

*Mediation Assessment*  
**BLM RESOURCE MANAGEMENT PLAN AMENDMENT**  
**FOR OTERO MESA**

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**FOR OTERO MESA**

**Executive Summary**

Otero Mesa in southern New Mexico is a large, remote landscape managed by the Bureau of Land Management (BLM). In October, 2000, in response to increased interest in oil and gas leases, BLM issued a *Draft Resource Management Plan Amendment and Environmental Impact Statement for Federal Fluid Minerals Leasing and Development in Sierra and Otero Counties* (RMP Amendment). This plan has met with opposition from numerous sources. Public focus has been on Otero Mesa, which covers the southern region of Otero County. In late February, the BLM Resource Advisory Council (RAC) held a public meeting to better understand the BLM's "preferred alternative" and hear from the affected parties. It was clear that both industry representatives and environmental advocacy groups were unhappy with the preferred alternative. As a result of their observations, the RAC made the following recommendation to the BLM:

*"Members recommended that the RAC convene a RAC workgroup composed of a small group of stakeholders to work to consensus on an alternative for O&G drilling on Otero Mesa. This should be a focused mediated discussion based on information already available to build consensus around another alternative. We see this as a pilot for the BLM.*

As a first step, RESOLVE was asked to conduct a feasibility assessment, consulting with the potential parties and involving them in shaping the decisions about whether and how to organize the process. Interviews were conducted with 10 interested parties.

It is my judgment, based on the interviews with the parties, that neither the initial mediation option as outlined nor a broader scoping of a mediation process are feasible at this time. The most significant barrier indeed may be time and timing. It is so late in this particular RMP Amendment process that many people understandably want to get it finished quickly; however, positions now are sufficiently polarized that it will take a long time to work through the barriers to negotiation let alone the barriers to agreement.

At least three factors pose barriers to success. First, the parties have strong and significantly different views on what a negotiation should be about, based on different priorities and/or values concerning this landscape and different assumptions about the specific policy decisions to be made now. This emerges most clearly in differences over whether the decision to limit the Resource Management Plan Amendment to fluid minerals leasing was too narrow or not. Thus, it would be very difficult for the parties to participate in a conversation about the questions of importance to one another. Second, several of the parties also are optimistic that their interests are more likely to be met through processes other than a mediated negotiation. Third, many of the parties

currently have limited direct contact with one another. Therefore, motivations may be misunderstood and a strong foundation for working through issues is missing. Although these three obstacles are not impossible to overcome, it would take a lot of time to create effective negotiating relationships for this process.

A decision not to proceed with mediation now does not mean that nothing can be done, however. This RMP Amendment is only one decision. Those with a direct interest in the management of Otero Mesa will continue to need to deal with one another over future decisions. BLM, the RAC and the directly affected parties can start now to lay the foundations for dialogue and collaborative problem-solving negotiations for such decisions in the future. Several process options other than mediation could add value to BLM's decision making processes both now and in the future: 1) as BLM completes this RMP Amendment process concerning oil and gas leasing specifically; 2) as it looks ahead to future, more comprehensive revisions to this RMP; and 3) as it addresses oil and gas leasing issues elsewhere in the state. Each of these options could help build the "social capital" that any community needs to deal with the differences that inevitably arise

Options for this RMP Amendment on Fluid Minerals Leasing and Development include:

1. Creating a working group of RAC members as "thinking partners" with BLM, and hold a one-time, two-day workshop to assist BLM in generating additional or modified alternatives for consideration. This would not involve reaching agreement on a preferred alternative. It would involve the directly affected parties as participants in the discussion.
2. Inviting Sierra and Otero Counties to participate as "cooperating agencies" under NEPA in completion of the Environmental Impact Assessment, which would respond directly to their request for a more active, collaborative role.
3. Engaging in a more proactive, government to government relationship in completing the cultural assessment collaboratively with affected tribes, again responding to concerns expressed about the degree of consultation.

Longer-term options for issues that will arise in managing the natural resources on Otero Mesa and surrounding areas include:

4. Fostering "partnering" relationships between ranchers and oil and gas companies (and others as interested), looking ahead to the issues that will arise after leasing during actual operations.
5. Convening a "visioning workshop" open to a larger number of those directly affected by this RMP, to share their hopes and concerns for what Otero Mesa will be in the future, as a basis for a future, comprehensive RMP revision.

Finally, longer-term options for initiating more collaborative strategies statewide include:

6. Holding a one or two-day "lessons-learned" session of a working group of RAC members, or adding this to the "thinking partners" session above.

## **Introduction**

In June 2002, The New Mexico Resource Advisory Council (RAC) asked RESOLVE to conduct a professional, neutral assessment exploring the feasibility of a mediated process to develop a consensus-based preferred alternative for the Bureau of Land Management's (BLM) resource management plan (RMP) for Otero Mesa, particularly for the management of oil and gas resources. Funding for this assessment was provided by the BLM through the U.S. Institute for Environmental Conflict Resolution (Institute). This assessment was conducted from late June through early August 2002.

Initially, BLM and the RAC contacted the Institute to find a mediator for a proposed meeting in July 2002 among individuals representing a few of the directly affected parties. The Institute provided expertise about best practices to BLM and the RAC, including how to address the immediate concerns of some of the parties about the purpose and scope of the meeting as initially proposed. Through these discussions, the scope of work evolved into a two-phase concept, beginning with this mediation assessment.

This assessment report is based on interviews with interested parties identified by the RAC and BLM, along with other interested parties suggested subsequently. This report summarizes the key findings of the assessment and suggests several process options for addressing concerns raised. Because a Draft Environmental Impact Statement (EIS) was prepared by the BLM and because the RAC's specific request was to assess the feasibility of mediation, this assessment report focuses principally on the opportunities and barriers to resolving the conflict and does not attempt to provide a comprehensive overview of the issues. For the most part, these can be found in the Draft EIS and the comments submitted by interested parties. This report does discuss the differences among the parties on their overall framing of the scope of issues for resolution, however.

The next step is for BLM and the RAC to discuss and decide which of these option(s) to undertake. (Some of these options could be conducted in a complementary fashion.) It is my understanding that the BLM will seek the RAC's guidance about the choice of options, understanding that the consent of the parties to any proposed process also will be needed.

## **Background**<sup>1</sup>

Otero Mesa in southern New Mexico is a large, remote landscape managed by the Bureau of Land Management (BLM). The RMP amendment in question addresses Sierra and Otero Counties, covering 1.8 million acres of BLM surface lands in the Las Cruces Field Office. Public focus has been on the Otero Mesa portion, which covers the southern region of Otero County. Virtually undeveloped, the mesa contains one of the last remaining portions of healthy Chihuahuan Desert grassland in the state, and it is home to many species of wildlife and native plants as well as independent cattle ranches that have been in operation for generations.

Exploratory wells drilled in 1998 discovered the potential for large-scale natural gas development and several companies have filed applications for permits to drill on Otero Mesa. Construction has been approved for a 15-mile pipeline from the initial well to existing gas lines in Texas. Lease applications for drilling, however, are on hold while the BLM revises its Resource Management Plan for the area to determine how, where, and when further development of the resource will be permitted.

Because of ecological concerns, previous management guidelines for the area stipulated a “no surface occupancy” limitation, which restricted new wells to within 150 yards of existing roads. The BLM issued a draft Environmental Impact Statement in November 2000 that was subsequently modified because of opposition from interested parties. The compromise solution now offered by the BLM is to allow for drilling on the Mesa while protecting the grassland habitat, by limiting drilling to 5% of a lease area at any one time. The conflict is over the 116,000 acres of Otero Mesa grasslands that would fall under the 5 percent surface occupancy limit. The BLM projects that 140 wells would be drilled, disturbing about 862 acres over a 20-year period, including nine-acre well-sites, roads, and 100 miles of pipelines.

