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Natural Resources and
Environment Section

AGENDA

**Colorado Natural Resources Trustees Meeting
September 13, 2021
2:00 pm to 2:30 pm**

Location: Teleconference

Zoom Call-in Information:

<https://us02web.zoom.us/j/82102593396>

Meeting ID: 821 0259 3396

**Note: A hyperlink to the meeting will be emailed to Trustees and staff and
will be posted on the Trustee website:**

<https://coag.gov/office-sections/natural-resources-environment/trustees/whats-new/>

Open Session

None

Executive Session

1. Bonita Peak Mining District – 25 minutes

Action Items: None

Documents: None

Open Session

2. Report from Executive Session

Action Item:

(1) Consider joining New Mexico Trustee Council

Document:

(1) Draft Memorandum of Agreement

**MEMORANDUM OF AGREEMENT
FOR A NATURAL RESOURCES TRUSTEE COUNCIL
FOR INJURY FROM RELEASES OF HAZARDOUS SUBSTANCES
INTO THE ANIMAS AND SAN JUAN RIVERS**

I. PARTIES AND AUTHORITIES

A. The following are parties to this agreement and act on behalf of the public in this matter as Natural Resources Trustees ("the Trustees"):

1. The NAVAJO NATION, acting through the DIVISION OF NATURAL RESOURCES TRUSTEE;
2. The STATE OF NEW MEXICO, acting through the OFFICE OF NATURAL RESOURCES TRUSTEE (ONRT); and
3. The STATE OF UTAH, acting through the DEPARTMENT OF ENVIRONMENTAL QUALITY and the DEPARTMENT OF NATURAL RESOURCES.

The following non-voting advisors are agencies with responsibilities and expertise for certain trust resources and desire to participate in this agreement in a non-voting capacity:

1. The United States Department of the Interior (DOI).

B. The parties enter into this MOA under the authorities of: the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), 33 U.S.C. § 1321(f); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9607(a)(4)(C), 9607(f), and 9620; the New Mexico Natural Resources Trustee Act (NRTA), NMSA 1978, §§ 75-7-1 to -5 (1993); 4 N.N.C. 2101 *et seq* (Navajo CERCLA); the Utah Water Quality Act, U.C.A. 19-5-101 *et seq.*; the Utah Environmental Mitigation and Response Act, U.C.A. 19-1-601 *et seq.*; U.C.A. 19-1-202(2)(g); all applicable rules issued under these statutes; and to the extent appropriate and elected for use by the Trustees, the Natural Resource Damage Assessment Regulations (NRDAR), as amended, 43 CFR Part 11 and 15 CFR Part 990.

C. Within the meaning of CERCLA, and its implementing rules, all the Trustees are trustees for natural resources that may have suffered injuries resulting from releases or threatened releases of hazardous substances (including radionuclides) from acid mine drainage or other discharges into the Animas and San Juan rivers.

D. This MOA supersedes the MOA that became effective on July 22, 2019. This MOA may be modified to include additional trustees, advisors, or potentially responsible parties (PRPs), in accordance with Sections XIII and XIV. Such modification may be effectuated by execution of an addendum in the form set forth in Exhibit 1.

II. PURPOSE

A. This MOA establishes a Natural Resources Trustee Council to carry out the objectives and activities set forth in Sections V and VI below, and provides a framework for coordination among the Parties in accordance with the authority established under applicable law as described in Section I.B.

B. Addenda to this MOA and separate agreements, such as funding, assessment, and restoration agreements, may be developed and executed as Trustee work progresses.

III. SCOPE

The geographic area addressed by this MOA consists of the San Juan River Basin from its headwaters to Lake Powell; all of Lake Powell, and any areas where natural resources may have been injured by releases of hazardous substances (including radionuclides) from current or former mining sites or the remediation or reclamation of such sites within the Colorado portion of the San Juan River Basin. This area includes but is not limited to the Bonita Peak Mining District (BPMD) as placed on the CERCLA National Priorities List (NPL) on September 9, 2016 by the U.S. Environmental Protection Agency (EPA).

IV. BACKGROUND

A. The Animas and San Juan River watersheds have been impacted by releases of mine wastes, heavy metals and other hazardous substances from hundreds of mine sites since late in the 19th century. Many of these sites continue to release hazardous substances into the watersheds long after mining activities ceased. On August 15, 2015, EPA was conducting an investigation of the Gold King Mine Site in the Upper Animas River watershed to determine how to deal with declining water quality in the Animas River. In the process, EPA's contractor breached a collapsed portal of the Gold King Mine on the Cement Creek in southwestern Colorado, releasing over three million gallons of acid mine drainage and 880,000 pounds of heavy metals into the Animas River watershed. The contaminant plume, which turned the rivers a bright yellow color, flowed down the Animas into the San Juan River in New Mexico, and continued down the San Juan into Lake Powell in Utah, flowing through lands of the Navajo Nation on the way. The extent to which the released contaminants remain in riverbed sediments or have been flushed into Lake Powell remains a subject of investigation and dispute.

