

# MEMORANDUM OF AGREEMENT

## AMONG THE

### NEW MEXICO OFFICE OF NATURAL RESOURCES TRUSTEE, UNITED STATES DEPARTMENT OF AGRICULTURE/FOREST SERVICE, AND UNITED STATES DEPARTMENT OF THE INTERIOR

#### I. INTRODUCTION

This Memorandum of Agreement (MOA) executed by the New Mexico Office of Natural Resources Trustee (NMONRT), United States Department of Agriculture/Forest Service (USDA/FS), and the United States Department of the Interior (DOI) (collectively referred to as the Trustees) is entered into in recognition of their common interests and/or responsibilities as designated natural resource trustees, including their coordination and cooperation in the initiation and conduct of natural resource damage assessments, settlement negotiations, development of positions for covenants not to sue or administrative releases from liability, or development and support of claims for litigation for injuries to natural resources resulting from discharges of oil or releases of hazardous substances, and the application of any natural resource damages recovered via any of those mechanisms toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

#### II. PARTIES

The following Trustees or their designees are Parties to this MOA and act on behalf of the public as Trustees for natural resources under this MOA:

1. The Trustee, New Mexico Office of Natural Resources Trustee, State of New Mexico,
2. Regional Forester, United States Department of Agriculture/Forest Service, and
3. The Secretary of the United States Department of the Interior.

Notwithstanding any other provision of this MOA, any natural resource trustee who is not a party to the MOA and who has a natural resource interest that is affected by a discharge of oil or release of a hazardous substance shall not be precluded from participating in the natural resource damage assessment process by this MOA. At the election of such trustee, he or she may be included in this MOA by amendment hereto. Such other trustees may include, but are not limited to Tribal governments, other Federal agencies, foreign countries, or affected trustee agencies from other states, which may be added by addendum to this MOA, as necessary, provided that statutory authority exists designating such other parties as Trustees.

### **III. LOCATION**

This MOA addresses natural resources within the boundaries of the State of New Mexico that are held in trust by both the Federal and State Trustees, including surface and ground waters of the State, which are injured as a result of discharges of oil as defined by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. ("FWPCA"), the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq. ("OPA"), or releases of hazardous substances as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601, et seq. ("CERCLA"), or injuries that may occur from discharges or releases in waters outside of the State's boundary with the potential of migrating into the State.

### **IV. PURPOSE**

The Trustees recognize the importance of integrating and coordinating among themselves and with the lead response, removal, remedial, or corrective action agencies in the reduction of risk to trust resources, and assessment of injuries or the potential threat of injuries to natural resources affected by discharges of oil or releases of hazardous substances including the consequences of removal, remedial, and corrective actions. The Trustees' primary goals are to ensure the restoration of injured natural resources and to seek compensation for interim lost use value caused by discharges of oil or releases of hazardous substances in order to restore, replace, rehabilitate, and/or acquire the equivalent of those affected resources and/or their services. In order to achieve their ultimate goals stated above, the Trustees' activities will primarily involve coordination of all planning, assessments and investigations with the lead response agency, ensuring protection or restoration of injured resources and/or their services as part of the removal, remedial or corrective action, determination of conditions upon which the Trustees may grant a covenant not to sue or other type of judicial or administrative release from liability during consent decree or other negotiations, or otherwise assessing and seeking damages for injuries to natural resources and/or the services they provide. The purpose of this MOA is to provide a framework for such coordination and cooperation among the Trustees, and for the implementation of the activities of the Trustees in furtherance of their natural resource Trustee responsibilities for those natural resources affected by those discharges or releases mentioned above. While this document is designed to eliminate the need for incident-specific MOAs, those additional MOAs may be useful or necessary in some cases.

### **V. AUTHORITY**

The Trustees enter into this MOA in accordance with the legal authorities provided for each Trustee by the National Contingency Plan, 40 C.F.R. Part 300, FWPCA, OPA, CERCLA, the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, and 15 C.F.R. Part 990, or the OPA regulations, when promulgated, and any other applicable laws or authorities. The State Trustee enters into this MOA pursuant to designation by the Governor of the State of New Mexico under CERCLA, FWPCA, OPA, or any other applicable laws or authorities.

