in the process.

- ***The existence and adequacy of already-existing resource surveys.*** (Since standards for survey work have been tightened since the 1970's, the mere existence of a previous survey does not necessarily mean that it is adequate to the present day.)
- ***The likelihood that the impact area contains undiscovered or unrecorded cultural resources.***
- ***The nature, scope and intensity of any additional inventories which may be required.***
- ***The list of "Interested Parties" which must be notified of the proposed action and offered the opportunity to join in the consultation process.*** This will, at a minimum, include Indian tribes traditionally associated with the area of impact.

Note: The 36 CFR 800 regulations stress that Native American groups with traditional ties to or concerns with the area must be notified as potential interested

4 ARM 17.24.404(5)(c)

parties. A later section of this guideline deals specifically with identification of and consultation on Traditional Cultural Properties. It is strongly recommended, however, that potentially interested Native American groups be contacted at this earlier point in the process, and given the opportunity to participate formally in the consultation process.

2. THE CULTURAL RESOURCE SURVEY:

A comprehensive resource inventory will identify possible cultural or historic resources within the proposed project area. This will involve both literature and field survey work, as well as consultation (when appropriate) with Native Americans. The scope and intensity of the survey will depend upon the nature of the proposed disturbance, the types of resources which are anticipated, and previous cultural resource work on the project and in the area.

- A. The SHPO will provide a file search for known sites in the APE prior to the field survey.
- B. With most *new* mines, the initial consultation will likely conclude that (a) the area has not been surveyed previously, or (b) that previous surveys (many of which were done in the 1970's) are inadequate to meet present standards, or provide only partial coverage. For expansions of existing mines, it may define new areas which have not been adequately surveyed.
- C. The Cultural Resource survey must be designed and carried out by a qualified archeologist, as defined by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. In the event that federal lands are involved, note similar stipulations in 16 USC 470 (The Archeological Resources Protection Act of 1979). (The survey must also comply with the requirements spelled out in any Memorandum of Agreement (MOA) covering the project, if such exists.)
- D. The basic requirement is for a ***Class III (intensive) survey*** of lands projected for **active** disturbance, and a ***Class II (Buffer-level) survey*** of areas which could be **indirectly** affected. The Class III inventory means a transect survey at 30-meter intervals for areas which will see active disturbance (mining, stockpiles, facilities, roads, ponds, highwall reduction, etc.).

(In the case of an underground mine, the active disturbance area is usually restricted to the portal, facilities and haulways. **Predictions of severe subsidence or ground failure, however, could necessitate a Class III inventory for the affected areas.**)

A **buffer zone** is surveyed selectively for rock art, rock shelters and/or standing structures in any area which could be indirectly disturbed by phenomena such as blasting vibration or ground settling.

Two types of features could necessitate expanding the scope of the survey beyond the normal buffer zone. The potential for *culturally or spiritually significant Native American sites (TCP's)* and the need to screen some of these from visual intrusion could push the inventory for these sites beyond the usual buffer zone.

The cultural resource consultant also needs to do a careful preliminary investigation of the potential for *historic landscape values*, and of the potential for visual intrusion into the setting of intact historical structures which may lie beyond the usual buffer zone. See the separate section on this topic for additional guidance.

- E. Section 106 tends to treat the inventory, the eligibility determinations and treatment decisions as separate entities. **For practical purposes, the goal of the field survey and report should be to produce enough information to not only identify the resources, but to make solid recommendations on their NRHP eligibility and provide summary professional recommendations regarding treatment/mitigation of those historic resources that will be impacted.**
- F. MDEQ will notify the appropriate Native American groups as soon as the applicant signals the intent to apply for a mining or exploration permit, or a major permit modification, to initiate consultation.

Native American response to this notification is difficult to predict. Interest may range from active participation, through secondary participation (keeping the parties informed of progress and findings), to expressions of no interest or even no response. If no response has been received prior to undertaking the field inventory for prehistoric/historic resources, the consultant should nonetheless make a special effort to identify physical features commonly associated with traditional Native American cultural/spiritual values.

These include possible vision-quest sites; rock cairns or alignments, springs, rock art, and possible rock-crevasse burial sites. These features must be recorded and included in a separate subsection of the inventory report. Should such features be found, MDEQ will notify the appropriate Native Americans of the fact.

3. THE CULTURAL RESOURCES SURVEY REPORT:

- A. **The Cultural Resources survey report must be submitted to MDEQ as a part of the permit application**, with one extra copy of the report. A third copy will go to SHPO. (The county copy of the permit application must have site location information deleted to protect the sites.)
- B. The report must meet SHPO and Department of the Interior standards⁵, and for

⁵ As outlined in sources such as Secretary of the Interior's Guidelines and Treatment of Archeological Properties: A Handbook

clarity should include the following items:

- i) **A concise description of the scope and nature of the proposed disturbance** (limits of the various types of disturbances, etc.). This must include a *map*, using a mine operations map as its base. The map should indicate proposed permit boundaries, and areas of probable effect.
- ii) **A description of the survey work:** Previous surveys, area surveyed, methodology, etc. The areas surveyed must be shown by type, intensity, etc. It should include a map similar to the above, for clarity.
- iii) **A *site map***, showing the location of all sites within the different survey areas. *NOTE: Native American groups may wish for the location of certain types of Native sites to be kept confidential. This should be checked with any interested Native American group prior to going with "public copy" of the inventory report.*
- iv) **A *narrative summary for each of the sites recorded*** within the survey boundary, including contractor's or consultant's recommendations as to NRHP eligibility, further work needed to resolve eligibility, etc.
- v) **A *table which lists all sites***, broken down by site type (prehistoric, historic, etc.). The table must include the consultant's recommendations as to their eligibility (or potential eligibility) for the National Register, and the potential impacts on the site. Criteria for eligibility shall be those presented in 36 CFR 60 and the National Historic Preservation Act. Sites requiring additional work to resolve eligibility should be noted as well.
- vi). **A *second table addressing only NRHP eligible or potentially eligible sites***. It must list the eligible sites, as well as:
 - a) The specific nature of the impact (mining, roads, spoil, etc.)
 - b) The probable date of impact,
 - c) A summary description of the mitigation/ treatment measures recommended, and
 - d) A proposed timetable for the mitigation/ treatment measures to be carried out.
- vii) The report must include ***properly executed site forms for each site***. The SHPO copy of the report should contain glossy photographs.

MDEQ and the SHPO will evaluate the report for completeness and technical adequacy, and for its specific recommendations regarding site eligibility and

treatment.

4. EVALUATION OF NATIONAL REGISTER ELIGIBILITY:

MDEQ will review the report's recommendations as to the National Register eligibility of each site, in consultation with the SHPO. (See Appendix "A", National Register Eligibility.) MDEQ will submit its findings, in consultation with OSM, to the SHPO. The SHPO will respond, indicating either concurrence with the recommendations, or disagreement. ***It is strongly recommended that the company participate actively in this consultation, because of its importance to the timing and/or cost of the permitting process.***

The most desirable (and usually timely) result of consultation is concurrence by the SHPO. This does not always happen, however. In the event that the SHPO **fails** to concur with MDEQ's findings on eligibility, however, three courses of action are available:

- A. ***MDEQ can engage in additional rounds of exchange with the SHPO over the issues.*** This usually works best where additional data or explanations are needed. *In cases where there is serious disagreement over site eligibility between MDEQ or the applicant and the SHPO, the applicant should keep in mind that prolonged debate could add months to the consultation process, for little gain⁶.*
- B. ***MDEQ can defer the eligibility call to the Keeper of the National Register (National Park Service).*** At the point where the SHPO indicates disagreement with MDEQ's (and OSM's) findings, MDEQ and OSM forward the necessary information to the Keeper with a request for a determination of eligibility for the site in question. **That determination is final, and we proceed accordingly.**
- C. ***MDEQ can defer to the SHPO's position.*** This may not, from the cultural resource standpoint, be the preferred route. Timing considerations may, however, dictate this course. If an applicant or permittee is on a tight schedule, the time spent debating the SHPO can sometimes offset potential savings.