The plan has met with opposition from both industry and environmentalists. Energy company officials say the proposal is too restrictive of exploration and development, and that it would be economically unfeasible to develop the resource. They believe that the area is potentially another Permian basin and are urging full development of the gas reserves. Environmentalists say the proposal doesn’t go far enough to reduce the industry’s impact on sensitive habitat for plants and wildlife. They have identified over

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<sup>1</sup> This background section is taken verbatim from the draft Scope of Work given to the author for this assessment (attached as Appendix A). Because the parties differ significantly in their descriptions of the issues and present situation, this language may not be acceptable to all. However, at this stage, the benefit that could be achieved from drafting mutually agreed upon language for this section of this report would have little benefit. The discussion of process options below is of more significance.

460,000 acres in the greater Otero area that they believe are suitable for Wilderness designation, and are urging that development stay out of these areas. The BLM's studies do not confirm the assessments of either the industry or environmental groups.

In late February, the BLM Resource Advisory Council (RAC) held a public meeting to better understand the BLM's "preferred alternative" and hear from the affected parties. It was clear that both industry representatives and environmental advocacy groups were unhappy with the preferred alternative, and that issues are complex and multi-faceted. As a result of their observations, the RAC made the following recommendation to the BLM:

*"Members recommended that the RAC convene a RAC workgroup composed of a small group of stakeholders to work to consensus on an alternative for O&G drilling on Otero Mesa. This should be a focused mediated discussion based on information already available to build consensus around another alternative. We see this as a pilot for the BLM.*

### **Assessment Approach**

A feasibility assessment is a commonly accepted element of good mediation practice.<sup>2</sup> RESOLVE's approach is to consult with the potential parties and involve them in shaping the decisions about whether and how to organize the process. This approach was taken here.

### **Method and Tasks**

The specific tasks completed for this assessment were based on commonly accepted mediation assessment procedures, including:

- involvement by representative parties in the selection of the neutral,
- obtaining background information and a preliminary list of names for individuals to be contacted from the responsible agency (BLM in this case),
- contacting the parties to explain the assessment process, ask if they are willing to be interviewed, and schedule those interviews,
- developing interview questions tailored to the specific dispute,
- conducting the interviews,
- drafting preliminary recommendations for next steps,
- consulting the parties about their views about those options, and
- completing an assessment report that reflects the views of the parties as well as the professional recommendations of the mediator.

In this case, a neutral mediator (the author) was selected in early June by individuals

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<sup>2</sup> Susskind, Lawrence and Jennifer Thomas-Larmer, "Conducting a Conflict Assessment" in *The Consensus-Building Handbook*, L. Susskind, S. McKearnon, and J. Thomas-Larmer (eds), Sage Publications, Thousand Oaks, California, 1999.

representing the RAC from the roster of professional mediators managed by the US Institute for Environmental Conflict Resolution, with assistance from the Institute.<sup>3</sup>

A general sense of urgency was and is present either to resolve the issues or for BLM to make a decision. However, when I called the parties suggested by the RAC, it became evident that they did not all have the same understanding about the assessment process, nor were all of them available for interviews in mid-June as the RAC and BLM had assumed. In addition, several of the parties initially suggested felt strongly that directly affected parties were missing from the list and should be added for the assessment itself to be credible. This is neither unusual nor should it be of concern, especially in a situation where mediation is being suggested on a relatively quick timetable.

Therefore, in consultation with BLM, the representative of the RAC to this process, and the parties themselves, each of the parties received a mailing with a letter describing the proposed activities, a handout about conflict assessments, a specific list of questions, and other background information. This foundation-building step added about two and a half weeks to the assessment process, but gave each of the parties a better understanding of this assessment and the ability to participate in shaping it. This is consistent with the principle that mediation is a voluntary process and, thus, that any mediation assessment should be conducted as a shared assessment with those parties. (See Assessment Approach below.)

Interviews or, in two cases, introductory meetings, were conducted with ten parties during the week of July 8, 2002. (See Attachment B.) All parties were extremely generous with their time and shared their views candidly and in good faith. The interviews were informal in nature, generally following the list of questions in Appendix C but only as applicable to the interests of each party. All parties were promised confidentiality, if requested, pursuant to the provisions of the federal Administrative Dispute Resolution Act.

To respond to the different views expressed by the parties about what they hoped mediation could accomplish, several process options were developed in the week or two following the interviews. Follow up interviews were conducted by phone during the weeks of July 29 and August 5 to consult with the parties about these options, and a status report was provided to the RAC on August 8. This final report reflects the comments of the parties and my professional judgment about process options that might be considered, with the views of the parties about the pros and cons of these options.

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<sup>3</sup> See Appendix A for the criteria used.



## **Assessment Criteria**

All parties should feel they have something to gain from participating in a mediated process, and no one should feel the process would harm their current standing or prospects for resolution of the issues. Obviously, mediation is a voluntary process. People have many legitimate options to choose from for dealing with their differences and for settling disputes in a democratic society – legislative, executive and judicial bodies exist at the local, state, and federal levels, as does recourse to the “court of public opinion” in a variety of media. Mediation also is not the only option for fostering dialogue and for seeking voluntary agreements on issues. Thus, an assessment (whether by each party or more formally with the assistance of a neutral) must ask whether parties can achieve their goals more effectively through processes other than mediation. This is the concept of “BATNA,” or the “best alternative” if no agreement were to be reached through negotiation.<sup>4</sup>

Mediation also is not the only way to foster greater dialogue, collaborative efforts, or agreements. Specifically, mediation generally assumes that the objective is a decision by mutual agreement. Other objectives short of agreement can be useful, however. In situations where seeking agreement is premature or infeasible, parties may also find it useful to: open lines of communication and build relationships, increase their mutual understanding of the issues and/or one another’s perspectives on those issues, engage in joint fact-finding and issue assessment, develop new options for further consideration, or implement joint projects.

Because how a process is structured will directly affect the potential of the process to satisfy parties’ interests, the approach taken in this situation, as in others, has been to mediate a shared conflict assessment among the parties. In other words, the objective of this assessment is a general agreement, to the extent possible, as to who will participate and in what way, what the scope of issues will be, any deadlines, frequency of meetings, information needed to make sound decisions, choice of the neutral mediator (if any), and other ground rules. It is particularly important that the scope of issues to be negotiated provide the opportunity for all parties to raise the key issues of concern to them, and parties need the opportunity to assess how the potential results of a negotiation or collaborative process would compare with their alternatives.

In assessing the feasibility of an agreement-focused consensus-building process, I explored whether the following, general conditions could be met.<sup>5</sup> Rarely are all the following conditions present in any specific situation, and often parties have a strong interest in making the attempt to resolve the issues that divide them even if many of these conditions are missing. However, the parties and the mediator need to be aware of which

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<sup>4</sup> Fisher, Roger and William Ury, *Getting to Yes*

<sup>5</sup> These factors have been developed by RESOLVE over the past 25 years, based both upon research and our experience with hundreds of public policy cases conducted by RESOLVE mediators and likely thousands conducted in the field as a whole. See also Bingham, Gail, *Seeking Solutions: Exploring the Applicability of ADR for Resolving Water Issues in the West*, Report to the Western Water Policy Review Advisory Commission, 1997.

factors may not be present, because those will be the challenges to success that must be overcome.

- The parties agree on the objectives for the negotiation or collaborative process.
- The parties agree on the scope of issues for discussion.
- There is a sufficiently well-developed factual base to permit meaningful discussion and resolution of the issues, or sufficient time to gather necessary information.
- Those participants interested in or affected by the outcome of the negotiation should be readily identified and few enough in number to allow representation of all affected interests in the process as designed. Participants should be able to represent and reflect the interests of their constituencies.
- The parties should all have some genuine interest in participating in good faith negotiations. They should feel themselves as likely, if not more likely, to achieve their overall goals using negotiations as they would through whatever alternatives to negotiation are available to them.
- The parties can obtain adequate resources to participate, including technical support.
- There should be a legislative, administrative or judicial deadline or opportunity, or some other forcing mechanism requiring a decision within the foreseeable future.
- The negotiation will not cause unreasonable delay.
- A mechanism exists to implement a consensus, if reached.