## VI. TRUSTEE FUNCTIONS

The Trustees or their representatives or designees shall seek to abate, through appropriate response coordination, potential threats, reduce risks, or assess damages for injury to, destruction of, loss of, or loss of use of, natural resources, resulting from unauthorized discharges of oil or releases of hazardous substances, including recovering response costs and the reasonable costs of assessing the damages. The measure of damages shall be the cost of restoring, replacing, rehabilitating, or acquiring the equivalent of the injured natural resources and/or services, plus interim lost use or diminution in value pending recovery, assessment costs, and Trustee administrative oversight and procedural costs associated with planning and administering or implementing the restoration of those natural resources and/or services. The Trustees recognize the Congressional and legislative intent that restoration is the preferred alternative wherever possible and practicable.

Consistent with their individual authorities and policies, the Trustees or their representatives or designees may employ one of several types of actions, depending on the circumstances of each discharge or release, in order to carry out their responsibility to minimize or eliminate risk, or to seek restoration and compensation. Such Trustee actions may include, but are not limited to:

- A. Performing preliminary assessments to determine the potential threat or the nature and extent of threats to natural resources;
- B. Preventing injury, destruction, or loss through requests for initiation of removal or remedial actions by authorized agencies, or by seeking such injunctive relief where authorized by law;
- C. Performing emergency restoration actions and seeking cost recovery for those actions;
- D. Minimizing residual natural resource injuries by participating in removal, remedial, or corrective actions as advisors to the lead response agency, and seeking restoration and compensation for any past or residual injury at remedial or corrective action sites;
- E. Negotiating a judicial covenant not to sue for natural resource damages for incidents covered by CERCLA, where appropriate, through the U.S. Department of Justice and the Office of the New Mexico Attorney General;
- F. Performing natural resource damage assessments;
- G. Negotiating administrative or judicial agreements for resource protection measures, restoration, and/or compensation for natural resource damages;
- H. Referring claims for natural resource damages for litigation; and/or
- I. Preparing and implementing restoration plans.

## VII. RESTORATION AND COMPENSATION GOAL

The goal of restoration or compensation projects is to assure that no net loss of natural resources or their services occurs. Prior to the consideration of restoration alternatives, the Trustees will strive to have any continuing releases that would impede natural recovery or limit the effectiveness of restoration activities controlled. In addition, the restoration of chemical and physical quality of the environment to baseline or no effects levels will be sought. Methods to accelerate the rate of return of injured habitats or ecosystems to baseline levels of services will be used whenever possible. Key species should be restored to baseline levels and lost services should be replaced as directly as possible. Consistent with the guidelines above, and regardless of whether the restoration action addresses restoration to baseline conditions or addresses interim losses, the restoration actions considered must have, as closely as possible, a demonstrable direct link to the injuries or losses caused by the release or discharge. Projects with less direct benefits to injured resources or lost services (*e.g.*, out-of-kind restoration or restoration distant from the site of injury) generally will only be considered when there are compelling reasons to consider such alternatives (*e.g.*, high levels of residual on-site contamination or restoration more effective in breeding habitat than on site). When acquisition is included as an alternative, it must be combined with additional actions or stipulations that will result in an increase in services, or prevent a decrease in services that are otherwise likely (*e.g.*, restoration/enhancement of the habitat acquired and/or a conservation easement to protect habitat from likely development). Acquisition will also be supported by endowment funds to cover long-term operation and maintenance whenever possible.

## VIII. TRUSTEE ORGANIZATION

The Trustees and their representatives recognize the importance of planning and coordinating their efforts in order to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable Federal and State law. The Trustees and/or Trustee representatives, or Trustee Council members (see below), will coordinate their efforts to ensure the following: 1) that notifications of discharges or releases will be relayed to all Trustee agencies according to the National Contingency Plan or Area Contingency Plans; 2) that sites with co-Trustee interests are identified by response agencies, including, but not limited to NPL sites, RCRA facilities, State sites, instantaneous discharges of oil or releases of hazardous substances, and fishing closures or advisories due to the discharge of oil or release of hazardous substances; 3) where possible, coordination of written comments to the lead agency On Scene Coordinators or Remedial Project Managers on all lead agency directed scopes of work, work plans, assessments and investigations, including remedial investigations, feasibility studies, and remedial designs; and 4) State and Federal coordination in consent decree, administrative agreement, or other types of negotiations. Notification, as referred to above, shall be made by telephone (with direct contact), or by letter or facsimile to persons designated to receive such information.