If additional work is required of the Company in order to resolve site eligibility, MDEQ shall notify the Company accordingly. If the site in question will not be disturbed in the first few years of mining, the final determination of eligibility might be deferred, and so stipulated in the permit.

There have been cases where eligibility questions remain unresolved, and a permitting decision deadline is approaching. It may be that testing involving limited excavation is needed to resolve the eligibility of a problematical site, and the field season is past. This is not necessarily a problem. Section 106 states that a site which is potentially eligible is

6 "Eligibility" itself imposes no cost on the applicant. The *treatment* of a site does...

treated as though it were eligible. A permit can be issued with the stipulation (probably in the form of a Memorandum of Agreement; see Appendix J) that the work be completed, and the eligibility question resolved. If the site proves to be eligible, appropriate mitigation must be planned and carried out.

5. FINDINGS OF EFFECT:

Section 106 mandates that two determinations be made for each eligible or potentially eligible property in a project area: **Will the proposed project have any effect upon the property? If so, will the effect be an adverse one?**

For the "Finding of Effect", the primary question is "**Will the proposed action or project alter the characteristics which qualify a property for inclusion in the National Register?**" For most coal mining projects, this determination is relatively straightforward. Any eligible site which is to be destroyed will suffer an "effect". Some sites peripheral to the mine, especially standing structures and rock art sites, will also suffer potential effects from blasting vibrations.

(Sites which will not be disturbed by mining are rated as "no effect" sites, and require no further treatment. Sites which are not eligible for the National Register require no further consideration or treatment, regardless of the effects of mining.)

The "adverse effect" determination is, under the new regulations, equally straightforward. For coal mines, the most common "adverse effects" are (a) destruction or damage, and (b) alteration of setting. ***Previous 36 CFR 800 rules contained a "no adverse effect" exemption for archeological sites which would be excavated under an approved plan. This exemption no longer exists under the current rules. Any site that will be destroyed or otherwise suffer significant alteration of setting is now treated as an adverse effect site, whether it is to be excavated or not. (Excavation may, however, reduce the adverse effect to an acceptable level.***

6. MITIGATION OR TREATMENT PLANS:

Once it is determined that there will be potential adverse effects on an eligible property, Section 106 requires the consideration of treatment plans. The goal of a treatment plan is to *eliminate, offset, or minimize* the adverse effects.

The most obvious way to counter potential adverse effects to a site would be to alter mining plans to *avoid* the site. No disturbance = no effect. **Section 106 recognizes, however, that economic and mine-planning considerations may make avoidance impractical. It does NOT forbid actions which will cause adverse effects.** It allows agencies to proceed with actions where there is unavoidable adverse effect...**as long as best efforts have been made to reduce or minimize those effects, or to compensate for them.** "Treatment" or "mitigation" are steps that are taken to reduce or compensate for adverse effects to sites that must be disturbed.

In most cases, the appropriate treatment or mitigation measures for a site are

dictated or suggested by the qualities which make the site eligible and the nature of the impact the project will have on those qualities. The most common example of mitigation is an archeological site, which is valued for the data it could provide. If the site is simply mined, the data are lost, and there is adverse effect. If the site is scientifically excavated, however, the data are recovered. The adverse effect is significantly reduced.

Treatment plans should also be tailored to the *significance* of each site or feature. **A historic site may meet one or more of the test criteria, and have good integrity, but not be a particularly significant site.** This factor does not generally enter into decisions on eligibility, but is important when determining how to *treat* the property.

It may not, for example, be worth preserving an undistinguished homestead cabin if there are several examples, perhaps better examples, in the area. Similarly, a homestead trash dump may contain information about 1920's homestead lifestyles. If that information is relatively insignificant, or could be better provided by other means, however, excavating the dump is probably not warranted.⁷

Here's how the mitigation review process should ideally work:

- A. **Preliminary or summary proposals to mitigate or treat impacts** should be included in or with the Resource Survey, for each *eligible, impacted* site. These plans should focus on the impacts *to the qualities which make the site eligible for the Register.*

MDEQ does not require that detailed mitigation proposals be prepared "up front" for *all* sites. Some cultural resource sites are in fact best left until the date of proposed disturbance is near. This is in part because research techniques or standards may change over the years.

The exceptions to this would be sites which are deteriorating with age...such as rock art sites or historic homesteads. These types of sites could be seriously damaged or lost within a decade or two. ***These sites will require mitigation ASAP, and detailed plans must be submitted accordingly.***

Because of this, for sites where disturbance is projected to occur well in the future, a permit may be approved based on *preliminary* treatment plans. These proposals commit the applicant to completing certain measures on each site with specific, detailed plans to be developed later for each site.

- B. **MDEQ and the SHPO shall review the proposed preliminary or summary mitigation plans for the eligible sites to be disturbed, in light of the plans ability to minimize or offset the adverse effects.** If the measures are deemed inadequate, MDEQ will suggest alternative mitigation measures. If the proposed mitigation measures are deemed adequate by MDEQ, it shall seek the formal

⁷ *Treatment of Archeological Properties: A Handbook.* Advisory Council on Historic Preservation, 1980

concurrence of the SHPO.

- C. **For sites which are to be mitigated immediately, a specific, detailed mitigation plan must be developed by the applicant for each site**, and reviewed by MDEQ in consultation with the SHPO. It must be submitted sufficiently in advance of the proposed commencement of the mitigation work to allow for MDEQ/SHPO consultation.
- D. **The mitigation must include a final report, which will be reviewed and approved by MDEQ.** *MDEQ recognizes that a comprehensive final report can take months to complete. In cases where fieldwork has been completed and timing is critical, MDEQ can approve disturbance based upon a preliminary field report.*
- E. *MDEQ must approve the detailed mitigation plan, in consultation with the SHPO, and complete a Memorandum of Agreement (see below) before mitigation work can proceed.* Deferred mitigation work, as described in Section (A), above, will be handled by stipulation in the Memorandum of Agreement.

7. FINDINGS OF EFFECT AND MEMORANDUM OF AGREEMENT:

- A. If MDEQ and the SHPO agree that adverse effects will occur, MDEQ will draft a formal "finding of effect" covering each eligible, affected site, and forward it to OSM. OSM will formally notify the Council of this finding, with supporting documentation, including a written concurrence by the SHPO, as prescribed in 36 CFR 800.5, and notify the Council of the consulting parties' intent to draft a Memorandum of Agreement (MOA) covering the proposed action. (For more discussion of the MOA, see Appendix J, "The Memorandum of Agreement (MOA).")
- B. Where the adverse effect and mitigation work is to be deferred into the future and a summary mitigation proposal is presented, MDEQ/OSM will state the "finding of effect" as conditional upon future review and approval of a detailed plan, under conditions to be spelled out in the MOA.
- C. The Council has 15 days to review the "finding of effect", and determine if it wishes to participate in the MOA or not. Lack of response from the Council within the 15-day period is considered as declining the opportunity to participate. Any consulting party may request that the Council participate in the MOA.
- D. An invitation to consult will also be extended to any other interested parties defined during the earlier consultation process, including Native American interest groups⁸. The mine operator or applicant is encouraged to participate in

⁸ It must be noted that while any interested party should be invited to consult in an MOA, concurrence is required only from the primary parties (MDEQ/OSM, SHPO, the operator and, if applicable, the Council). For Native American tribes, absolute concurrence is *only* required on actions involving tribal (reservation) land.

the consultation.