### **Recommendation to Proceed**

Based on its discussions with some of the parties, the RAC outlined a possible mediation approach to seek agreement on the preferred alternative for the Otero and Sierra County RMP Amendment. The RAC's recommendation was as follows:

*"Members recommended that the RAC convene a RAC workgroup composed of a small group of stakeholders to work to consensus on an alternative for O&G drilling on Otero Mesa. This should be a focused mediated discussion based on information already available to build consensus around another alternative. We see this as a pilot for the BLM.*

In requesting an assessment of the feasibility of such a mediated process, the RAC

explicitly recognized that the affected parties need to be involved in determining the protocols for any mediated negotiations.

It is my judgment, based on the interviews with the parties, that neither the initial mediation option as outlined nor a broader scoping of a mediation process are feasible at this time. The most significant barrier indeed may be time and timing. It is so late in this particular RMP Amendment process that many people understandably want to get it finished quickly; however, positions now are sufficiently polarized that it will take a long time to work through the barriers to negotiation let alone the barriers to agreement.

At least three factors pose barriers to success. First, the parties have strong and significantly different views on what a negotiation should be about, based on different priorities and/or values concerning this landscape and different assumptions about the specific policy decisions to be made now. This emerges most clearly in differences over whether the decision to limit the Resource Management Plan Amendment to fluid minerals leasing was too narrow or not. Thus, it would be very difficult for the parties to participate in a conversation about the questions of importance to one another. Second, several of the parties also are optimistic that their interests are more likely to be met through processes other than a mediated negotiation. Third, many of the parties currently have limited direct contact with one another. Therefore, motivations may be misunderstood and a strong foundation for working through issues is missing. Although these three obstacles are not impossible to overcome, it would take a lot of time to create effective negotiating relationships for this process.

A decision not to proceed with mediation now does not mean that nothing can be done, however. This RMP Amendment is only one decision. Those with a direct interest in the management of Otero Mesa will continue to need to deal with one another over future decisions. BLM, the RAC and the directly affected parties can start now to lay the foundations for dialogue and collaborative problem-solving negotiations for such decisions in the future. Several process options other than mediation could add value to BLM's decision making processes both now and in the future: 1) as BLM completes this RMP Amendment process concerning oil and gas leasing specifically; 2) as it looks ahead to future, more comprehensive revisions to this RMP; and 3) as it addresses oil and gas leasing issues elsewhere in the state. Each of these options could help build the "social capital" that any community needs to deal with the differences that inevitably arise

Options for this RMP Amendment on Fluid Minerals Leasing and Development include:

*Option 1:* Creating a working group of RAC members as "thinking partners" with BLM, and hold a one-time, two-day workshop to assist BLM in generating additional or modified alternatives for consideration. This would not involve reaching agreement on a preferred alternative. It would involve the directly affected parties as participants in the discussion.

*Option 2:* Inviting Sierra and Otero Counties to participate as "cooperating agencies" under NEPA in completion of the Environmental Impact Assessment,

which would respond directly to their request for a more active, collaborative role.

*Option 3:* Engaging in a more proactive, government to government relationship in completing the cultural assessment collaboratively with affected tribes, again responding to concerns expressed about the degree of consultation.

Longer-term options for issues that will arise in managing the natural resources on Otero Mesa and surrounding areas include:

*Option 4:* Fostering “partnering” relationships between ranchers and oil and gas companies (and others as interested), looking ahead to the issues that will arise after leasing during actual operations.

*Option 5:* Convening a “visioning workshop” open to a larger number of those directly affected by this RMP, to share their hopes and concerns for what Otero Mesa will be in the future, as a basis for a future, comprehensive RMP revision.

Finally, longer-term options for initiating more collaborative strategies statewide include:

*Option 6:* Holding a one or two-day “lessons-learned” session of a working group of RAC members, or adding this to the “thinking partners” session above.

In evaluating these options, it is important to remember that their success also will depend on the active involvement of the parties in shaping the specific approaches, because these are voluntary activities requiring their consent to participate. The importance of continued dialogue about opportunities for dialogue also should not be forgotten. Circumstances change over time, and people’s thinking evolves. Leaving the door open for people to change their minds about the value of dialogue, collaborative efforts, or mediated negotiations never hurts.

### Overview/Analysis

Perhaps one reason that the RMP Amendment process has taken as long as it has regarding oil and gas leasing on Otero Mesa is that the inherent dynamics of the situation pull in opposing directions – some supportive of resolution; others pulling people apart. Looking at the situation through a conflict resolution lens, several of the above criteria emerged from the assessment interviews as the key challenges to a successful negotiation or collaborative problem solving effort for Otero Mesa. Others did not seem to pose as significant obstacles, or may even create incentives for dialogue.

The most significant challenges seem to be that:

*1. The parties do not agree on the assumptions that would shape the scope of issues for a negotiation.* Thus, they have significantly different views about how to frame the questions for negotiation, or even what conversation to be in. Should it be about:

- how to overcome misperceptions about the impacts of oil and gas exploration and development,
- how to minimize the negative effects of oil and gas exploration and development,
- where and how to do oil and gas exploration and development,
- how to preserve the ecological and wilderness values of the Chihuahuan desert grasslands,
- how to preserve and enhance the social and economic conditions for the people who live in the area, or
- something else again?

2. In part because the parties start with such different assumptions about what the conversation should be about, they each emphasize the importance of different forums for decision making and are optimistic that their interests are more likely to be met through these forums. These include: the traditional NEPA process, the APD process under current oil and gas regulations, government to government procedures for cultural resources, the courts (including for the adequacy of the NEPA compliance), the legislative process for wilderness designation, and others.

3. Many of the parties currently have limited direct contact with one another. Therefore, motivations may be misunderstood and a strong foundation for working through issues is missing. Each of the participants was quite open during the assessment interviews, and all demonstrated their good faith in any process that they would participate in. However, a significant amount of distrust exists concerning one another. This could be overcome, but it would take a considerable amount of time.

4. The strong sense of urgency that many parties feel to reach closure on the RMP Amendment makes it difficult to spend the time needed to overcome current barriers. Those parties who have been involved in the process for the past few years have an understandable desire to avoid anything that would delay a decision. These generally are the people who support or accept oil and gas development in the region. This sense of urgency is not shared by those who question that assumption. In addition, any mediation process almost certainly would take more time than many of the parties feel would be worthwhile.

Other factors that are likely to present challenges include:

- the fact that this specific dispute is seen by several parties in the context of larger national debates – over energy policy, wilderness preservation, and the deep passions about who “owns” the West;
- the factual basis for negotiations may need significant attention as well, e.g. the amount and quality of the data being used concerning the “reasonably foreseeable development” estimates, the type and distribution of traditional cultural properties (including the need for an ethno-historic overview in addition to archeological information), the location of roads (and what constitutes a road), etc; and
- lack of sufficient recognition of tribal interests in this area until recently, in part through this assessment.

Several factors do provide important positive incentives for success, and others were

considered neutral, i.e. they don't seem to pose a serious problem. They are:

- The strong interest by BLM in involving the parties and its commitment at the highest levels to implement agreements reached create as strong a mechanism to implement a consensus as generally is possible.
- The upcoming decision about a preferred alternative and the subsequent "Record of Decision" for the RMP Amendment provide a clear opportunity and focus for action in the foreseeable future. The almost two year period since issuance of the draft EIS also creates a sense of urgency.
- The parties generally are easily identified, few enough in number to allow representation of all affected interests, and able to identify individuals who can represent their constituencies.
- Parties did not express any concern about resources for participation.
- All parties are operating in good faith, as indicated by the quality and extent of their participation in this assessment.

## **Process Options**

### Mediation Options

At least two mediation options emerged during the course of this assessment. They were:

- The initial mediation option proposed by the RAC – an intensive session with a few of the most directly affected parties; and
- An expanded mediation option – including a broader scope of issues, additional parties, and more meetings.