For each individual case or incident involving significant participation by two or more State and Federal Trustees, the Trustees agree to create a council (Trustee Council) representing

the Trustees with an interest in resources at a site at issue, which will implement this MOA and to which a representative will be designated by each Trustee agency. The Trustees agree to appoint representatives to the Trustee Council who have the level of knowledge and expertise needed to effectively guide the damage assessment and restoration process. Agencies agree to appoint representatives to the Trustee Council who have, at a minimum, the level of authority necessary to make decisions on issues presented to the Council. The Trustees may create Trustee Councils for either a portion of, or the entire damage assessment and restoration processes. For example, the Trustees may create one council to address the damage assessment phase and another to handle the restoration phase. The Trustee Council will designate a Lead Administrative Trustee for individual cases or incidents for administrative purposes. The Trustee Council may seek additional legal or scientific expertise outside its membership when needed. The Trustee Council may also establish committees and subcommittees as necessary for the efficient operation of the Council. Each Trustee agency will notify Council members when representatives resign and agree to inform other Trustee representatives about who the replacement will be. For individual incidents, the Trustee Council will attempt to name the Lead Administrative Trustee within 24 hours of Trustee notification in order that a Trustee point of contact be established as rapidly as possible. In addition, where appropriate, the Federal Trustees shall designate a lead Federal Trustee for the purposes of accessing the Federal Oil Spill Liability Trust Fund.

#### **IX. TRUSTEE COUNCIL DUTIES AND RESPONSIBILITIES**

On behalf of the Trustees, the Trustee Council created to address each site or incident shall coordinate and authorize (consistent with applicable law, policy, mandated areas of jurisdiction, and areas of special expertise) all Trustee activities and matters under this MOA in accordance with the decision making requirements contained in Section XI. The Trustee Council may take whatever actions it determines are appropriate to fulfill the trust responsibilities of the Trustees under and to effectuate the purposes of applicable Federal and State law. It is expected that the Trustee Council may, as appropriate and consistent with each representative's delegated Trustee authority, take any of the following actions, among others, while focusing on their individual trust resource responsibilities related to a particular incident:

- A. Conduct or oversee scientific and technical studies, sampling, and other matters related to the determination of injuries and/or the assessment of damages for trust resources which may have been lost, injured or destroyed.
- B. Seek compensation from responsible parties for damages and/or restoration costs and for the costs of planning and implementing the assessment and/or restoration.
- C. Participate in negotiations with responsible parties.
- D. In accordance with applicable law and respective agency policy and delegation of authority, supervise, manage and obligate on behalf of the Trustees any money paid to the Trustees, except for reimbursement of assessment and administrative costs, by or on behalf of

responsible parties for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources.

E. Oversee the development, implementation, and appropriate monitoring of a plan for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those trust resources and/or their services that may be injured, destroyed or lost.

F. In accordance with applicable law, make all necessary decisions on a case by case basis for the management and administration of funds pursuant to Section XI.

G. In accordance with applicable law, arrange contracts with professional consultants that the Trustee Council determines are necessary.

H. Communications with potentially responsible parties or their agents and with other persons or entities: The Trustees and Trustee Council members agree that they will endeavor to have coordinated communications with potentially responsible parties or their agents and with other persons or entities on matters related to natural resource damages and claims for those damages. To the maximum extent possible, no Trustee or Trustee Council member will undertake to speak on behalf of the Trustees with the potentially responsible parties or to speak on behalf of the other Trustees with other persons or entities without first providing the other Trustees or Trustee Council, whichever is appropriate, notice and an opportunity to participate in such discussions as appropriate. The above agreement shall not preclude a Trustee or Trustee Council member from having separate communications with the potentially responsible parties on matters within the scope of the MOA where circumstances warrant, provided that each Trustee or Trustee Council member notifies the other Trustees and agrees to provide documentation of the communication for the Administrative Record. Nothing in this section purports to or shall prohibit the respective trustees from fulfilling the mandates of their Office or Department.