- E. An MOA may be written to cover an individual site or sites, or a broader action (a mine permit or amendment) which involves multiple sites over time. For a major permit or amendment whose effects will occur over time, the vastly preferred option is to draft an MOA covering *all* anticipated adverse effects resulting from the permit or amendment.

There are two reasons for this. First, it avoids the extra delay involved in writing multiple MOA's, covering individual sites. Second, most mines will (sooner or later) discover unexpected sites which were missed in the initial survey. If treatment of these sites is already spelled out in an MOA, these discoveries will not require the drafting of separate MOA's.

- F. If the Council declines to participate, MDEQ/OSM and the SHPO (and any other interested parties) will consult and draft an MOA. The signed MOA must be submitted to the Council for its records. This is the final step in the Section 106 process for the sites subject to the MOA, and must take place before the undertaking proposed in the MOA is approved.
- G. If MDEQ/OSM and the SHPO fail to agree on the terms of an MOA, OSM will request the Council to join in consultation. The Council will either join in consultation, or offer its comments.
- H. Once the MOA is signed, it becomes the basis for future cultural resource compliance for the action covered, whether for an individual site or a complete permit or permit amendment. Compliance with the terms of the MOA will be stipulated in the permit or amendment by MDEQ. The memorandum will also contain provisions for modification, dispute resolution or termination.
- I. *There are provisions in the regulations for termination of consultation regarding MOA's, with additional procedural steps. These have not been included in this guideline, for the sake of brevity. In most cases, it is anticipated that the normal consultation process will produce results which are satisfactory to the primary consulting (concurring) parties.*

THE PERMIT/AMENDMENT REVIEW AND APPROVAL PROCESS:

1. As mentioned earlier, review and approval of the Survey Report, determination of eligibility, and review and approval of the mitigation plans, may all take place at the same time. Deficiencies or problems will be cited as a part of the formal permit application deficiency review and response process.
2. From a more practical standpoint, deficiencies are usually handled as soon as they are

identified, sometimes on a case-by-case basis. This provides the opportunity to correct deficiencies, before the official deficiency-response process begins.

3. *The cultural resource inventory obligation must be completed prior to permit issuance.* Other outstanding obligations, such as final eligibility resolution and detailed mitigation plans, will be covered in the Memorandum (or memoranda) of Agreement.
4. *The Memorandum of Agreement must be signed before a permit or amendment can be issued.*

AFTER A PERMIT IS ISSUED:

The issuance of a permit does not end the review and approval process for Cultural/Historical Resources. For most coal mines, the life-of-mine Memorandum of Agreement will specify the outstanding (and ongoing) obligations of the operator. These obligations include:

1. Submittal, review and approval of detailed work plans for the mitigation measures for each eligible, impacted site where mitigation was deferred must be completed per the procedures approved in the Memorandum of Agreement. This will be done by MDEQ, in consultation with the SHPO.
3. Upon completion of required site treatment, clearance to disturb a site must be given by MDEQ.
4. After the permit is issued, the permittee and MDEQ should annually review site status.
5. Annual reports submitted under ARM 17.24.1129 must list all mitigation tasks completed, as well as sites impacted, in the preceding 12-month period. They must also list any mitigation work proposed, and sites which will be impacted, in the following 12-month period.
6. All major and minor revisions requested after permit issuance must address the proximity of cultural resource sites and identify the impact, if any, that the revision would have to the site(s).

IMPORTANT: The issuance of a permit includes an ongoing obligation to protect all cultural resources, anticipated or not. Companies are obliged to watch for the incidental discovery of cultural materials during mining, to protect those resources, and to notify MDEQ of such discoveries. (See Appendix "D", Incidental Discoveries and Appendix "J", Memorandum of Agreement.)

DOCUMENTATION:

Applicants and permittees are responsible for keeping detailed documentation of their cultural

resource compliance.

1. At a *minimum*, the applicant/operator's files should contain the following correspondence *prior to permit issuance*:
 - A. **The cultural/historical resource survey report,**
 - B. **Eligibility determinations** (dated evidence of concurrence between MDEQ and the SHPO),
 - C. **Approval of mitigation plans** (evidence of concurrence between MDEQ and the SHPO),
 - D. **Determination(s) of effect** (evidence of concurrence between MDEQ and the SHPO), and
 - E. **Permit stipulations** (where applicable), or **Memorandum** (or Memoranda) **of Agreement.**

2. In addition to the above items, operators' files should also contain the following correspondence *after permit issuance* (or before, in the event that some sites are mitigated before the permit is issued.)
 - A. The detailed mitigation work plan for each eligible, affected site,
 - B. Formal approval of each detailed work plan, (concurrence, between MDEQ and the SHPO),
 - C. Mitigation reports for each site mitigated,
 - D. Approval of the mitigation report (MDEQ), and
 - E. Permission to disturb a site (MDEQ).

3. ALL correspondence must be sent to non-originating agencies, other consulting parties, and the company.

APPENDIX A: NATIONAL REGISTER ELIGIBILITY

Most cultural/historical sites or properties are *not* automatically eligible for the National Register simply because they are "old". Sites must meet one or more specific *criteria* (spelled out in the regulations of 36 CFR Part 60), in order to be considered eligible. **A site's eligibility must be expressed in terms of one or more of the following criteria:**

1. Its **association with events** which have made a significant contribution to the broad patterns of our history⁹, *or*
2. Its **association with the lives of persons** significant in our past, *or*
3. Its **embodiment of the distinctive characteristics** of a type, period, or method of construction, *or* represent the work of a master, *or* possess high artistic values, *or* represent a significant *entity* whose individual *components* may lack individual distinction, *or*
4. **Its potential to yield information important in history or prehistory.**

In *addition* to meeting one or more of these criteria, sites are supposed to have *integrity of location, design, setting, materials, workmanship, feeling and association*. For example, a historic log homestead cabin which is in disrepair, or one which has been re-sided with aluminum siding, may not be eligible. The same applies to an archeological site which has been seriously compromised by erosion.

NOTE: *Native American sites (Traditional Cultural Properties and other spiritual sites)* are more problematical, when it comes to determining eligibility. **Traditional Cultural Properties** (TCP's) are, under the 1992 amendment to the National Historic Preservation Act, potentially eligible for nomination to the NRHP. Most such sites have visible, physical attributes which identify them as TCP's: vision quest enclosures, rock alignments, rock art panels, etc. In some cases, however, we are forced to go with verbal assurances from the Native Americans. These assertions can sometimes be very vague, and/or subjective in nature. It is sometimes not as simple, in short, to "test" for eligibility for TCP's.

Native Americans believe that many apparently natural sites or settings can have personal spiritual value. Many of these sites, however, are considered to have "**intangible spiritual values**", and are **not** deemed eligible for the Register. The test for eligibility for this type of site is that it must have *features which can be associated with specific ceremonial or specialized traditional cultural activities*.

⁹ These "events" may be brief, single events or broader in scope, such as "the homestead era".

APPENDIX B: HISTORIC LANDSCAPES¹⁰

Introduction:

"**Historic landscapes**" are a relatively new concept in the field of cultural/historical resource management. The concept grew out of controversies over visually intrusive modern development, adjacent to sites like the Gettysburg Battlefield monument. It was recognized that in some cases, modern intrusions into the "view" (both from and to) a historic site could seriously detract from the historic "sense" or "feeling" of a site, thereby detracting from the integrity of the site.