### Initial Process Option: Intensive Session with a Few Directly Affected Parties

*Objective, Scope and Process Recommended.* The RAC initially envisioned a single, multi-day, intensive session in the summer of 2002, involving six representatives of interested parties. The individuals suggested as participants in the process were:<sup>6</sup>

Steve Capra, New Mexico Wilderness Alliance  
Bobby Jones, Rancher  
Chuck Moran, Yates Petroleum  
Mike Nivison, Otero County  
Robyn Tierney, NM RAC (in a liaison role)  
BLM (either as an observer or participant)

As noted in their resolution, the RAC envisioned these individuals being named as a working group of the RAC. They would seek to reach a consensus recommendation on a preferred alternative for the Resource Management Plan Amendment, supported by all parties and approved by the full RAC. No press would be permitted in the negotiation setting.

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<sup>6</sup> Steve Yates, HEYCO Petroleum, had originally been suggested but was an alternate was suggested for personal reasons. Also, BLM was suggested as either a participant or observer.

One question that was not clearly settled was how far the scope of the discussion about the plan amendment could be expanded beyond the alternatives currently under discussion. However, most parties did assume that the overall focus would be the same as that of the RMPA process to date, which most but not all described as how to proceed with oil and gas leasing on Otero Mesa while minimizing any negative effects.

### Pros and Cons.

The advantages of this option are:

- The intended objective is a decision so that the RMP Amendment process can reach closure,
- The RAC and BLM expressed the intent to adopt an agreement, assuming it is within existing legal parameters, and so there is a clear mechanism for implementation,
- It would conclude relatively quickly.

The disadvantages of this option (and the expanded mediation option) are described above, but include that:

- It doesn't encompass all parties' interests
- Not all parties are willing to participate
- Not all interested parties are included (e.g. the tribes, Sierra county, other environmental groups)
- Some parties are concerned about the parity of representation of their views at the table.
- Uncertainty exists about whether the RAC intended decisions to be reached by majority vote or consensus, which would need to be clarified
- Clarification also is needed about the scope of alternatives that can be considered without reopening the scoping process for this EIS (a supplemental EIS could be done, however)
- One meeting is insufficient time for the scope of issues raised

Next Steps. None recommended other than to encourage all parties to respect that a decision not to participate actually is an indication of good faith because it is an honest communication about that party's key interests and concerns.

### Expanded Mediation Option

Objective, Scope and Process Recommended. An alternative to the initial process option would be to expand the scope of the negotiations in several ways, each responding to concerns expressed by one or more parties in the assessment interviews. These would be to expand: 1) the scope of issues, 2) the number of parties, and 3) the number of meetings.

Lack of agreement about what questions should be negotiated is one of the principle obstacles to a successful mediation in this situation. The assumption in the initial process option that the negotiations should focus on policies concerning how to guide fluid

minerals leasing and development does not provide a sufficient opportunity to explore the principle concerns of those parties who are interested in protecting the ecological and cultural values of Otero Mesa. A "Citizens Proposal" for wilderness areas has just been completed, using BLM's guidelines. The Ysleta del Sur Pueblo also has published volumes on its history as a tribe, which includes linkages to indigenous peoples who lived on Otero Mesa. Otero Mesa also has and is being used by the Mescalero and perhaps other tribes. One possibility could be to expand the scope of the RMP Amendment process to include a review of this information and a discussion of what actions to take.

The geographic extent of the mediated negotiations is another question, i.e. whether the negotiation only concerns the Chihuahuan desert grasslands of Otero Mesa or whether it would be beneficial to consider the provisions for oil and gas leasing across the entire two county area of Sierra and Otero Counties to which the RMP Amendment is applicable. Most of those interviewed would focus on Otero Mesa. No specific agreements have been reached at this time about the geographic scope of issues, however.

If it is the full geographic extent of the RMP Amendment, then the directly affected parties also logically include Sierra County.

The Ysleta del Sur, Mescalero, and perhaps other tribes should be invited based on their current and traditional interests in Otero Mesa. One or more additional environmental groups would also need to be invited to respond to the concerns expressed about parity in the representation of interests concerning ecosystem functions and values.

An expanded negotiation process is likely take five to seven meetings over a period of several months, from Fall 2002 through late Winter/early Spring 2003.

### Pros and Cons.

The advantages of this option are:

- The intended objective is a decision so that the RMP Amendment process can reach closure.
- A clear mechanism for implementation would remain, if the RAC and BLM so choose.
- More of the parties who see themselves as directly affected would be included.
- It would encompass more parties' interests.

The disadvantages of this option are described above, but also include that:

- It is not likely to be acceptable at this time to the environmental community in that it still presumes that oil and gas leasing would occur in some parts of Otero Mesa, and it might encompass issues that other parties are unwilling to accept (e.g. that construction activities will cause negative environmental effects, or that the decision to consider the potential for wilderness designation is still open).
- It should not be expanded to such an extent that BLM would be required to reopen the scoping process.
- It would take too long.



- The other disadvantages noted about the initial mediation option also apply.

*Next Steps.* None recommended other than that noted for the initial option above. Also, this option might need to begin with the Visioning Workshop option below as a way to begin to work through the challenge of the different assumptions the parties have about the scope of issues to discuss.

#### Other Process Options

##### Option 1: “Thinking Partners” Work Group of the RAC to Develop New Alternatives

*Objective, Scope and Process Recommended.* Although mediation involving the directly affected parties does not appear feasible, the BLM remains left with the task of developing a preferred alternative for the RMP Amendment for Otero and Sierra Counties. BLM clearly is interested in ensuring that the best thinking goes into this decision, and the RAC is one of its resources for obtaining advice. The current RAC also has informed itself about the issues in a significant way. Therefore, an alternative to mediation among the direct parties would be for the RAC to form a small, diverse working group of its own members, with the objective of developing additional options for consideration by the BLM. This would not require negotiation of one preferred alternative, but rather would be intended to expand current thinking about options, none of which are attractive to many of the parties.

RAC members should be selected to reflect the diversity of views on the issues and should be known for creative thinking. A single meeting, possibly two days in length, would probably be sufficient. The meeting should be in person, however, and should take place before December so that it involves those on the RAC who have spent the time to educate themselves on the issues. Individuals representing the directly affected parties should be invited to participate actively (“at the table”) as resources but not as formal members of the work group, so as to avoid the appearance of a negotiation that, at this stage, is not acceptable to all parties. Because the product could include multiple options none of which would be binding, there would be little reason to close the meeting to other observers, if interested.

#### Pros and Cons.

The advantages of this option are:

- It could get new alternatives on the table that would help BLM address more of the interests and concerns that have been expressed, i.e. it is directly useful in the RMP Amendment process.
- It would take advantage of the education that the RAC has had about the issues, and provide RAC members with the opportunity to make a contribution.
- The perspectives of all interested parties could be a resource, without asking them to make formal compromises of their positions about the preferred alternative.
- It does not require choosing one set of assumptions (or “framing”) of the issues, since multiple options could be developed.
- It would take less time than a full negotiation.

The disadvantages of this option are:

- It doesn't provide a decision and, therefore, it also is unclear what the impact would be.
- It may not be perceived as sufficiently different from the initial mediation option.
- It might not generate new ideas.
- It could be hard for some parties to see how they could have a positive influence, if the assumption is that oil and gas leasing will occur.
- The participation by directly affected parties, even as resource people not as members of the ad hoc work group, could be mischaracterized in a negative way.
- It would not work if it took place after the change of members, since the current members are the ones who have had the education on the issues.
- It would take time away from other activities (e.g. other RAC priorities, completion of the RMP Amendment, work on identifying areas that should be eligible for wilderness designation, etc.)

*Next Steps.* If this option is selected, the RAC should form this work group quickly, identifying a diverse group (of perhaps 5-6 of its members) and set a date for this fall in consultation with BLM. Someone should be identified as the chair (perhaps the current RAC liaison to this assessment), with the responsibility to work with the RAC facilitator, work group members and BLM to form an agenda. The facilitator could contact those interviewed for this assessment to determine their interest in participating. Clarity that this an option generating exercise, not a negotiation, is important.