## **X. LEAD ADMINISTRATIVE TRUSTEE**

The duties of the Lead Administrative Trustee shall include, but are not limited to: coordination and monitoring of the progress of the formulation of technical and legal positions for covenant not to sue, administrative agreement, or other negotiations; coordination and monitoring of the progress of the natural resource damage assessment process; scheduling of meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis; preparing agendas for those meetings; acting as a central contact point for the Trustee Council; establishing and maintaining records and relevant documents; and other administrative duties as directed by the Trustee Council. The Lead Administrative Trustee will be responsible for informing the other Trustee Council members of all pertinent developments on a timely basis. The Lead Administrative Trustee may delegate any of his/her duties to another Trustee representative with the concurrence of the Council. Assigned duties do not provide the Lead Administrative Trustee with decision making rights beyond those normally held by each Trustee.

## **XI. DECISION MAKING**

The Trustees will act through a Trustee Council established for each site of interest, comprised of Trustees with an interest in any natural resources at such site. The Lead Administrative Trustee must be selected by consensus. For issues on which the Trustee Council is taking action, the Trustees shall act by consensus and unanimity. The members of the Trustee Council will strive for unanimous consent on all decisions. The Trustees further agree that decision making deliberations will focus upon the Trustees' mutual goals of mitigating injury through cleanup, source control and remediation, and of assessing, restoring, rehabilitating, replacing and/or acquiring the equivalent of the affected natural resources and services. In the event of a dispute among members of a Trustee Council, those Trustees whose resources are not significantly affected by the dispute shall consider deferring to the judgment of the other Trustees. Any matters in dispute within the Trustee Council may be elevated to the Authorized Officials of the Trustee Agencies for resolution in an expeditious manner. The Trustees or their representatives may establish further mechanisms by which disputes may be resolved. If unanimity cannot be achieved, a dissenting Trustee may withdraw from a Trustee Council and proceed on a site specific claim. In addition, site specific agreements among Trustees or Trustees and other parties may address decision-making as to a particular site.

This section does not preclude the Parties from proceeding independently on any aspect of a natural resource damage assessment claim when necessary and appropriate. The Parties reserve the right to initiate and conduct litigation against any potentially responsible party and engage in individual pre-litigation settlement, subject to the obligation to communicate with other Parties/Trustees, as set forth in this agreement

## **XII. FUNDS**

The Trustees agree to cooperate in good faith to attempt to establish and maintain, to the extent consistent with applicable law, a joint trust account(s) or joint court registry account(s) for purposes of receiving, depositing, holding, disbursing, and expending all funds for the conduct of the damage assessment and restoration process, including all natural resource damage recoveries obtained or received by the Trustees and interest earned thereon. The Trustees agree that they will use all recovered damages for natural resource injuries exclusively for restoration activities consistent with Trustee Council approved Restoration Plans conducted under this MOA to address those injuries to natural resources and the services that they provide. The Trustees agree to request that administrative costs recovered from responsible parties be separately reimbursed to each individual Trustee agency. Administrative costs, if deposited to an agency fund, will be disbursed by electronic transfer or by check to the individual agencies as rapidly as possible, and shall be used at the individual agency's discretion. To the extent consistent with applicable law, the Trustees agree to deposit any recoveries for injury to natural resources obtained or received by or on behalf of any Trustee as a result of joint damage assessment and restoration activities under Federal and/or State natural resource damage assessment regulations in a joint account(s), unless all Trustees agree that funds recovered from a particular case require different treatment.

The Trustees, in accordance with their decision making process in Section XI, shall establish standards and procedures governing the joint use of all natural resource damages received by the Trustees for the purposes of developing and administering or implementing a Final Restoration Plan for restoring, replacing, rehabilitating and/or acquiring the equivalent of natural resources injured as a result of an incident and the reduced or lost services provided by those resources.

The Trustees further agree that the reasonable costs jointly agreed upon for the initiation of damage assessment and for the planning, conduct, evaluation and coordination of all natural resource damage assessment activities pursued by the Trustee Council with respect to natural resource injuries or lost services resulting from an incident shall be advanced or reimbursed to each Trustee out of any damage assessment cost recoveries or payments thereon, including funds received from the Oil Spill Liability Trust Fund.