For this reason, the office of the Keeper of the National Register published several new guidelines as National Register Bulletins. Under these guidelines, the cultural/historical review process for a proposed action must take into account the potential for the existence of a "historic landscape", and the potential for project-related impacts to that landscape.

Even if it seems intuitively obvious that an intact historic landscape does not exist, the cultural resource consultant will still have to show that the issue was addressed, and *demonstrate* its non-existence in the cultural resource inventory report.

The following sections outline a two-phase process for tackling the landscape issue:

Landscape Evaluation:

In most of the coal development areas of Montana, the odds are that the historic landscape will have undergone significant modification. Modern buildings, roads, or other features will have sufficiently altered the historic character and feeling of the area to compromise its integrity. For that reason, the landscape evaluation outlined below does not include the detail that would be needed to formally nominate a landscape for the Register, but is sufficient for evaluative purposes.¹¹

The basic requirement in the landscape evaluation is to **compare the present-day landscape with the landscape of the primary historic period of interest**. In most coal projects, that period is the homestead period from about 1880 to 1940.

The methodology is to determine the changes which have occurred since the period of interest, whether the present-day landscape retains any historic integrity, and if so, what affects the proposed project may have on the historic landscape.

¹⁰ The section on "Documenting Historic Landscapes" is condensed from, or based upon, the guidelines worked up by Mr. Dale Herbort for MDEQ's Abandoned Mines program. I am indebted to him for his research of landscape issues.

¹¹ For additional details on this subject, see National Register Bulletin 30, "Guidelines for Evaluating and Documenting Rural Historic Landscapes"

In summary, a "landscape" is defined by a series of "process patterns":

- o of land use,
- o of spatial organization,
- o of relationship and response to the environment, and
- o of cultural traditions or ethnicity,

These process patterns consist of the following components:

- o transportation/travel networks,
- o physical or man-made boundary demarcation,
- o vegetation (relative to land use),
- o buildings, structures or other objects,
- o "cluster" or grouping arrangements,
- o archeological elements, and
- o small-scale elements (building styles, etc.).

The task is to define and compare the historic landscape with the present-day one. This assessment should include existing historic buildings, old foundations, old road or rail embankments, and information on farming and settlement patterns gleaned from interviews of local residents and courthouse records.

The evaluation of the historic landscape is primarily in terms of its *significance* and *integrity*. It must clearly meet the National Register criteria for eligibility. *And it must retain the essential character and feeling of the historic period in question,* in order to meet those criteria. **If it fails to pass either of these tests, it is not eligible for consideration for the National Register,** and does not require further consideration once the eligibility consultation process is complete.

APPENDIX C: HUMAN REMAINS OR BURIAL MATERIAL

[As of this writing, there has not been a *verified* discovery of Native American human remains or burial materials at a Montana coal mine since Montana's Permanent Program rules went into effect. In May of 1997, however, a staffer at one coal mine discovered a previously unreported rock cairn site which appeared to have the potential to be a human burial. This site was subsequently excavated by an archeologist. No remains were found. The following section has been extensively re-written based upon our experience in working with the Native American Graves Protection and Repatriation Act (NAGPRA) on the Decker site.]

[Note: Native Americans, as a rule, hold human burials and associated "grave goods" (artifacts buried with the deceased) in special reverence. Until recently, this type of site was not protected, at least not very effectively, by law. This has changed, with the passage of the Native American Graves Protection and Repatriation Act (federal), and the Montana Burial Protection Act, both in the 1990's. Operators should pay special attention to this section. As noted below, the subject will not come up often...maybe never, within the average life of a coal mine. If it does, however, the implications for non-compliance are pretty serious.]

I frequently get asked three questions about human burials:

- *If I find and report a human burial, will it shut down my mine? As a rule, no. Most human burial discoveries would take place as the result of incidental activities (monitoring), or during pre-stripping operations. The latter activity usually takes place sufficiently in advance of actual mining that there is ample time to resolve the issue.*
- *Would I be required to modify my mining plan to avoid the burial? In all probability, no. You would have to temporarily avoid the site (leave a topsoil island, for example), until the required decisions were made. In point of fact, the preferred treatment, whether it turns out to be a sheepherder's grave or a Native American burial, is "re-interment with respect". The burial would eventually be disinterred under supervision, and re-buried elsewhere.*
- *How long WOULD it take? It would vary with the situation. First of all, it may NOT turn out to be a burial, as was the case in the only reported "burial" we have had at a coal mine. Second, it may clearly be a modern European burial. Third, that's where DEQ comes in. DEQ is charged with cultural resource compliance. That having been said, it's also DEQ's job to make sure that other agencies, where involved, don't drag their feet. Remember, we have an interest in making the cultural resource protection system WORK.]*

Introduction:

The odds of discovering a human burial site on a coal property in Montana are relatively slim. Most Native Americans in this region utilized platform or rock crevice burials, rather than the traditional deep European burial. With the ravages of time, including weather, scavengers and "collecting" during the homestead period, relatively little has probably survived. **Permittees**

and/or operators must, however, be aware of the special requirements for handling incidental discoveries of human remains and/or burial materials under both Montana and Federal law.

First of all, a *possible* burial discovery will take one of two forms. The discovery may appear as an ambiguous feature which *could* be a human burial. For example a rock cairn near an old homestead site could be the rock pile from Aunt Maudie's garden...or it *could* be Aunt Maudie. If it's only a *potential* burial site, it's handled as an incidental archeological discovery (see Appendix D), *until or unless* human remains are verified.

The site may, on the other hand, clearly appear to contain human remains. If a site yields human remains, either on initial discovery or after testing, the treatment will depend upon the land ownership.

Private or State Lands:

The Montana Burial Protection Act makes it illegal to (a) pilfer, destroy, or permit the pilfering or destruction of human remains or burial materials, (b) buy, sell or barter human remains or burial materials, or (c) disclose the existence of human remains or burial goods, in knowledge that it could lead to pilfering or destruction. This protection extends to **all** human remains and burial materials on State or private lands, ***regardless of period of burial.***

The act spells out a specific procedure to follow, in the event suspected remains or materials are discovered:

- A. The county Coroner must be notified *immediately*.
- B. The Coroner has 2 days in which to determine if the remains are human, and of a forensic interest.
- C. If there is no forensic interest in the remains, the Coroner will notify the SHPO within 24 hours of making that determination.
- D. The SHPO shall notify the Montana Burial Preservation Board, as well as the landowner.
- E. The Burial Preservation Board shall have 36 hours to conduct a preliminary field review, unless circumstances warrant more, and make its recommendations. The recommendations must include whether the remains can be preserved in place or disinterred and reburied, and a timeframe for final disposition.
- F. ***If the Board and landowner cannot reach agreement on the disposition of the remains or materials within 40 days, the remains must be removed, usually by a qualified archeologist.***

Operators' Note: Penalties for pilferage or destruction of a burial are a fine of up to \$1000, up to 6 months in the county jail, or both. Buying, selling, transporting or

bartering are punishable by a fine of up to \$50,000, or a prison term of up to 20 years, or both. There is a fine of between \$100 and \$500 for failure to follow the notification process.

Federal Surface Lands:

For discoveries on federal surface lands, a different set of procedures applies once human remains are found. In addition to MDEQ, the operator also needs to notify the federal land management agency. BLM policies require that any human burial be evaluated and reinterred somewhere else.¹²

In the event that testing of the remains indicates a Native American origin, the **Native American Grave Protection and Repatriation Act** (PL 101-601, "NAGPRA") applies. This requires the notification of Native American groups with possible ties to the burial, and that the disposition of the remains be determined in consultation with the concerned Native Americans. (There are fines and up to 1 year in prison for pilferage, so operators need to guard against opportunistic Acollecting≅ by field crews.).

