

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,  
THE STATE OF NEW MEXICO, and  
THE NEW MEXICO OFFICE OF  
NATURAL RESOURCES TRUSTEE,

Plaintiffs,

v.

No. CIV-04-1101 JH RHS

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY,

Defendant.

**JOINT MOTION FOR  
DISBURSEMENT OF FUNDS**

Plaintiff the United States of America, on behalf of the Department of the Interior, Fish and Wildlife Service (“United States”) and Plaintiffs the State of New Mexico and the New Mexico Office of Natural Resources Trustee (jointly, “State”) jointly move the Court to enter an order permitting the disbursement of funds paid into the court registry pursuant to the consent decree (“Consent Decree”) entered in this matter on January 28, 2005. As grounds for this motion, the movants state:

1. Pursuant to the Consent Decree, Defendant Burlington Northern and Santa Fe Railway Company (“BNSF”) deposited \$396,230.66 and the U.S. Department of the Treasury (“Treasury Department”), successor in interest to the U.S. Railroad Administration, deposited \$3,769.34 into a “Habitat Resources Damages Account” within the court registry as damages for alleged injuries to habitat natural resources. (Consent Decree ¶¶ 5, 8.) The Consent Decree specifies that the United States and the State (jointly, “Trustees”) shall use these funds (“Habitat Resource Damages Payments”) to plan and implement projects to restore, replace or acquire

habitat natural resources equivalent to the allegedly injured habitat natural resources. The Habitat Resource Damages Payments, including earned interest, currently total approximately \$419,219.75.

2. Pursuant to the Consent Decree, BNSF deposited \$654,961.94 and the Treasury Department deposited \$6,230.66 into a “Groundwater Resources Damages Account” within the court registry as damages for alleged injuries to groundwater natural resources. (Consent Decree ¶¶ 5, 8.) The Consent Decree specifies that the State shall use these funds (“Groundwater Resources Damages Payments”) to plan and implement projects to restore, replace or acquire groundwater natural resources equivalent to the allegedly injured groundwater natural resources. The Groundwater Resources Damages Payments, including earned interest, currently total approximately \$692,961.83.

3. The Trustees have agreed regarding the distribution of the Habitat Resource Damages Payments and Groundwater Resources Damages Payments for use to restore, replace or acquire natural resources equivalent to the allegedly injured natural resources, as provided in the Consent Decree. To memorialize this agreement, the Trustees executed the Resolution attached at Exhibit A. The Trustees therefore move this Court for an order disbursing these funds as described in this motion.

4. The Trustees move this Court to disburse the Habitat Resource Damages Payments, including earned interest, as follows: \$143,131.00 to the United States and \$276,088.75 to the State. Any additional Habitat Resource Damages Payments remaining within the court registry shall be distributed to the State to be put toward the City of Albuquerque Open Space Division Bosque Re-vegetation Project.

5. The United States shall deposit these Habitat Resource Damages Payments into a segregated subaccount of the U.S. Department of the Interior Restoration Fund, for the purposes of reimbursing planning and oversight costs and financing habitat restoration work as provided in the Consent Decree. Disbursement instructions for these funds are attached hereto as Exhibit B. The United States shall not commingle these funds with any other moneys that it holds.

6. The State shall deposit these Habitat Resource Damages Payments (including any additional Habitat Resource Damages Payments distributed to the State pursuant to Paragraph 4 of this motion) into a segregated subaccount of the N.M. Natural Resources Trustee Fund, for the purposes of reimbursing planning and oversight costs and financing habitat restoration work as provided in the Consent Decree. Disbursement instructions for these funds are attached hereto as Exhibit C. The State shall not commingle these funds with any other moneys that it holds.