B. New Mexico, the Navajo Nation, and Utah, as well as numerous private plaintiffs, subsequently filed separate lawsuits against EPA and other defendants asserting various claims and damages related to the August 2015 incident. These actions have been centralized in the U.S. District Court for the District of New Mexico as MDL No. 18-md-2824. The effect, if any, of this litigation on the Trustee's claims for natural resources damages is yet to be determined.

C. In addition to its direct effects, the August 2015 incident and subsequent investigations brought to light that chronic discharges of acid mine drainage, of less spectacular nature but nonetheless involving substantial quantities of contaminants, have or may have been occurring from not only the Gold King Mine but numerous other current and former mining sites in southwestern Colorado that may have resulted in injury to the Trustee's natural resources caused by the releases of hazardous substances.

D. Also in response to the August 2015 incident and the increased public concern it caused, EPA added the BPMD to the NPL on September 9, 2016. As described by EPA, the BPMD “consists of 48 historic mines or mining-related sources where ongoing releases of metal-laden water and sediments are occurring within the Mineral Creek, Cement Creek and Upper Animas River drainages in San Juan County, Colorado.” Under its CERCLA authorities, EPA is conducting a Remedial Investigation/Feasibility Study, performing removal and interim remedial measures, and will ultimately determine a final remedial action for the site.

E. The Trustees enter into this agreement to maximize the efficiency and minimize the costs of determining injuries to their respective natural resources caused by the August 2015 incident as well as legacy releases into the Animas and San Juan Rivers, assessing natural resource damages for such injuries, determining appropriate restoration measures, and coordinating these activities with existing litigation and with EPA’s clean-up of the BPMD.

V. COUNCIL AND OBJECTIVES

A. Each Trustee shall designate one Council designee (Designee), and provide replacements and alternates as necessary. The Designees are listed in Appendix 1, updates to which shall not be considered amendments to this Agreement. DOI shall designate a point of contact, and will offer advice and information through its senior management, staff, and counsel, as appropriate.

B. The Council will be a collaborative working group that coordinates Trustee activities identified in Section VI. The general objectives of the Council are as follows:

1. To share relevant data and information among all parties, subject to Section VII (Confidentiality);
2. To integrate, consistent with regulatory guidance, natural resource restoration into cleanup actions taken at the BPMD or elsewhere and to minimize future injuries to natural resources while promoting protection of cultural resources during restoration and cleanup actions.
3. To encourage cooperative and cost-effective solutions to assessment and restoration issues; and
4. To perform a Natural Resource Damages Assessment in such a manner as the Council shall decide in accordance with Section XI. The measure of natural resource damages contemplated under this agreement may include but is not limited to the following:
 - a. The costs of restoring injured natural resources,
 - b. Interim lost use or diminution of value of the injured natural resources pending natural recovery or restoration of the injured natural resources,
 - c. Reasonable costs of the NRDA, including restoration planning costs, and

d. Trustee oversight costs associated with administering or implementing restoration projects for injured natural resources. This may include Trustee costs of participation in removal, remedial, corrective or other response actions carried out by other federal and state agencies in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.

5. To perform such subsequent steps in the natural resource damages assessment and restoration process as the Council shall decide are warranted in accordance with Section XI.

Additional objectives may be established by future agreement of the Trustees and incorporated into this MOA by addendum or in a separate, subsequent agreement.

VI. ACTIVITIES

The Council will carry out its activities relying on information developed by the Trustees and their contractors, and, as directed by the Council, any Council contractor, as well as other information in the possession of the Trustees or other parties. The actions taken by the Council to meet the objectives listed in Section V may include but are not limited to the following:

A. Create a Technical Workgroup and a Legal Workgroup, and other workgroups or committees, which shall report to the Council, when they are deemed necessary and appropriate to further the purposes of this Agreement;

B. Coordinate Trustee participation in removal, remedial, corrective or other actions under the authority of applicable laws or other federal or state agencies in order to minimize residual injury to natural resources;

C. Coordinate and/or carry out Trustee actions for NRDA, including, but not limited to, scientific and technical studies, sampling, and economic studies;

D. Coordinate and/or carry out Trustee actions for the development and implementation of a plan for the restoration of injured natural resources and their services; and

E. Coordinate and/or carry out Trustee participation in settlement negotiations for recovery of natural resource damages as described in Section V, with PRPs.