BLM's preferred procedures, once they are notified of a *potential* burial, are to (1) draw up a plan for evaluating the site in question, (2) notify the appropriate Native American groups of the plan, with a brief comment period, (3) have a contractor¹³ brought in to test the site for remains, and (4) (if so) remove them to a lab to test for origins. If the remains appear to be Native American, their subsequent disposition will be determined in consultation with the Native Americans, in compliance with the provisions of NAGPRA.

This need not be a burdensome process on the operator. The testing for, and/or exhumation of, a human burial is usually a matter of a very few days of field work. Determination of Native or Euro-American (or other) origin usually requires removal to a laboratory setting. At this point in the evaluation process the remains are out of the ground, and the operator can probably be cleared to resume operations.

For operators, the question which most often arises is "Could a burial find shut me down, and for how long?" In a "worst case" scenario, human bone material might be turned up by a scraper pre-stripping soils. Under the Montana Burial Protection Act, the remains *must* be removed from the site within 40 days of a proposed plan from the Burial Protection Board, if the Board and the operator don't agree on an acceptable plan before then. Since the Board has 36 hours to propose such a plan, the maximum delay would be on the order of 43 days from the reporting of the discovery, plus whatever time is necessary to exhume the remains.

The impact on operations would, in all likelihood, be restricted to pre-stripping operations in the immediate vicinity of the discovery. Since most operators strip soil well in advance of overburden drilling, a 40-plus day delay might not pose much of a problem.

¹² The operator should check the terms of their BLM leases. While recent leases place the burden of resolving incidental discoveries like this one on the lessee, in some older leases the BLM assumed responsibility for such finds.

¹³ Or BLM archaeologists, in the event that it's BLM's responsibility....

The federal statutes contain no such mandatory window. NAGPRA can impose a 30-day shutdown of the disturbing activity where necessary. There is no time limit, however, for resolution of the disposition of the remains. The wisest choice for an operator faced with a burial on BLM surface (for example) is to be prepared to line up a qualified archeological contractor as soon as possible, to facilitate getting the remains out of the ground.

APPENDIX D: INCIDENTAL DISCOVERIES

Occasionally the phrase "*We already have all our archeological clearances*" comes up in conversation. This is sometimes used to assert that since the inventories have been completed, the eligibility determinations made, and the eligible sites either mitigated or committed to mitigation, that the cultural/historical obligations are therefore at an end.

This is not, however, the case.

Section 800.11 of 36 CFR 800, the regulations implementing the National Historic Preservation Act, extends the coverage of the Act, and the obligations of the responsible agency, to incidental discoveries (often referred to as unanticipated finds). MDEQ, administering Montana mine permits under OSM oversight and with OSM funding, is responsible for assuring that newly-discovered cultural resources are afforded the same protection as those discovered during pre-mining inventories. **So, by virtue of their permits, are mining companies.**

This obligation was formerly covered by permit stipulations. Under the latest Section 106 regulations, it is now, or should be, covered in the required Life-Of-Mine Memorandum of Agreement for adverse effects to cultural resources (see Appendix J). Each comprehensive MOA will contain a set of provisions for handling incidental discoveries.

Most operators are understandably concerned about the impact of an unexpected "find" on their operation. What if a major discovery should seriously hold up operations?

Realistically, the chances that an incidental discovery would seriously delay critical mine operations are relatively slim. First of all, most archeological sites in the coal region are small in scale. Second, *most* sites prove *not* to be eligible for the National Register, after relatively quick review. This is borne out by the pre-mine inventories for most operating companies: the number of *ineligible* sites and "Minor Activity Loci" (MAL's) outnumber the eligible sites by a large margin.

Finally, most incidental finds will occur during a single phase of mine operations: soil stripping.

Since most operations pre-strip soil weeks (or more) ahead of overburden stripping, there's plenty of time to conduct a good preliminary investigation, and even to carry out more detailed investigation, should that be indicated.

MDEQ has discussed this with the SHPO, and they agree. SHPO recognize that coal mines have "tight" operating schedules, and are not particularly interested in "shutting down" anyone. It has in the past left the initial decision about a potential site (is it or isn't it?) to MDEQ. It has also been willing to have an archeological contractor called in immediately (should that be warranted) to do "salvage" archeology on a site, as long as the SHPO is notified, and the work is done by a qualified contractor under MDEQ's oversight.

Past discovery situations have been handled quickly, with little impact on operations. In one case, an employee noted a jumble of bone along the margin of a new drainage-control feature at the stripping edge. He staked the site, and contacted MDEQ. Later that week, the MDEQ specialist was able, with about an hour's careful trowel work, to verify that it was washed-in, immature bison or cow bone and not an archeological site.

In another case, scraper operators reported a fair amount of bison bone, including two skulls, during subsoil stripping. The operator staked out a 10' x 10' "island". The MDEQ cultural resources person arrived at the site the next day. After recovering all the bone in about two hours (with the help of mine staff), it was determined that it was an isolated bison bone find, with no associated human artifacts.

In both cases, operations suffered only brief disruption.

Our recommendations for handling incidental discoveries follow:

- A. **If an operator finds a possible site, stake it off immediately** and notify the scraper operators to leave an "island".
- B. **Call MDEQ** and provide what information is available. We'll try to get to the site within 24 hours or less, if possible.
- C. **MDEQ will try to record the site, and resolve the preliminary questions on-site.** If it involves minor excavation, a couple of utility people could be very useful. This approach will generally take care of most finds of this type.
- D. **If the discovery appears to be an eligible site, the operator will need to hire a qualified contractor.** MDEQ can notify the SHPO and handle the case as an emergency "salvage" excavation, however, to minimize the procedural consultation delays.

In reality, expedited treatment of incidental discoveries will be covered in each Life-of-Mine MOA.

APPENDIX E: NATIVE AMERICAN CONSULTATION

Native American consultation is a growing part of the cultural resources evaluation process. There has been a long-standing requirement in 36 CFR 800 to offer Native American tribal groups the opportunity to participate in the consultation on site eligibility and mitigation for traditional archeological and historical sites. *This requirement has been reinforced in the new Section 106 regulations adopted on June 17th, 199 .*

An ongoing concern of many Native Americans has been that federal actions generally ignored potential impacts to sites or features which were associated with either present-day or "traditional" spiritual or ceremonial use. The passage of the American Indian Religious Freedom Act (AIRFA) required that religious or traditional cultural sites and values be *considered* by federal agencies. It did **not**, however, provide the site-specific protection afforded by the National Register of Historic Places.

In 1993, the National Historic Preservation Act was amended to require consultation with Native Americans regarding "traditional cultural properties" (TCP's) as a part of the Section 106 process, and to broaden consideration of TCP's to be included on the National Register. This has in effect added a third category of "resource", although there is considerable overlap, to "prehistoric" and "historic" resources to be evaluated under Section 106.

When a permitting or amendment application process starts, it is MDEQ's responsibility to identify and formally notify the probable interested Native American groups or individuals. The applicant's cultural resource consultant, however, should discuss probable interested tribes and contacts with MDEQ's cultural resources specialist, and be prepared to bring any who express interest into the evaluation process.

Commonly, the official respondent from an interested tribe will be the chairperson of the tribal cultural commission, or possibly a Tribal Historic Preservation Officer (THPO). In addition, applicants must be prepared for responses from individual tribal members, often among the traditional spiritual practitioners in the tribe. Their input must be considered equally, because the relationship between the tribal government and the "traditionalists" varies from tribe to tribe¹⁴.