### **XIII. CONFIDENTIALITY**

The Trustees support an open government policy of providing access to scientific information created or obtained by the Trustees during the damage assessment process. The Trustees do hereby agree that any information in the possession of the Trustees shall be confidential if, and only if, such information is privileged or is obtained or retained in anticipation of litigation or during pending litigation, provided, however, that all such information is subject to disclosure pursuant to Federal and State rules of evidence and discovery. Further, any information furnished to the Forest Service or the Department of the Interior under this instrument is subject to the Freedom of Information Act. Information subject to public disclosure upon request under the Freedom of Information Act or the equivalent State law shall be released. However, the Parties acknowledge and agree that all Federal documents produced in fulfillment of obligations under this MOA that are protected from release under Federal law will be protected from release by State agencies. The Trustees further agree that materials prepared in anticipation of litigation by one Trustee shall be kept confidential when shared with other Trustees or persons assisting such Trustees in preparation of litigation. All Trustees agree to notify other Trustees, in writing, of each request for information no more than five (5) days from the date of such request. Trustees will disseminate all relevant documents to each other so that each agency can respond to any request it receives.

### **XIV. RESERVATION OF RIGHTS AND PARTICIPATION IN SIMILAR ACTIVITIES**

Except for the confidentiality agreement contained in Section XIII, all parties understand that this document is not intended to create any further legal rights or obligations among the Trustees or any other persons not a party to this MOA. Nothing in this MOA is to imply that any signatory government is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources. This instrument in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations and individuals.

## **XV. MODIFICATION OF AGREEMENT**

Modification of this MOA shall be in writing and upon approval of all Trustees who are parties to the MOA at the time of any proposed modification. It is acknowledged that additional agreements may be executed by the Trustees with regard to natural resource damage claims that arise and for planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. These incident-specific MOAs shall not be considered modifications of this MOA.

## **XVI. TERMINATION**

This MOA shall be in effect from the date of execution and for five (5) years from such date, unless terminated in advance by action of the Trustees. At any time the Trustees determine that there is no purpose served by this MOA, the MOA will terminate upon such a finding. Any Trustee agency may withdraw from this MOA at any time for any reason. In the event any Trustee withdraws from the MOA, it must provide thirty days written notice before the withdrawal can become effective. In the event of such withdrawal, this MOA remains in full force and effect for the remaining parties.

In the event of the withdrawal of any Trustee, or at the termination of this MOA, each Trustee agrees to cooperate in preparing a full and complete accounting for and status report of all accounts managed jointly by the Trustees or their representatives pursuant to Section XII of this MOA.

This MOA is subject to renewal by action of the Trustees for five year terms in successive periods.

## **XVII. LIMITATION**

Nothing in this MOA shall be construed as obligating the United States, the State of New Mexico or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law, or to expend funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341. This MOA does not apply to any site which is the subject of pending litigation at the effective date of this MOA.

This document is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the Parties will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the Parties and shall be independently authorized by appropriate statutory authority. Specifically, this instrument does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.

### **XVIII. THIRD PARTY CHALLENGES OR APPEALS**

The rights and responsibilities contained in this MOA are subject to the availability of funding and are intended to be guidance for the respective Trustees. They may not be the basis of any third party challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this agreement.

### **XIX. EXECUTION: EFFECTIVE DATE**

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA. The date of execution shall be the date of the final Trustee's signature.

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NEW MEXICO OFFICE OF NATURAL RESOURCES TRUSTEE,  
UNITED STATES DEPARTMENT OF AGRICULTURE/FOREST SERVICE, AND  
UNITED STATES DEPARTMENT OF THE INTERIOR

  
\_\_\_\_\_  
Trustee,  
State of New Mexico Office of Natural Resources Trustee

5/25/04  
Date

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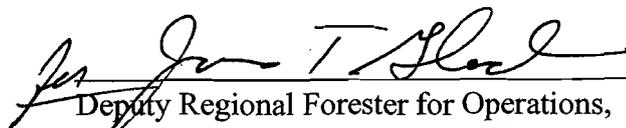
Frank M. DeLuise

Program Manager,  
Natural Resource Damage Assessment and Restoration  
U.S. Department of the Interior

3/10/04

Date

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Deputy Regional Forester for Operations,  
U.S. Department of Agriculture, Forest Service

  
\_\_\_\_\_  
Date