#### Option 2: Counties as "Cooperating Agencies"

*Objective, Scope and Process Recommended.* The Otero County Commissioner for this area noted several issues about the NEPA process, including his interest in Otero County playing a more active role as a "cooperating agency" as allowed under NEPA. He noted that the county's resources and experience could contribute to the EIS process for this RMP Amendment, e.g. in the information and analysis of the socio-economic environment and custom and culture issues. BLM could establish a more collaborative relationship with Otero and Sierra Counties by including them formally in the process as cooperating agencies, which also would recognize the special role of counties as governments in how the process is conducted that is of concern to the Commissioner.

#### Pros and Cons.

This option was not formally discussed with the parties, because of the focus of this assessment initially was on options involving all parties.

#### Next Steps.

BLM and the counties should discuss this option and formalize the roles and relationships in whatever type of document is consistent with guidelines promulgated by the Council on Environmental Quality.

### Option 3: Strengthen the Consultation on Cultural Issues on a Government to Government Basis with Affected Native American Tribes

*Objective, Scope and Process Recommended.* Although BLM sent letters to five tribes asking about their interest in consultation on the RMPA for Otero and Sierra Counties and included them in standard notices about opportunities for public comment, current leadership in the two tribes contacted for this assessment do not feel they have been consulted adequately or even at all. BLM and interested tribes have the opportunity now to conduct the Section 106 review collaboratively on a government to government basis.

Serious concerns about the accuracy of the Draft EIS were raised in the interviews conducted, particularly Section 3.14.3 of the EIS and the specific statement that “No American Indian religious sites or traditional cultural places have been identified within the Planning Area.” Both tribes interviewed pointed out the limits of only contracting with archeologists, and strongly recommended that an ethnographic analysis also be conducted. One idea to explore would be whether any of this could be done as a collaborative effort, contracting with experts provided by the tribes. Tribes currently have such expertise and have access to more information from elders than do non-Indians, thus potentially improving the quality of the assessment. (Studies on Ft. Bliss may provide a useful example of this.) Sovereignty issues and confidentiality concerns about sacred sites suggest that this might best be implemented through an independent process, parallel to any broader negotiation on other issues. It could be convened with or without a mediator, although the Advisory Council on Historic Preservation was mentioned as a resource.

Recommended participants would include at least BLM, the Ysleta del Sur Pueblo and the Mescalero. Other tribes, such as the Hopi and Zuni, were mentioned and should be contacted to explore their interest.

#### *Pros and Cons.*

The advantages of this option are:

- It could build stronger working relationships between BLM and the affected tribes.
- It could occur in parallel with the completion of the RMP Amendment process.
- It could add to the information needed to protect cultural resources adequately.

The disadvantages of this option are:

- It doesn't provide a forum for making a mutually agreed-upon decision among all parties concerning the preferred alternative.
- It would cause some delay in that the tribes have not been actively involved in this process to date.
- The tribes might be interested in a different approach to consultation.
- Some parties don't believe it is necessary, since their experience with the Section 106 review process occurs later when construction would take place.
- *Additional points may come from those parties whose comments have not yet been obtained.*

Next Steps. If this option is selected, a useful first step would be for BLM staff to meet personally with people from the Ysleta del Sur and Mescalero Tribes to explore their interest and to ask them for names of individuals in other tribes whom they think might also be interested in Otero Mesa. Identifying examples of other cooperative working relationships between BLM and tribes in other areas might provide useful models for specific roles and relationships. It will be important to remember that each tribe has multiple people and offices that may have an interest in these issues (e.g. tribal council, elders, historic preservation officers, environmental planners, etc.)

#### Option 4: Establish a “Partnering” Relationship Between the Ranching and Oil and Gas Communities (and others as interested)

Objective, Scope and Process Recommended. Whether or not a mediation process is convened at this stage in developing the preferred alternative for the RMP Amendment, some of the issues of concern (particularly to the ranching community) involve actual operations during oil and gas exploration and production. BLM, the oil and gas industry and the ranching community could take the initiative now to foster regular communication directly between ranchers and the oil and gas industry (and others as interested), looking ahead to the issues that will arise after leasing during actual operations. This could include either: a) a regular dialogue such as has recently been initiated in the Farmington area or b) site-specific agreements (similar to those in the construction industry) if/when oil and gas companies file Applications for Permits to Drill (APDs).

For example, a group such as that in Farmington could begin to build lines of direct communication and develop working relationships between those that will be living and working on Otero Mesa, which would be the basis for solving operational problems if they arise in the future. Specific questions could include whom to call if damage occurs to fences, animals or other private property; what actions will be taken and whether the lease holders will take responsibility for their subcontractors’ actions; specific placing and size of well pads; where to use caliche versus gravel on roads, etc. Few, if any, of these issues are easily dealt with in a Resource Management Plan concerning leasing. They may be more appropriately dealt with at the time of an APD. However, uncertainty about operations caused by perceptions of problems that have occurred elsewhere in the state is affecting the RMP Amendment process now.

Experience in the construction industry with creation of “Partnering Agreements” suggests that even a single meeting – in advance of breaking ground – makes a significant and positive difference in avoiding disputes in the future once operations begin. The experience in Farmington would be a good model for how often to hold meetings in Otero and Sierra Counties, whom to involve and what to discuss. Participants in such “partnering” meetings build enough of a direct relationship that they will call one another more readily if problems arise, and they will have the basis for solving issues early rather than letting them grow and turn into more serious conflicts, administrative actions, and/or litigation over damages.

### Pros and Cons.

The advantages of this option are:

- It provides a forum for addressing the concerns of the ranching community about issues that will arise during operations.
- It would not delay the RMP Amendment process.
- It creates direct communication between those who will be living and working on Otero Mesa, and give them the opportunity to develop more accurate knowledge of one another's views and to open lines of communication with one another.
- It is an opportunity for mutual education.
- It could provide the foundation for better communication in the future.
- It would take less time than a full negotiation.

The disadvantages of this option are:

- It doesn't provide a decision directly useful in concluding the RMP Amendment.
- It may be confused with current industry groups such as the one in southeast New Mexico.
- It might leave out some parties, who would then not have the benefit of close, on-the-ground working relationships and also raise questions of access/fairness.

Next Steps. A next step could be for the ranchers and oil and gas companies on Otero Mesa to contact their counterparts in the Farmington area and learn more about the group there. Either the oil and gas companies or the ranchers could initiate such meetings, either on an ad hoc or regular basis. BLM could play a facilitative role, encouraging direct communications and participating as a resource depending on the topics of most interest to the ranchers and oil and gas representatives.

### Option 5: Visioning Workshop

Objective, Scope and Process Recommended. BLM could convene a workshop for a larger group of interested parties to share their perspectives about what they value and how they would like to see Otero Mesa in the future. This could be organized in several ways, either as an invited group of approximately 15-25 individuals (several from each of the constituencies discussed above) and open to the public as observers or as an interactive, "roundtable" format with anyone from the public invited.

The biggest barrier to any mediated negotiation at this stage is that the parties are asking different questions. Most simply put, is it how to proceed with oil and gas leasing or whether or where? Or, is it how to protect the ecological values of the Chihuahuan desert grassland? In such situations, the question for discussion either needs to be reframed (generally more broadly) or no meaningful conversations can occur. Sometimes, a workshop for people to talk to one other more directly but in a larger context can produce that reframing of the issues. In this case, the larger context might be the question of how each of the parties would like to see Otero Mesa in the future. A field trip together often can help make those conversations more concrete and can build lines of communication that hadn't existed before. The agenda for such a workshop should be collaboratively designed by representatives of the parties, and all parties should have a role in sharing

information from their perspective. Both the design process and the workshop should be facilitated by someone with experience in similar, resource-based, visioning workshops where more collaborative relationships have emerged.

### Pros and Cons.

The advantages of this option are:

- All interested parties could be included.
- Parties could talk with one another directly, not “at” BLM.
- There is no commitment to negotiate.
- Parties would have the opportunity to develop more accurate knowledge of one another’s views and to open lines of communication with one another.
- It is an opportunity for mutual education.
- It does not require choosing one set of assumptions (or “framing”) of the issues.
- It may offer the opportunity to identify where common ground does exist, e.g. on some basic principles, and to clarify the reasons for disagreement on others.
- It could provide the foundation for better communication in the future.
- It would take less time than a full negotiation.