Tribal representatives will sometimes visit a proposed mine or amendment site at their own expense. Recent practice has seen representatives ask for financial support for such visits. Their rationale is that they are providing consulting expertise for the project, much in the same way as the archeological consultant¹⁵. The decision on financial or other support for Native American informants is strictly up to the applicant.

14 In some tribes, the *traditional* tribal leadership structure (elders and/or chiefs) is relatively well integrated with the legally-recognized tribal council government. In others the integration is not as thorough, and the traditional structure may in fact act as a parallel "shadow government".

15 The BLM rejects this approach. Its position is that Native American consultation is, by and large, the same as input from any "interested party". This also the policy of OSM, as well as the Montana SHPO.

The Department *cannot* impose it as a requirement. It should be recognized, however, that many tribal cultural organizations have extremely limited finances. Company support in the form of transportation or gas, meals, etc., can go a long way toward creating a climate of good will.

In some situations, it may become necessary to specially contract or subcontract for Native American consultation¹⁶. In such cases, it is extremely important that the applicant/operator assure that the consultation is comprehensive. The internal dynamics of tribal affairs can sometimes be a shifting pattern of tribal politics, clan or band rivalries, and disputes among special societies.. A contractor in this area should be able to demonstrate sufficient knowledge of current events in the tribe or tribes in question to assure that the consultation has covered a sufficient range of representative opinions¹⁷.

Where a Native American group or individual indicates that a site or feature has significance to them, it is important to determine **whether it qualifies for the National Register as a "Traditional Cultural Property"**. In order to qualify **it must have distinct features which can be associated with specific ceremonial or traditional cultural activities, and with present-day use or importance**. Examples of such features are rock-art sites, vision-quest enclosures, special rock-cairn alignments, etc. This determination is sometimes a highly subjective judgement. Native Americans may also express concerns over traditional gathering sites for traditional plants.

Mitigation measures are ultimately a matter for negotiation between the interested parties and the applicant. Applicants must be aware that in many cases, respondents may insist upon outright avoidance and visual screening as the only viable treatment for a spiritually significant site.

TIMING: The timing of Native American consultation is sometimes a vexing problem. It may be that no response is received to the applicant's (or MDEQ's) first requests for consultation. While guidelines on this problem are pretty vague, MDEQ suggests the following course for pursuing Native American consultation:

- A. **MDEQ is (as noted above) responsible for making the first contact with the pertinent Native American representatives**, when the application process is far enough along to define probable areas of impact.
- B. **The applicant's cultural resource consultant should contact the concerned groups, as the field inventory effort takes shape**. Some respondents may wish to visit the site while the consultant is in the field. Others may prefer to wait and review the field inventory report, before selecting specific features to visit. Should the latter be the case, the consultant must make every effort to watch for specific types of features with traditional tribal significance (rock art, vision quest sites, etc.). Copies of the survey report must be provided to the designated interested tribal parties, when they become available.

16 The BLM, for example, sometimes expects lease applicants to pay for contracting Native American consultation.

17 Applicants/operators should read Bulletin 38, from the National Park Service, for additional guidance on this subject. See the recommended reading list at the end of this guideline.

- C. Under the new Section 106 regulations, concerned Native American groups should be invited to join in the consultation for the Memorandum of Agreement required for any adverse effects to cultural resource sites¹⁸. For non-Indian lands completion of the MOA, with or without tribal participation, satisfies the tribal consultation requirement as long as the required efforts have been made, except for possible incidental discoveries.
- D. If no expressions of interest have been received by the time a permit decision is needed, MDEQ will send notification to that effect to the designated tribal organizations. That will effectively close the formal Native American consultation process for the permit, with the exception of (1) amendments or renewals, and (b) incidental discoveries.

Tribal consultation is technically an *agency* responsibility. However, a mining applicant or permittee is likely planning on a long-term presence in an area with a concerned Native American group or groups. When this is the case, developing an ongoing working corporate-tribal relationship is *highly* recommended. For this reason, MDEQ recommends that applicants themselves get involved in the Section 106 consultation with the Native Americans. In some instances, Montana mining firms have effectively taken the lead role in Native American consultation, talked with the affected tribe, and developed mutually acceptable solutions to Native American CRM issues before bringing them to MDEQ.

18 While tribal groups must be invited to consult, tribal veto power in consultation extends *only* to tribal property.

APPENDIX F: ONGOING OBLIGATIONS for HISTORIC BUILDINGS

In Montana's coal regions, most of the historic-period structures are homestead-era buildings. Many have been abandoned for years. They are in various stages of disrepair, and most continue to deteriorate. There has been a lot of discussion in Montana over the past few years, regarding **what, if any, obligations a company has for restoring or maintaining historic buildings, once they are determined to be eligible for the National Register.**

There are two citations in historic preservation law and rules regarding this situation. 36 CFR 800.9 states that an activity involves "adverse effects" to a historic property when (among other things) it involves "neglect of a property resulting in its deterioration or destruction".

Section 110 of the National Historic Preservation Act, as amended in 1992, states that **a federal agency "will not grant...a permit...to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected a historic property....or having legal power to prevent it, allowed such significantly adverse effect to occur...."**

This being the case, what *are* a company's obligations to (a) protect and (b) preserve historic homestead buildings in its project area? The following comments may clarify this:

1. **A company may not, under any circumstances, destroy or otherwise adversely affect a historic building until it has completed Section 106 consultation, met the agreed-upon mitigation obligations, and received clearance from MDEQ.**
2. Buildings which have been through the consultation process and were not deemed eligible for the National Register may be disposed of as desired; there are no further obligations.
3. Where a building is owned by someone other than the permittee, such as a surface lessor, **the owner's rights to use the building as he or she pleases are not subject to Section 110.** Such an owner is perfectly free to demolish a structure to salvage wood for a corral, or to remove a safety hazard, etc.
4. Section 110 would, however, apply **if a company intentionally *colluded* with an owner in order to avoid its Section 106 responsibilities**, e.g. paid the owner to demolish a building, or made demolition of buildings a condition of a lease agreement. This could be grounds for permit denial.
5. If a building was originally determined to be eligible but has subsequently deteriorated, **an owner/company can always request to demolish it** for salvage, safety or other purposes. If the building has lost its integrity, the odds are permission will be granted.

6. Most historic homestead buildings are already abandoned and deteriorating when they come under Section 106 protection. **A company is not required to prevent or repair a leaking roof, or a collapsing chimney.** An exception would be where a company has committed to rehabilitating a structure as part of its mitigation plan, and then fails to do so.

7. The ownership of a historic property must be taken into account in the consultation on treatment or mitigation plans. **Because of his ownership rights, the owner of a historic property (usually the surface owner) has virtual veto power over any proposed treatment of the property.** A company cannot, for example, agree to preserve a building if the owner does not want it preserved.

APPENDIX G: DEFINITIONS

Adverse Effect

Harm to historic properties, directly or indirectly caused by a Federal agency's action (undertaking). "Harm" is here defined as *diminishing the integrity of the characteristics which make the property eligible for the National Register of Historic Places*. Criteria of effect and adverse effect are found in 36 CFR 800.9.

Advisory Council on Historic Preservation

Sometimes called the Council. Created by the National Historic Preservation Act, the Council is responsible for overseeing and coordinating historic preservation, and for promulgating regulations defining federal, state and tribal obligations regarding sites that may be affected by federal, or federally-controlled, activities. Duties and regulations pertaining thereto are found in 36 CFR 800.