VII. CONFIDENTIALITY

A. The parties recognize that all written or oral communications related to the assessment and recovery of damages for injury to natural resources may be undertaken in anticipation of litigation. Accordingly, this MOA, and any written or oral exchange of information or data hereunder, is not intended to waive any applicable exemptions from disclosure, including attorney work product, attorney-client privileged communications, joint enforcement privilege, deliberative process exemption, executive privilege,

confidential business information, or any other applicable exemption from disclosure that a party holds. Such communications will be protected from disclosure to the maximum extent possible under applicable federal, tribal, or state law.

B. The Trustees further recognize that information or data provided to the Trustees under this MOA may be subject to the separate Confidentiality and Common Interest Agreement (Confidentiality Agreement) between the Trustees, as governed by applicable tribal and state disclosure laws. If any Trustee receives a request for disclosure of any information or data exchanged thereunder, that Trustee shall notify the other Trustees in the manner provided for in the Confidentiality Agreement.

C. Any documents provided to the Navajo Nation under this MOA shall be subject to the Navajo Nation Privacy Act (NNPA). The Navajo Nation shall not disclose materials to the public that are expressly exempt from NNPA disclosure requirements and will make release determinations for all other documents pursuant to Navajo Nation law and policy.

D. The Navajo Nation reserves the right not to divulge internal and confidential information relative to sensitive areas and sites. All parties seek to avoid harm to these areas and sites based on information provided by Navajo Nation representatives and other sources.

VIII. INTERRELATIONSHIP WITH CULTURAL RESOURCE PRESERVATION AND NATURAL RESOURCE MANAGEMENT

The parties recognize the importance of preserving and protecting cultural resources and that many Native American traditional, spiritual and cultural practices utilize natural resources. Accordingly, the parties also recognize that cultural services are among the human services that natural resources can provide, and that preservation and restoration of cultural services will be integrated into the Council's activities, recommendations and planning.

IX. IMPLEMENTATION

A. The Trustees' representatives shall meet as often as they determine necessary. Decisions made at each meeting will be documented and distributed to all Council representatives (email is acceptable).

B. Decisions may be described and documented in exhibits the Trustees develop and incorporate into this MOA, or in other agreements among the Trustees that supplement or supersede this MOA.

X. LEAD ADMINISTRATIVE TRUSTEE

The New Mexico ONRT shall act as the Lead Administrative Trustee on behalf of the Council. The Lead Administrative Trustee, or a contractor under its supervision, shall:

(1) coordinate the scheduling of Council meetings and preparation of meeting agendas and summaries;

- (2) maintain administrative record files for the Council;
- (3) distribute relevant documents;
- (4) facilitate effective and efficient communication among the Trustees and between the Trustees and any contractors;
- (5) inform the Council of all pertinent Trustee activities on a timely basis; and
- (6) perform the other responsibilities of a lead administrative trustee identified in the CERCLA rules or agreed to by the Council. *See, e.g.,* 40 C.F.R. § 300.5 (CERCLA rule). The designation of Lead Administrative Trustee shall confer no additional decision making authority on the New Mexico ONRT.

A change in the designation of the Lead Administrative Trustee, including the identification of a co-lead, may be made in accordance with Section XI and XIII of this MOA. The designation of Co-lead Administrative Trustees shall confer no additional decision making authority on the designated Co-Lead Trustees.

XI. DECISION MAKING

All decisions made by the Council shall be by consensus of the Trustees. Consensus on a Council action is reached when all Trustees agree or do not object to the proposed recommendation or action. The Council may adopt bylaws to direct the process to reach consensus, but each Trustee shall have only one vote on the Council, to be exercised by that Trustee's Designee. In the event consensus is not reached, the Council shall conduct good-faith discussions directed toward obtaining consensus. Good faith includes, without limitation, acting in a timely manner on necessary decisions. In the event consensus still cannot be reached, the matter in dispute may be presented to the Trustee officials who executed this MOA. If consensus is not reached, each Trustee may take individual positions or actions on its own behalf, but such individual positions or actions shall not constitute or be regarded as the positions or actions of the Council.

XII. FUNDING

The full and meaningful participation of the parties in the implementation of this MOA may require considerable administrative, technical, legal, and other resources. The parties acknowledge that each party offers valuable strengths and perspectives for the implementation of this MOA. However, the parties also acknowledge that the participation of each party under this MOA is contingent upon the availability of funding.

XIII. TERMINATION, EXPIRATION, SURVIVAL AND AMENDMENT

A. Unless earlier terminated, this MOA shall be effective from the Effective Date, as provided in Section XVI, and shall remain in effect for a period of five years. The Parties may renew this MOA for a period of

one or more years as they see fit. Any Trustee, in its sole discretion, may terminate its participation in this MOA at any time by giving to all other Parties 30 days prior written notice, signed by an authorized official of the terminating Trustee. Termination by a single Trustee shall not affect the MOA as to the remaining Parties, and termination of participation under this MOA is prospective only. Any amendment to this MOA, including any exhibits hereto, must be in writing and executed by all of the Parties.

