Bjornsen, Alan

From: Mary M. Hopkins [Hopkins@uwyo.edu]
Sent: Friday, April 23, 2010 2:21 PM
To: Bjornsen, Alan
Cc: 'Judyth_Reed@blm.gov'; patrick_walker@blm.gov
Subject: Lost Creek MOA_Draft_04_23_10
Attachments: Lost Creek MOA_Draft_04_23_10.doc

DRAFT revised agreement from our call today.

Mary

F/62

MEMORANDUM OF AGREEMENT
AMONG UNITED STATES NUCLEAR REGULATORY COMMISSION, WYOMING STATE HISTORIC PRESERVATION OFFICER, BUREAU OF LAND MANAGEMENT RAWLINS FIELD OFFICE, NORTHERN ARAPAHO TRIBAL HISTORIC PRESERVATION OFFICER, EASTERN SHOSHONE TRIBE, AND LOST CREEK ISR, LLC
REGARDING ARCHEOLOGICAL DATA RECOVERY AT 48SW16604, SWEETWATER COUNTY, WYOMING.

WHEREAS, the U. S. Nuclear Regulatory Commission (NRC) acknowledges and accepts as guidance the Advisory Council on Historic Preservation's (ACHP) "Recommended Approach for Consultation on Recovery of Significant Information from Archeological Sites," published in the *Federal Register* on May 18, 1999 (vol. 64, no. 95, p. 27085), as part of its revised regulations (36 CFR Part 800) for implementing Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA, 16 U.S.C. 470); and

WHEREAS, the NRC, the Wyoming State Historic Preservation Office (SHPO), Lost Creek in situ recovery (ISR), LLC (LCI), and Bureau of Land Management Rawlins Field Office (BLM) (collectively hereafter called "Consulting Parties") agree that site 48SW16604 is a historic property eligible under 36 CFR Part 60.4, Criterion D, that will be adversely affected by mining-related activities as presently planned; and

WHEREAS, the NRC has contacted the Northern Arapaho Tribal Historic Preservation Officer (NATHPO), the Northern Arapaho Tribe (NAT) and the Eastern Shoshone Tribe (EST) and have invited them as signatories, and they have agreed to participate; and

WHEREAS, the NRC is the lead Federal agency for this undertaking for purposes of compliance with Section 106 of the NHPA; and

WHEREAS, site 48SW16604 is located on land managed by the BLM Rawlins Field Office, which will carry out certain responsibilities identified in this MOA; and

WHEREAS, the "Treatment Plan for Mitigative Excavation of Prehistoric Site 48SW16604 for the Proposed Lost Creek ISR Project in Sweetwater County, Wyoming" (Treatment Plan), is incorporated herein by reference; and

WHEREAS, in accordance with 36 CFR Part 800.6(a)(1), NRC has notified the ACHP of its adverse effect determination with specified documentation specified in 36 CFR 800.11(e) and the ACHP has chosen not to participate in the consultation; and

Comment [MMH1]: NRC will notify ACHP asap.

WHEREAS, in accordance with 36 CFR 800.6(b)(1)(iv), NRC shall submit this MOA, along with the documentation specified in 36 CFR 800.11(f), to the ACHP prior to approving the Undertaking in order to meet the requirements of Section 106 and 36 CFR 800.6(b)(1); and

WHEREAS, the NRC, the BLM, the Northern Arapaho Tribe, the Eastern Shoshone Tribe, and State of Wyoming and SHPO do not waive their sovereign immunity by entering into this MOA,

and each fully retains all immunities and defenses provided by law with respect to any action based on, or occurring as a result of, this MOA; and

WHEREAS, signing of this MOA does not constitute a record of decision or approval of the Lost Creek ISR project, by any of the consulting Federal agencies; and

WHEREAS, this MOA, consisting of seven pages, represents the entire and integrated agreement between the Consulting Parties and supersedes all prior negotiations, representations and agreements, whether written or oral, regarding Section 106 review of the current effects of the Lost Creek ISR project on site 48SW16604.

NOW, THEREFORE, the Consulting Parties agree that, if approved, the Lost Creek ISR project shall be implemented in accordance with the following stipulations to mitigate the adverse effects of mining and construction activities at site 48SW16604.