Area of Potential Effect (APE)

The geographic area within which an undertaking may cause changes in the character or use of historic properties, where they exist.

Effect

Any change in the characteristics that qualify a historic property for the National Register of Historic Places.

Eligible Property

With respect to the National Register, an "eligible" property is one which has either been formally listed by the Secretary of the Interior, or which meets the criteria for listing.

Historic Properties

Properties such as archeological sites, buildings or landscapes that are considered eligible or potentially eligible for the National Register of Historic Places.

Indian Lands

For the State of Montana, this definition applies primarily to recognized reservation lands. All other lands are considered subject to State regulatory jurisdiction, regardless of ownership. For federal agencies, however, "Indian Lands" include not only reservation lands but off-reservation land rights that may be held in trust by the federal government for a recognized tribe (including mineral rights). In some cases (including trust mineral rights), joint jurisdiction may be negotiated.

Interested Person

Organizations or individuals that are impacted by or have an interest in an undertaking on historic properties (from 36 CFR 800.2(h)).

Keeper of the Register

Under the Secretary of the Interior, the Keeper is the final arbiter on the eligibility of sites or features for the National Register.

Memorandum of Agreement (MOA)

In Section 106 terms, an agreement among (at least) the Department, OSM, the SHPO, and the permittee, covering cultural resource requirements for a proposed action or series of actions. It may apply to a single site, or the life of a mine, and is essentially a contract spelling out ongoing cultural resources obligations for a project.

Minimal Activity Locus (MAL)

Isolated finds of cultural material, usually very limited in quantity and scope, with the potential to yield very limited data on an area's cultural heritage.

Mitigation

Tasks undertaken to eliminate, lessen or compensate for the projected effects of an activity upon historic resources.

National Historic Preservation Act

16 USC 470-470w. Enacted in 1966, amended in 1980 and 1992, this act aimed at strengthening the process of inventorying historic and cultural sites. The act established a National Register of Historical Places; enhanced and encouraged national, state, local and tribal interest in historic preservation; established the appointment of State Historic Preservation Officers; and created the Advisory Council on Historic Preservation.

National Register of Historic Places (NRHP)

Established under the NHPA, the National Register is a national listing of recognized historical, cultural, archeological and architectural sites or features. It is administered by the Keeper of the Register, National Park Service, under the Secretary of the Interior. The eligibility of a site for the National Register triggers the protection features of the NHPA.

Potentially Eligible Property

This is a “hot button” term for some people in CRM. For this handbook it means a property which *may* meet the criteria for listing on the National Register, but where the visible information is not sufficient to make a *definitive* judgement about eligibility. A potentially eligible property merits the same protection under Section 106 as a clearly eligible property, until such time as its eligibility (or the lack of it) is determined.

Section 106 Process

The review and consultation process established under Section 106 of the NHPA, and administered by the Council under its regulations in 36 CFR 800. During this process, agencies afford Council the opportunity to comment on undertakings that may affect historic properties, and must take Council's comments into account.

Site

An area or feature which exhibits evidence of past cultural activity, whether prehistoric, protohistoric or historic. As opposed to an MAL, a site should show a significant amount of cultural debris, and have at least some potential for yielding data on an area's cultural heritage.

State Historic Preservation Officer (SHPO)

Appointed by the Governor under the provisions of the NHPA, the SHPO is the senior representative of the state with regard to the protection and preservation of historic, cultural, archeological and architectural resources. Most phases of the cultural resource evaluation process must be carried out in consultation with the SHPO's office.

Treatment

Specific steps or tasks carried out on a historic property after its discovery, whose goal is to mitigate (eliminate, lessen or compensate for) the effects of a proposed action. (This term is often used interchangeably with the term "mitigation work".)

Tribal Historic Preservation Officer (THPO)

A tribal representative recognized and funded under Section 106. The THPO's Section 106 authority and responsibilities are similar to the SHPO's, and exercised primarily on Indian lands.

Undertaking

As defined in the 1992 amendments to the NHPA, any project, activity or program funded wholly or in part under the direct or indirect jurisdiction of a federal agency, including:

- a) those carried out on behalf of the agency,
- b) those carried out with Federal financial assistance,
- c) those requiring a Federal permit, license or approval, and
- d) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

APPENDIX H: APPLICABLE HISTORIC PRESERVATION LAWS AND REGULATIONS

Federal Laws and Regulations:

The National Historic Preservation Act of 1966, Amended 1976, 1980 and 1992 (16 U.S.C. 470-470w-6)

36 CFR 800 - Protection of Historic Properties - Regulations of the Advisory Council on Historic Preservation. (*The primary "how-to" regulations promulgated under Section 106 of the NHPA*)

The Archeological Resources Protection Act of 1979 (16.U.S.C 470aa-47011) (*Special requirements for protection on federal or Indian lands*)

43 CFR 7 - Archeological Resources Protection Act - Supplemental Regulations

36 CFR 60 - The National Register of Historic Places (*Regulations governing nomination procedures, criteria for eligibility, etc.*)

American Indian Religious Freedom Act (P.L. 95-341) July, 1978
(*Called "AIRFA"*)

Native American Graves Protection and Repatriation Act (P.L. 101-106) November, 1990
(*Called "NAGPRA"*)

43 CFR 10 - Native American Graves Protection and Repatriation Act Regulations

Montana Laws:

22-3-401 through 413, MCA Montana Antiquities Act

22-3-801 through 811, MCA Montana Human Remains and Burial Site Protection Act

APPENDIX I: RECOMMENDED CULTURAL RESOURCE PROTECTION READING LIST

Archeology and Historic Preservation - Secretary of the Interior's Standards and Guidelines - Federal Register Vol. 48, No. 190, 1983

Treatment of Archeological Properties: A Handbook
Advisory Council on Historic Preservation, 1980

Potsherds and Petroglyphs: Effects of Cultural Resource Management on Public Lands Development, by Walter E. Stern; Rocky Mountain Mineral Law Institute Proceedings #14

Guidelines for Evaluating and Documenting Rural Historic Landscapes National Register Bulletin 30

Guidelines for Evaluating and Documenting Traditional Cultural Properties National Register Bulletin 38

APPENDIX J: THE MEMORANDUM OF AGREEMENT (MOA) **(New for 2001)**

The requirements within the 1999 36 CFR 800 regulations for Memoranda of Agreement covering all adverse effects from mining are not new. Adverse impacts to cultural historic sites have *always* required an MOA. What *is* new is that the exemption from "adverse effect" findings for the excavation of archeological sites has been eliminated in the 1999 regulations. The destruction of archeological sites, even where excavation (data recovery) is planned, constitutes an adverse effect.

This has greatly expanded the need for Memoranda of Agreement, for most mines. Under the earlier regulations, adverse effects were pretty much restricted to the destruction or relocation of NRHP-eligible historic buildings. This meant that an MOA might be required in one or two isolated instances. Archeological sites, which comprise the majority of the cultural/historic sites in most mine areas, could be excavated under agreement between MDEQ/OSM and the SHPO, and be exempted from the "adverse effect" requirements.

The reasoning behind eliminating the exemption for archeological sites is not without controversy. In essence, it is based upon the dictum that "Archeology is the only science which destroys its laboratory, in carrying out its research." It is true that 75 years ago, radio-carbon dating (for example) was not available, so we didn't save charcoal samples. Technology does improve with age, and material may be overlooked or discarded which might in the future prove valuable. The counter-argument is "How significant is the information which might be lost?"