The disadvantages of this option are:

- It doesn’t provide a decision directly useful in concluding the RMP Amendment.
- If not done in parallel with concluding the RMP Amendment, it would cause delay.
- It appears to some that it is redundant of the scoping process.
- It would take time away from other activities (e.g. completion of the RMP Amendment, work on identifying areas that should be eligible for wilderness designation, etc.)
- The parties’ views may remain too polarized for this to be successful. They may simply talk “at” one another. (“Some people won’t ever listen.”).

Next Steps. Theoretically, any party could initiate this option. At this stage, however, it might best be initiated by an entity that either has no position or takes a middle ground, and one that has good communication with all sides and is willing to play a role as catalyst for a process jointly shaped by all parties rather than setting an approach or agenda themselves. This might include BLM, the RAC, the US Institute for Environmental Conflict Resolution, a university center or state agency. If this option were selected, two important first steps are: 1) to decide whether it is better to hold such a workshop during the completion of the RMP Amendment EIS process or after a final EIS has been published and 2) to develop the outline of an agenda and its objectives, structure, and scope, in consultation with the parties. These two tasks are linked in that the parties should be clear about the relationship (or lack of relationship) between this visioning workshop and the specific issues that will remain in dispute about the RMP Amendment. It will be important to overcome the assumption that these disputes are a barrier to the objectives of starting new lines of communication, increasing understanding of one another’s picture of what Otero Mesa can and will be like under different scenarios, and identifying those questions that can be asked together.

## Option 6: Lessons Learned Workshop

*Objective, Scope and Process Recommended.* BLM in New Mexico clearly is interested in fostering more collaborative processes, and the RAC is one of its resources for obtaining advice. The current RAC also has informed itself about the issues in a significant way. Therefore, the RAC could form a small, diverse working group of its own members, with the objective of identifying additional lessons learned for future RMP Amendment processes in New Mexico. RAC members should be selected to reflect the diversity of views on the issues and should be known for creative thinking. A single meeting, possibly two days in length, would probably be sufficient. The meeting should be in person, however, and should take place before December so that it involves those on the RAC who have spent the time to educate themselves on the issues. Individuals representing the directly affected parties should be invited to participate actively (“at the table”) as resources.<sup>7</sup>

### Pros and Cons.

The advantages of this option are:

- It would take advantage of the education that the RAC has had about the issues, and provide RAC members with the opportunity to make a contribution.
- It would support BLM’s current efforts to foster more collaborative land use planning.
- The perspectives of all interested parties could be a resource.
- It could be done relatively quickly.

The disadvantages of this option are:

- The RAC has a broad scope of issues to address, and may not have the time and resources to undertake a separate, lessons-learned workshop.
- Focus could lean too much toward mistakes and not also recognize successes to build upon.

*Next Steps.* See Option 1 above.

## **Summary of Findings**

The options above were developed based on interviews with parties. In those interviews, parties discussed the issues and concerns they have both about the substance of the RMP Amendment alternatives under discussion and about the process for developing those alternatives and conducting the environmental impact assessment. These findings are presented below.

In the charge for this assessment, the RAC listed the following issues as “some of the fundamental issues to be resolved (and opportunities for negotiation)...:

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<sup>7</sup> BLM might also want to consider initiating a multi-state workshop to develop lessons learned from a larger sample of RMP Amendment processes. This would be most rich if it included stakeholders in those processes.

- the extent of potential development and the number of leases/operators
- proposals for protection of some or all of the unroaded grassland areas
- fragmentation of habitat due to roads and pipelines
- habitat protection for the endangered Aplomado falcon
- economic feasibility of limitations on development
- use of alternative technologies such as directional drilling
- reclamation standards and practices
- further exploration to determine resource potential prior to full development and subsequent remediation of exploration sites”

The interviews generally confirmed this list. The principle additional issues found were the concerns about cultural resources, wilderness designation, and the process issues noted below.

The issues that parties are concerned about are described in slightly more detail below. It should be noted, however, that these descriptions are from the perspective of individual parties -- thus, not all parties would agree that any one of these are, in fact, a real concern. Also, this is not meant as a comprehensive list, as one is not needed for the purposes of this report, particularly given the conclusion that mediation is not feasible at this time. Such a list could be generated from public comments received on the Draft EIS. However, that task was beyond the scope of this assessment.

The author also made additional observations that might be useful based on the patterns in the comments of the parties. These are described under ‘observations’ below.

### Substantive Issues

- Views about the extent and duration of land disturbing activities from oil and gas exploration and development differed widely. Some viewed it as extensive and highly adverse. From this perspective, significant additional research and protective measures are needed (e.g. dealing with the science of restoration in this arid environment). Some of these concerns are about habitat (e.g. fragmentation due to road and pad construction). Other concerns have to do with protecting wilderness values. Other parties view the potential adverse impacts as minimal or non-existent, with most if not all impacts able to be restored in a reasonable time period. From this perspective, drilling would not have an adverse impact on other resources such the Aplomado falcon, grassland habitat, grazing, or traditional cultural resources, and, thus, an important issue is correcting misperceptions about adverse impacts. Others’ views fell somewhere in the middle.
- The economic and social benefits of oil and gas development also are important to some parties. Otero County, for example, has only about 12 percent of its land in private ownership. Thus, the tax base is very small, and the county budget needs additional funds for rising costs to support schools, roads, recent fire-fighting activities, etc.
- Ranchers generally accept the premise that oil and gas leasing has a place in BLM’s



multiple-use context, but want to ensure that the activities do not damage roads, fences, water supplies and other ranching assets – and are concerned about those kinds of impacts from observations of oil and gas operations in other parts of the state. A specific interest is to create lines of communication between the ranching and oil and gas community, so that they know whom to call if problems arise during operations, and ranchers particularly would like the lease holders to take responsibility for their subcontractors. The overarching concept is the desire for the oil and gas companies to consider themselves as neighbors in a shared landscape.

- Road construction and pad size are specific issues of concern for all parties (although from conflicting perspectives), as is the degree to which the location of leases should be constrained. Positions vary widely depending on the party's views about the legitimacy of environmental concerns (and/or the legitimacy of doing any oil and gas development at all at this time).
- The assertion in Section 3.14.3 of the EIS and the specific statement that “No American Indian religious sites or traditional cultural places have been identified within the Planning Area” was strongly challenged by the tribes. The extent of tribal connections to and use of Otero Mesa is largely not perceived by non-Indians. The Mescalero state that Otero Mesa was a bridge between the Waco, Guadalupe, and Sacramento Mountains for their people and perhaps also the Chiracawa and Warm Springs Apache. The Ysletta del Sur report that their people took annual salt migrations through the area, using Alamo Mountain as a landmark.
- Based on this relationship with the land, tribes also are concerned about the lack of information about existing cultural resources. They feel that a well-designed, random survey is needed to identify traditional cultural resources, because all alternatives in the EIS show considerable amounts of land as open to drilling. The tribes' concern is that, without additional information, such drilling is likely to impact significant landscapes, plant gathering areas, springs, caves and possible rock shelter sites and caches. The tribes made several specific requests or suggestions. First, the Ysletta del Sur offer to share a published set of archives. The Mescalero asked that, if surveys were done of traditional cultural properties or archeological resources, the tribes get copies of them, including any maps.
- Wilderness designation is another large concern, again from conflicting perspectives. The environmental community has conducted a significant data collection effort, using BLM's handbook for wilderness designation, and concluded that BLM's decision in the late 70s and early 80s not to designate certain areas was flawed. They are proposing about 500,000 acres to be designated wilderness area, about 10% of which is on Otero Mesa. This constitutes only about 20% of the grassland area, but has raised serious concerns from the perspective of the ranching community, focusing particularly on concerns that this would put their entire livelihoods at risk. They and others rely on the decision made decades ago that this area doesn't qualify as wilderness.
- None of the alternatives in the EIS appears to have a strong advocate for it. BLM

sought to balance multiple interests through a variety of options, e.g. no surface occupancy areas combined with directional drilling to maintain the largest possible areas of unfragmented habitat; a “5% solution” intended to create more flexibility for drilling combined with accountability for achieving restoration objectives; etc. Specific objections have been raised for each that would need to be discussed further, either to correct misperceptions or develop new strategies, if agreement on a preferred alternative were to be possible.