STIPULATIONS

A. DATA RECOVERY.

1. Prior to the construction of any facilities within 200 feet of site 48SW16604, the data recovery program shall be implemented by LCI in accordance with the Treatment Plan prepared by Centennial Archaeology, Inc., dated January 2008, and incorporated into this MOA by reference.

2. The BLM will issue a renewal of the existing Cultural Resource Use Permit for Excavation or Removal for the data recovery to proceed and will monitor data recovery activities as needed.

Comment [MMH2]: Parties are all ok with these changes.

B. NAGPRA CONSIDERATIONS.

1. To the best of the Consulting Parties' knowledge and belief, no human remains, associated or unassociated funerary objects or sacred objects, or objects of cultural patrimony as defined in Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001), are expected to be encountered during data recovery work. However, should human remains be encountered, work will immediately stop in the vicinity of the discovery, the area will be secured, and the archaeological field director will immediately contact the BLM and NRC. The BLM will notify the Sweetwater County Sheriff's office and Sweetwater County Coroner's office and the SHPO. If the human remains are determined to be Native American, the BLM will be responsible for compliance with the provisions of NAGPRA.

Comment [MMH3]: Intent is for BLM take all responsibility for NAGPRA compliance.

C. REPORTING.

1. Upon completion of field work, a letter report briefly describing the results of

field work, and a statement of confidence that completed investigations have met data recovery plans and adequately mitigated adverse effects, will be submitted by LCI to the Consulting Parties for their review and comment.

Upon approval of the letter report by the BLM and the SHPO, BLM will issue a formal Notice to Proceed to LCI.

Comment [MMH4]: Patrick needs to confirm the "notice to proceed" language.

2. A final report detailing results of data recovery efforts and mitigation procedures will be submitted by LCI to the Consulting Parties for review no later than 24 months following the completion of field work, unless the Consulting Parties mutually agree to an extension of this deadline.

Comment [MMH5]: All agreed to extend the time from 6 to 24 months.

3. The consulting archaeologist will prepare a summary journal article to be submitted to the editor of the *Wyoming Archaeologist* on the results of the data recovery within six months of the acceptance of the final data recovery report. The article should consist of summary information and results of the data recovery; approximately three to five standard 8 1/2 x 11 pages of text, two or three photographs and one or two illustrations. This information should be derived directly from the data recovery report and no new research is required. The editor of the Wyoming Archaeologist is not required to publish the report in the journal. Submission of the article by Centennial Archaeology completes the responsibility under this MOA. If data recovery **does not** provide information appropriate for a journal publication, consulting archaeologist will notify the LCI and all parties will consult on the appropriateness of this stipulation. The parties will document the discussion and decision made in writing. The publication of the summary of the results of the excavations will make the information available to the general public.

D. PERMITTING AND INSPECTIONS

1. NRC shall require as a condition of any license issued to LCI, that LCI complies with the cultural resource Treatment Plan described in **STIPULATION A.1.** and the provisions in this MOA.

2. Any NRC license conditions will be enforced subject to the extent of NRC's regulatory authority and as NRC determines to be appropriate.

E. AMENDMENTS

1. Any signatory to this MOA may request that it be amended, whereupon the signatories will consult to reach agreement. Such amendment shall be effective upon the signature of all Consulting Parties to this MOA, and the amendment shall be appended to the MOA as an Appendix.

2. Modifications to the Treatment Plan as described in **STIPULATION A.1** may be executed upon concurrence of all Consulting Parties as long as no modifications to the body of the MOA are required. This modification will

not require a formal amendment to this MOA as per **STIPULATION E.1.**

F. DISPUTE RESOLUTION

1. Should any party to this MOA object within 30 days to any activity pursuant to this MOA, NRC shall consult with the objecting party to resolve the objection.

   If NRC determines the objection cannot be resolved, NRC shall forward all documentation relevant to the dispute to the ACHP. Any comments or recommendations received from the ACHP will be forwarded to the signatories for consideration.

   Resolution of the objection will be documented in a written resolution and distributed to all signatories by the NRC. If a signatory fails to respond within 30 days of receipt of the written resolution, concurrence with the resolution will be assumed by the other parties and the resolution will go into effect.

   Comment [MMH6]: Added this clause. Dispute will be documented and distributed. Is this clear to everyone?