Nonetheless, the new regulations require Memoranda of Agreement (or a single, comprehensive MOA) for all eligible archeological sites to be destroyed, as well as for all eligible historic buildings. Some discussion of this subject is in order.

What is an MOA?

Realistically, an MOA is nothing more than a formal, multi-party agreement document *which covers much the same cultural resource obligations which were formerly covered by cultural resource consultation correspondence, and/or by MDEQ permit stipulations*. Under the former regulations, archeological work which took place prior to permit issuance was covered by documented consultation between MDEQ/OSM and the SHPO. When permits were issued, they contained cultural resource stipulations covering any outstanding obligations for CRM sites. The new regulations require the same level of consultation. The difference is that the results of that consultation, particularly the post-permitting obligations, will now be covered by an MOA.

Who is involved in an MOA?

Pretty much the same parties that have always been involved in the CRM consultation process. MDEQ and OSM, the State Historic Preservation Office (SHPO), and the applicant or operator, at a minimum. When we reach the point of negotiating an MOA (which means when we agree that there will be adverse effects on cultural resources sites), we notify the Advisory Council of

the effects, and of our intent to draft an MOA. The Council has the option of participating in the MOA, or not. As noted in this guideline, there is also a requirement that the opportunity to consult on the MOA be extended to affected Native American groups, and to other interested parties.

I have 32 archeological sites. Does this require 32 MOA's?

Hopefully, no. Individual, site-specific MOA's may be required for the short term, for some mines or applicants, on some sites. Multiple, site-specific MOA's are NOT recommended over the longer term.

The Advisory Council, in fact, is recommending that for new mine permits or major revisions, we execute a single, life-of-mine MOA covering all known *and unanticipated* adverse effects. In a nutshell, this will state the results of the cultural resource inventory, the number of known sites which are deemed eligible for the NRHP, and the eligible sites which will be disturbed by mining. It will spell out procedures for determining treatment for each site, and carrying out that treatment. It will also spell out protocols for handling unexpected site discoveries, and for modifying the agreement to cover later amendments.

Ideally, this means that when MDEQ is ready to issue a permit or major amendment, we will have an MOA in place governing the life of that permit. Instead of a list of permit stipulations for cultural resources, the permit will contain a single stipulation...that the permittee follow the provisions of the MOA.

When do we draft this comprehensive MOA?

As early in the process as we can. For new permits or amendments, we **MUST** have the MOA done before permit issuance. In practical terms, we could theoretically draft the MOA as soon as the required cultural resource inventories are completed, site eligibilities are resolved, and the applicant has confirmed which sites will be adversely affected.

Realistically, no applicant wants to spend money on excavation until he/she is reasonably certain which eligible sites will likely be disturbed. For most permit or amendment applicants, therefore, an ideal time to draft the MOA would be at such time as the applicant is ready to commit to any specific pre-permit or pre-amendment archeological excavation.

What about existing permits?

These are, as of 2001, a bit of a problem. Since the requirement for MOA's is relatively new, it imposes something of a "load" on MDEQ, OSM and the SHPO. (We currently hold 10 active mining permits, and are working on two major amendment applications as of this writing.)

For now, we are concentrating on MOA's for the major permit amendment applications, because these actions have specific target dates or statutory deadlines. In the process, we are rolling into those MOA's the entire permit which will be amended. As we get these actions cleared, we will be turning our attention to the remaining active mine permits. Priority will be given to those permits where we know that there are outstanding site obligations.

Incidental discoveries will, in the interim, have to be handled by individual MOA's.

What will a comprehensive MOA consist of?

We are trying to arrive at a "standard" structural framework for comprehensive MOA's which will be an acceptable "template" for all MOA's. At present, we have this pretty much in hand for the individual, site-specific MOA's (having done a couple). For the long-term MOA's, however, we are still "in our first waltz". Once we get the first ones thrashed out, the others should come easier.

Overall, here's what the structure of the long-term MOA's will look like:

"Whereas": This section will include the basis for the proposed action (existing permit or major amendment), a narrative of the resources involved, their eligibility, and proposed disturbance...along with some legalistic verbiage.

Stipulations: This section is the "meat" of the MOA. It will include any site-specific obligations necessary. For most of the affected sites, it will spell out a "standard treatment" process like we follow now (submit research plans for approval, reporting requirements, etc.) It will contain provisions for handling incidental discoveries, possible burials, expedited treatment of selected sites, reporting, annual reports, etc. *This section will be kept as generic and flexible as possible, to allow the maximum freedom of action without modification of the MOA.*¹⁹

Other: The MOA will also contain standard provisions for modification or termination of the agreement, dispute resolution, etc. *The goal will be a long-term MOA which will require a minimum of modification, but will also be readily modifiable in the event of permit amendments, etc.*

Once we get long-term MOA's in place for each mine, we should be able to handle almost all expected (as well as unexpected) cultural resource work under the existing MOA, without additional site-specific agreements. In the interim, we will (for better or worse) have to deal with a mixture of negotiating the long-term agreements, while cranking out some site-specific agreements to cover our short-term needs.

APPENDIX K: SOME THOUGHTS ON SITE TREATMENT

¹⁹ This is, in part, based on some bitter experience in Wyoming, where archeological MOA's were so specific in nature that excavations were held up while agreements were re-negotiated or modified to fit conditions encountered on the ground.

Mine operators or applicants and their contractors should pay careful attention to the treatment options available, and participate actively in the process of developing appropriate treatments for eligible sites. Operators and applicants often show deep concern over the determination of eligibility for a site. Site eligibility, however, is less critical to the overall permitting process than the treatment of a site. In addition, the treatment can be the high-cost issue for a site, compared with the simple fact of eligibility. Finally, it is possible for an operator or applicant to hastily commit to a site treatment which seems to offer a "path of least resistance", only to regret the commitment later. This can be especially true in the federal lease application process, where site treatments can become binding lease stipulations which can be difficult to alter at a later date.

There is a degree of leeway or judgement available in determining the most appropriate treatment for a given site or proposed action. As noted in the text of this guideline, the most appropriate treatment for *any* site (archeological or historic) is one which addresses *the qualities which make the site potentially eligible for the National Register*, as well as the *significance* of the site. Running a close third is the significance of the proposed treatment itself. Avoiding a historic cabin which will only deteriorate with age may, for example, be less desirable than finding someone who wants to move or re-construct the building on another site.

A couple of further comments on treatment are in order. First, it should be remembered that the most appropriate (and preferred) "treatment" for a cultural resource site is *always* avoidance. This is clearly stated in 36 CFR 800. Operators, of course, always like to be able to employ the most straightforward mining plan possible. It may well be, however, that the cost of excavating an extensive archeological site is not really justified, when compared to the quality or cost of the coal involved. Additionally, operators should be prepared to justify the assertion that a site "cannot economically be avoided", if that is the case.

Sometimes a site is "on the borderline" between being disturbed or avoided. In such a case, the wisest *permitting* approach may be to state that the site "may" be disturbed, and make a commitment to either (a) develop a treatment plan for approval, or (b) avoid the site. Developing a treatment plan is not necessarily a costly item...and it may give you the information you need to assist in the ultimate decision to disturb or avoid. Besides, preserving your options for uncertain sites avoids inadvertently "locking you in" to a particular course of action in a Memorandum of Agreement.

Another comment is that operators/applicants should be "creative" in thinking about possible treatment options. While treatments are generally thought of as site-specific tasks, there are times when broader, "compensatory" treatments may be appropriate and cost-effective. An example might be where despite the best site-specific treatments, an operator is still left with adverse effects to a number of historic sites. One option might be to use the historic information gathered to support the writing of a local community history. (A variation on this worked very well for one applicant in Montana.)