- Other specific policies, e.g. protections near riparian areas, were only briefly mentioned but would likely be points of discussion in any mediated negotiation.

### Process Issues

- Tribes did not feel that they had been consulted about traditional cultural properties, and were not aware of the status either of the RMP Amendment process nor of the potential for mediation. Comments were made that the assessment not be rushed.
- Time also was a process concern from the opposite perspective, with several comments made that this RMP process has taken far too long and that mediation not become one more source of delay.
- Tribes also have serious concerns about sharing detailed information about the location of sacred sites, which would need to be addressed as part of ensuring that oil and gas exploration and development avoided these locations.
- Parties have different status under NEPA, with some eligible for cooperating agency status and others not. The structure of a mediation process might need to take this into account in some manner. Otero County made a specific request that the county be named a cooperating agency for the purpose of this EIS process.

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### Requests

### Observations

- High degree of interest
- The lack of data to support the conclusion that the impacts of oil and gas leasing on cultural resources would be minimal.

### **Lessons Learned for Future RMP Amendment Processes**

The ideas that follow are those of the assessor, from a vantagepoint outside the process and from a perspective oriented to how to anticipate and resolve differences. This does not make these lessons either “right” or the most important ones – far from it. Each of the individuals involved in this RMP Amendment process also has useful perspectives from which to draw insights about how to improve such process in the future. “Learning organizations” institute regular opportunities for reflection on practice. Thus, a first recommendation might be that BLM routinely consult those involved (and those BLM had hoped to involve) in an RMP process to ask about expectations, what challenges arose, what worked, what didn’t work, and recommendations for how to approach the process differently in the future. Maintaining a cumulative list of these ideas over time may illuminate important patterns or themes. Handing out the list of these ideas to the public at the beginning of each RMP Amendment process could add to a shared language and could foster more explicit discussion and .... Of the process – and add to the “social capital” in the

One overarching lesson from the Otero Mesa experience is to be more proactive and interactive at each step in the process, and to go beyond the basic techniques of written notices and public hearings. This can be done by:

- Making personal calls and visits,
- Developing the scope and focus of the RMP Amendment process jointly with the stakeholders,
- Considering conducting the EIS process itself collaboratively,
- Conducting early scoping meetings as interactive workshops to foster dialogue among the stakeholders not just between the stakeholders and BLM,
- Conducting joint field trips,
- Convening informal meetings or workshops to develop the alternatives to be evaluated.
- Involving parties in joint fact-finding activities, generally,
- Involving tribes in doing ethnographic data collection, specifically,
- ....

Making personal calls and visits.

Developing the scope and focus of the RMP Amendment process jointly with the stakeholders

Considering conducting the EIS process itself collaboratively

Conducting early scoping meetings as interactive workshops to foster dialogue among the stakeholders not just between the stakeholders and BLM

Conducting joint field trips

Convening informal meetings or workshops to develop the alternatives to be evaluated.

Involving parties in joint fact-finding activities, generally

Involving tribes in doing ethnographic data collection, specifically.

relationships generate more information and better working relationships.

### **Conclusion and Next Steps**

As noted in the analysis above, a decision not to proceed with mediation now does not mean that nothing can be done. BLM, in particular, and the other directly affected parties can take steps to improve the quality of this RMP Amendment and to lay the foundations for dialogue and collaborative problem-solving negotiations for decisions that will arise in the future.

The next step is for BLM and the RAC to discuss and decide which of these option(s) to undertake. (Some of these options could be conducted in a complementary fashion.) It is my understanding that the BLM will seek the RAC's guidance about the choice of options, understanding that the consent of the parties to any proposed process also will be needed.

Appendix A.

## **Scope of Work**

### **Mediation services for the Collaborative Development of a Preferred Alternative for Oil and Gas Drilling on Otero Mesa**

**Convener:** New Mexico Bureau of Land Management, Resource Advisory Council

**Project Location:** Otero Mesa, Otero County, New Mexico, about 90 miles southeast of Alamogordo, NM and 50 miles northeast of El Paso, TX

**Summary:** The New Mexico Resource Advisory Council (RAC) seeks a highly qualified and experienced mediator to assist in a situation assessment and potential mediated forum to develop a consensus-based preferred alternative for the BLM's resource management plan (RMP) for Otero Mesa, particularly for the management of oil and gas resources.

The issue has become highly contentious with considerable media attention following the release of a draft EIS and RMP amendment by the BLM. The draft EIS proposes a preferred alternative that has been rejected by both industry and environmental groups. Although the final EIS was originally targeted for publication in August 2002, the process has been purposefully slowed down so that a satisfactory outcome may be developed. This mediation effort is intended to build a collaborative alternative and is supported by the BLM as a pilot project for collaborative approaches to on-the-ground management issues. Because of the controversy surrounding this situation, extreme polarization between industry and environmental representatives, and the need for a timely resolution, a very qualified and experienced environmental mediator is sought.

The BLM is working with the US Institute for Environmental Conflict Resolution (USIECR) in selecting an appropriate mediator and in developing other guidelines for the process. Some parties have expressed a willingness to negotiate and are currently determining the best people to represent them in an agreement-seeking mediation. Other parties have not yet committed to a mediation process, but are willing to engage in a situation assessment. The initial scope of work is to conduct an assessment to determine if a mediated agreement may be possible and, if so, to make recommendations regarding the design of a forum in which to seek agreement. If the value of a mediated session is determined, Phase Two would focus on the mediation, itself.

**Background:** Otero Mesa in southern New Mexico is a large, remote landscape managed by the Bureau of Land Management (BLM). The RMP amendment in question addresses Sierra and Otero Counties, covering 1.8 million acres of BLM surface lands in the Las Cruces Field Office. Public focus has been on the Otero Mesa portion, which covers the southern region of Otero County. Virtually undeveloped, the mesa contains one of the last remaining portions of healthy Chihuahuan Desert grassland in the state,

and it is home to many species of wildlife and native plants as well as independent cattle ranches that have been in operation for generations.

Exploratory wells drilled in 1998 discovered the potential for large-scale natural gas development and several companies have filed applications for permits to drill on Otero Mesa. Construction has been approved for a 15-mile pipeline from the initial well to existing gas lines in Texas. Lease applications for drilling, however, are on hold while the BLM revises its resource management plan for the area to determine how, where, and when further development of the resource will be permitted.

Because of ecological concerns, previous management guidelines for the area stipulated a “no surface occupancy” limitation, which restricted new wells to within 150 yards of existing roads. The BLM issued a draft environmental impact statement in November 2000 that was subsequently modified because of opposition from interested parties. The compromise solution now offered by the BLM is to allow for drilling on the Mesa while protecting the grassland habitat, by limiting drilling to 5% of a lease area at any one time. The conflict is over the 116,000 acres of Otero Mesa grasslands that would fall under the 5 percent surface occupancy limit. The BLM projects that 140 wells would be drilled, disturbing about 862 acres over a 20-year period, including nine-acre well-sites, roads, and 100 miles of pipelines.

The plan has met with opposition from both industry and environmentalists. Energy company officials say the proposal is too restrictive of exploration and development, and that it would be economically unfeasible to develop the resource. They believe that the area is potentially another Permian basin and are urging full development of the gas reserves. Environmentalists say the proposal doesn’t go far enough to reduce the industry’s impact on sensitive habitat for plants and wildlife. They have identified over 460,000 acres in the greater Otero area that they believe are suitable for Wilderness designation, and are urging that development stay out of these areas. The BLM’s studies do not confirm the assessments of either the industry or environmental groups.