   If resolution of the objection requires an amendment to the MOA, it will be done per Section E of this agreement.

2. Nothing in this Section shall be construed or interpreted as a waiver of any judicial remedy that would be available to any party of this MOA.

3. Nothing in this Section shall be construed or interpreted to apply to BLM's or NRC's enforcement actions related to compliance with BLM's or NRC's regulations or license conditions.

G. TERMINATION

Signatories to this MOA may initiate termination by providing written notice to the other signatories of their intent. After notification by the initiating Signatory, the remaining parties shall have 60 business days to consult to seek agreement on amendments or any other actions that would address the issues and avoid termination. If such consultation fails, the termination will go into effect at the end of this 60 day period, unless all the parties agree to a longer period.

In the event of termination, NRC will comply with 36 CFR 800.4 through 800.6 with regard to this individual undertaking covered by this MOA.

Comment [jer7]: This MOA covers only one undertaking.

H. DURATION OF AGREEMENT

1. This MOA shall remain in effect for three years from its date of execution by the signatories (last date of signature), or until completion of the work stipulated, whichever comes first, unless extended by agreement among the signatories pursuant to **STIPULATION C.2**.

GENERAL PROVISIONS OF THE AGREEMENT

A. **ENTIRETY OF AGREEMENT**. This MOA, consisting of six pages, represents the entire and integrated agreement between the parties and supersedes all prior negotiations, representations and agreements, whether written or oral.

B. **PRIOR APPROVAL.** This MOA shall not be binding upon any party unless this MOA has been reduced to writing before performance begins as described under the terms of this MOA, and unless this MOA is approved as to form by the Attorney General of the State of Wyoming, or his representative.

C. **SEVERABILITY.** Should any portion of this MOA be judicially determined to be illegal or unenforceable, the remainder of the MOA shall continue in full force and effect according to its terms, and any party may renegotiate the terms affected by the severance.

D. **THIRD PARTY BENEFICIARY RIGHTS.** The parties do not intend to create in any other individual or entity the status of third party beneficiary, and this MOA shall not be construed so as to create such status. The rights, duties and obligations contained in this MOA shall operate only between the parties to this MOA, and shall inure solely to the benefit of the parties to this MOA. The provisions of this MOA are intended only to assist the parties in determining and performing their obligations under this MOA. The parties to this MOA intend and expressly agree that only parties signatory to this MOA shall have any legal or equitable right to seek to enforce this MOA, to seek any remedy arising out of a party's performance or failure to perform any term or condition of this MOA, or to bring an action for the breach of this MOA.

Execution of this MOA by NRC, SHPO, NATHPO, BLM, Lost Creek ISR, LLC, NAT, and EST the submission of documentation and filing of this MOA with the ACHP pursuant to 36 CFR §800.6(b)(1)(iv) prior to NRC's approval of the undertaking, and implementation of its terms, are evidence that NRC has taken into account the effects of this undertaking on historic properties and afforded the Council an opportunity to comment.

Signatures: In witness thereof, the parties to this MOA through their duly authorized representatives have executed this MOA on the days and dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of this MOA as set forth herein.

The effective date of this MOA is the date of the last signature affixed to this page.

Signatories:

United States Nuclear Regulatory Commission

By._____Date:_____
Title: Larry W. Camper, Director
Division of Waste Management and Environmental Protection

Wyoming State Historic Preservation Officer

By:_____Date:_____
Title: Mary Hopkins, State Historic Preservation Officer

Northern Arapaho Tribal Historic Preservation Officer

By:_____Date:_____
Title: Darlene Conrad, Tribal Historic Preservation Officer

Bureau of Land Management

By:_____Date:_____
Title: Patrick Madigan, Rawlins Field Office Manager

By:_____Date:_____
Title: Bill Hill, Deputy State Director
Resource Policy and Management

Lost Creek ISR, LLC

By:_____Date:_____
Title: Wayne Heili, President

Invited Signatories:

Northern Arapaho Tribe

By:_____Date:_____
Title: Harvey Spoonhunter, Tribal Chairman

Eastern Shoshone Tribe

By:_____Date:_____
Title: Ivan Posey, Tribal Chairman

Wyoming Attorney General's Office Approval as to Form:

By:_____Date:_____
Title: Don Gerstein, Senior Assistant Attorney General