B. Sections VII, XIV and XV of this MOA, shall survive and remain in effect following expiration or earlier termination of this MOA.

XIV. GENERAL PROVISIONS

A. Unless otherwise expressly provided herein, terms used in this MOA shall have the meanings assigned to them in CERCLA, as well as in applicable regulations issued under CERCLA.

B. The Parties agree that this MOA shall not be treated as an admission of liability, fact, or law, and shall not be admissible in evidence against any Party for any purpose.

C. Subject to unanimous consent by the existing Trustees, which consent shall not be withheld unreasonably, others who are trustees of natural resources that may have been injured by releases of hazardous substances within the scope of this agreement may join in this MOA after the Effective Date by executing an addendum to this agreement (see Exhibit 1). Prior to joining, they may, with the unanimous consent of the other Trustees, participate in Council meetings, but may not vote at those meetings.

D. This MOA is strictly for internal management purposes for each of the Parties. It is not legally enforceable, and shall not be construed to create any legal obligation on the part of any Trustee. This MOA shall not be construed to provide a private right or cause of action for or by any person or entity. This MOA does not create or authorize a basis for any third-party claim, challenges, or appeals to the actions of the Parties. In addition, this MOA in no way restricts any of the Parties from participating in any activity with other public or private agencies, organizations, or individuals.

E. This MOA is neither a fiscal nor funding obligation document. Nothing in this MOA authorizes or is intended to obligate the Parties to spend, exchange, or reimburse funds, services, supplies, or transfer or receive anything of value. 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 the agreements shall recite the appropriate statutory authorities. This instrument does not provide such 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 legal requirements for competition.

F. The Trustees agree that they will endeavor to have coordinated communications with potentially responsible parties or their agents for matters related to natural resource damages and claims for those

damages. This does not preclude a Trustee or their agent from having separate communications with potentially responsible parties on matters within the scope of the Agreement where circumstances warrant, provided that such Trustee or Trustee Council member or agent, informs and consults with other Trustees.

G. Subject to unanimous consent by the Council as comprised at the relevant time, entities identified as PRP may join this MOA, and the MOA may be amended as necessary to accommodate such action.

H. Nothing in this MOA or exhibits attached hereto shall be construed as a waiver of the sovereign immunity of the Navajo Nation, the State of Utah, the State of New Mexico, or other entities joining the Trustee Council in the future through amendment of this MOA.

XV. RESERVATION OF RIGHTS

A. The Parties understand that this MOA is not intended to create any further legal rights or obligations between the Parties or any other persons not party to this MOA. Nothing in this MOA implies that any Trustee is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources.

B. This MOA, including any exhibits attached hereto, does not limit the right of any Trustee to assert the liability of, or to pursue, contribution actions against another person, and does not constitute a waiver by any of the Trustees of any legal or equitable claims or defenses. Nothing in this MOA shall limit the rights of the Trustees, and the Trustees expressly reserve their rights, to bring any claim they may have against any defendant for damages for injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances and for the reasonable costs of assessing such damages.

XVI. EFFECTIVE DATE

This MOA may be executed in one or more counterparts, all of which shall be considered an original. The effective date of this MOA (Effective Date) shall be the last date of execution of any counterpart hereof. The effective date of any exhibit hereafter developed and incorporated into this MOA shall be the date set forth in such exhibit.

(Signatures on following pages)

XVII. SIGNATURES

The undersigned representative of each Trustee certifies that he or she is authorized to execute this MOA on behalf of and to bind that Trustee:

FOR THE NAVAJO NATION

The Honorable Jonathan Nez
President

Date

FOR THE STATE OF NEW MEXICO

Maggie Hart Stebbins

Trustee

New Mexico Office of the Natural Resource Trustee

Date

FOR THE STATE OF UTAH

Scott Baird
Director
Utah Department of Environmental Quality

Date

Brian Steed
Director
Utah Department of Natural Resources

Date

For the United States Department of Interior:

Mark Huston
Acting Director, Office of Restoration and Damage Assessment

September 1, 2021

Date

[Exhibit 1: Form of Addendum]

ADDENDUM

PARTICIPATION BY ADDITIONAL PARTIES

IN BPMD MOA

The [agency], by and through [authorized representative], desires to become a party to the Bonita Peak Mining District Natural Resource Damages Trustee Council as [a/an] [Trustee] [Advisor].

Now, therefore, [agency] agrees to the terms and conditions of the Memorandum of Agreement.

Dated: _____

[AGENCY]

By: _____

[name]

[title]

[address]

On behalf of the existing Trustees, as Lead Administrative Trustee I attest that the Trustees unanimously consent to [agency] joining this MOA as [a/an] [Trustee] [Advisor], effective upon the date below.

Dated: _____

By: _____

[name]

[title]

[address]