In late February, the BLM Resource Advisory Council (RAC) held a public meeting to better understand the BLM’s “preferred alternative” and hear from the affected parties. It was clear that both industry representatives and environmental advocacy groups were unhappy with the preferred alternative, and that issues are complex and multi-faceted. As a result of their observations, the RAC made the following recommendation to the BLM:

*“Members recommended that the RAC convene a RAC workgroup composed of a small group of stakeholders to work to consensus on an alternative for O&G drilling on Otero Mesa. This should be a focused mediated discussion based on information already available to build consensus around another alternative. We see this as a pilot for the BLM.*

Some of the fundamental issues to be resolved (and opportunities for negotiation) include:

- the extent of potential development and the number of leases/operators

- proposals for protection of some or all of the unroaded grassland areas
- fragmentation of habitat due to roads and pipelines
- habitat protection for the endangered Aplomado falcon
- economic feasibility of limitations on development
- use of alternative technologies such as directional drilling
- reclamation standards and practices
- further exploration to determine resource potential prior to full development and subsequent remediation of exploration sites

The national BLM office is encouraging this effort as a pilot project for collaborative decision-making around difficult natural resource issues, and as an alternative approach to litigation. The BLM has agreed to support a consensus decision that is recommended by this working group and approved by the NM RAC, as long as it is within legal boundaries.

Because of public pressure to complete the EIS, and because this analysis has already been going on for more than four years, there is a need to determine as soon as possible if a mediated solution may be achievable, and if so, to bring the parties together in a timely way to work intensively toward a solution. While the RAC recommendation expressed a desire and expectation to find a preferred alternative that can be folded into the current draft EIS, the BLM is also prepared to amend the draft EIS if a consensus solution is reached that lies outside of the existing analysis.

**Services needed:** The coalition of environmental groups advocating for the protection of Otero Mesa has not agreed to participate in a mediation at this time. They are willing, however, to engage in an assessment of the situation. The initial scope of work is to conduct a situation assessment to determine if a mediated alternative is possible. This would include conducting interviews with all affected parties, working with the parties to explore their willingness to come to the table, and developing a process design for such an agreement-seeking forum if it were to proceed. Interviews should commence the first week in June 2002. The BLM would be looking for a “go-no go” determination within an expediently reasonable timeframe accompanied by a pre-mediation assessment report which would outline the issues, interests, and determining factors (if a “no go” determination is made, the BLM will use this report as background in making its decision around the preferred alternative for the EIS/RMP).

If a mediated process is to proceed as “Phase Two” of this effort, the RAC recognizes that a professional mediator will have recommendations about the most effective way to proceed and will defer to the judgment of the selected mediator to finalize the process design. The RAC also recognizes the need for the affected parties to be involved in determining procedural protocols in order for the effort to be successful. Provisionally, however, the following has been proposed by the RAC as parameters for such a process:

The negotiations will take place over a period of 3-5 days within the next 60 days

A very small group of 5-7 representatives will be at the table, with one person representing each of the following interests :

1. Oil and Gas industry

2. Environmental advocate
3. Grazing permittee
4. County representative
5. RAC member, whose role will be as an observer/participant and RAC representative, rather than as an advocate for any particular interest.
6. BLM observer/participant

Each interested party will be permitted to bring up to 3 additional people, who will sit in the room as observers and will be available to caucus with the negotiators as needed during breaks.

The effort will be mediated by an outside, highly experienced environmental mediator. The mediator may choose to engage the assistance of the RAC facilitator in the mediation process. The RAC facilitator would provide logistical support, background, experience with the issues, and provide an information conduit regarding this process to the current and future RAC members.

One of the days could be used as an opportunity to go out into the field together as a group and examine the issues on-the-ground.

The session is to be approached as a RAC workgroup meeting, not a public forum. Press will not be permitted in the negotiation setting.

The goal of the session is to complete the development of a consensus recommendation, supported by all parties, which would be approved by the full RAC. If this meeting fails to achieve a consensus, the RAC will refer the issue back to the BLM for final decision. If it becomes clear during the session that a consensus could be possible with more time, additional sessions may be convened for that purpose. The intention, however, is to reach consensus in one multi-day, intensive session.

**Criteria for selection of Mediator:** A mediator will be selected in consultation with the US Institute for Environmental Conflict Resolution (USIECR), based on the following criteria and qualifications:

1. High levels of successful experience and skill with difficult environmental mediations in an accelerated timeframe
2. Understanding and experience with federal land management, natural resource management, and particularly, BLM procedures (including NEPA)
3. Experience in mediating oil and gas development issues, grazing issues, and wilderness issues
4. Familiarity with the region (arid desert landscape)
5. No previous relationship with New Mexico's O&G industry, wilderness groups, or other involved parties; an ability to maintain impeccable neutrality
6. Willingness to work as a team with the RAC and with the RAC facilitator (the mediator will lead the project)
7. Strong references and reputation
8. Availability to take on the project and work intensively in June and July, 2002
9. Affordability



Appendix B.

**Preliminary Contact List**

Mescalero Apache Tribe

Donna Stern-McFadden  
Jeff Hanson

New Mexico Wilderness Alliance

Steve Capra  
Randy Gray  
Michael Robinson  
Todd Schulke

Otero County

Dan Bryan, County Attorney  
Mike Nivison, Commissioner

RAC Liaison

Robyn Tierney, New Mexico Game & Fish

Rancher

Bobby Jones

State of New Mexico

Kathleen McGee, Lt. Governor's Office

U.S. Bureau of Land Management

Amy Luders  
Tom Phillips  
Rich Whitley

USFS New Mexico Ecological Services Field Office

Lyle Lewis  
Patricia G. Zenone

Yates Petroleum Corporation

Chuck Moran

Ysleta del Sur Pueblo

Lt. Governor Carlos Hisa  
Rick Cassava  
Jacob A. Massoud  
Robert J. Truhill, Diamond Rash Gordon & Jackson, P.C.

***Otero Mesa***  
**Assessment Questions**

Background/Introductions

- Approach to assessment (consultation with parties about what next steps in resolving these issues would be constructive, if any, and how to organize them) – any questions you have? about the process? about me?
- What experiences have you had with negotiation, mediation, or other consensus-building processes? What lessons are important to apply to this situation?

Substantive Concerns

- Background on this situation
  - chronology (events, relevant decision points)
  - what was your role
  - who else was involved
- What are the questions or issues that need to be addressed now?
- What outcomes are you seeking on these issues?
- How do these outcomes relate to the current EIS? (within the scope of the current alternatives or not? What other actions would need to be taken, by whom, to accomplish these outcomes?)
- What do you think others' interests are? What options might exist for solving their concerns that you would consider reasonable?
- What could be gained from seeking an agreement with the other interested parties on these issues?
- What would be the characteristics of a sound agreement, why?
- What would be the next steps in implementing an agreement, if reached?
- What will happen if no agreement is reached?
- What objectives other than seeking agreement might be helpful?
- What policies or laws need to be considered?
- What information is currently available on the issues? What information is needed? Where might disputes over scientific information arise?
- What should be the geographic scope or focus of any discussions?

Process/Representation Concerns

- What are your hopes/criteria for a good process? What would make it most constructive from your perspective?
- Who will participate in the process representing your interests? How many on your team? Need for technical people? Who speaks (should there be a lead negotiator?)
- What other parties should be represented in the process?
- To what extent will concerns about confidentiality be applicable in this situation (for information? the discussions themselves?)
- What would be a realistic timetable? Why? How much time could you devote to a

process, if convened?

- Do you have an opinion about whether the meetings are open or closed? Are there any constraints in New Mexico or federal law? Public perceptions/legitimacy of the process?
- Is unanimous agreement the goal? What ratification issues might arise? What will your needs be for consulting with those you represent?
- Do you see any other procedural barriers to a successful process?
- Are there any ground rules that you would like to suggest?
- Where can/should we hold a first meeting?

### Wrap up

- What other points would you like to make?
- Do you have any further questions of me or about the process?
- Is there anyone else I should contact for this assessment?
- Discuss next steps, arrange a time for me to call to share what I think I've heard about next steps that everyone would see as constructive and to discuss any process issues that remain.