7. The Trustees move this Court to disburse the total Groundwater Resources Damages Payments, including earned interest, to the State, which shall deposit these Groundwater Resources Damages Payments into a segregated subaccount of the N.M. Natural Resources Trustee Fund, for the purposes of reimbursing planning and oversight costs and financing groundwater restoration work as provided in the Consent Decree. Disbursement instructions for these funds are attached hereto as Exhibit D. The State shall not commingle these funds with any other moneys that it holds.

8. The Trustees have contacted counsel for BNSF regarding BNSF's position on this motion, but have not received a response.

WHEREFORE, the Trustees respectfully request this Court to grant this motion and issue an order in the proposed form submitted herewith authorizing the disbursement of the Habitat

Resources Damages Payments and the Groundwater Resources Damages Payments from the respective court registry accounts.

Respectfully submitted,

**FOR PLAINTIFFS THE STATE OF NEW MEXICO AND THE  
NEW MEXICO OFFICE OF NATURAL RESOURCES TRUSTEE:**

/s/ Karen L. Reed

Date: June 29, 2007

Gary K. King, Attorney General  
By: Karen L. Reed, Assistant Attorney General  
New Mexico Office of the Attorney General  
P.O. Drawer 1508  
408 Galisteo Street, Room R-118  
Santa Fe, New Mexico 87504-1508  
Phone (505) 827-6695  
Fax (505) 827-4440

**FOR PLAINTIFF THE UNITED STATES OF AMERICA:**

W. BENJAMIN FISHEROW  
Deputy Section Chief  
Environmental Enforcement Section  
Environment & Natural Resources Division  
United States Department of Justice

/s/ Karen L. Reed for Steven D. Shermer

Date: June 29, 2007

STEVEN D. SHERMER  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Ben Franklin Station - P.O. Box 7611  
Washington, D.C. 20044-7611  
Phone (202) 514-1134  
Fax (202) 616-6584  
Steven.Shermer@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that, on this 29<sup>th</sup> day of June, 2007, I mailed a true and complete copy of the foregoing Joint Motion for Disbursement of Funds, and the accompanying proposed order, via U.S. first-class mail, postage prepaid to:

Paul Hoferer, Esq.  
BNSF Railway Company  
2500 Lou Menk Drive  
AOB, 3<sup>rd</sup> Floor  
Ft. Worth, TX 76131

Larry P. Ausherman, Esq.  
Modrall Sperling Roehl Harris & Sisk, PA  
P.O. Box 2168  
Albuquerque, NM 87103

/s/ Karen L. Reed  
Karen L. Reed

EXHIBIT A

Resolution

COURT REGISTRY ACCOUNT  
IN RE: BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY  
CASE 04-CV-01101

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

WHEREAS, the Tie-Treater Trustee Council was created pursuant to the Memorandum of Agreement mutually entered into by the U.S. Department of Interior, Fish and Wildlife Service (FWS) and the New Mexico Office of Natural Resources Trustee (ONRT);

WHEREAS, the AT&SF Albuquerque Court Registry Account was established by the Court Order of January 28, 2005, in Civil Action No. 04-CV-01101 in the United States District Court for the District of New Mexico;

WHEREAS, the Tie-Treater Trustee Council, by unanimous consent (see signatures of the trustee representatives), agrees that the following is an appropriate distribution of funds from the Court Registry Account and that the Trustee Council should seek an order from the district court distributing these funds as follows:

1. \$143,131.00 shall be disbursed on or about May 1, 2007, payable to the FWS for the following:
  - a) FWS staff personnel expenses incurred for evaluation and selection of potential restoration projects, for preparation, review and finalization of a restoration plan, and for development and publication of outreach materials (\$51,627.00);
  - b) FWS staff expenses for monitoring, management and oversight of the Whitfield Wildlife Area Riparian Zone Project implementation (\$16,471.00); and
  - c) Whitfield Wildlife Area Riparian Zone Project proposal funding for Valencia Soil and Water Conservation District via reimbursable grant agreement with FWS (\$75,033.00).

WHEREAS, funds payable to the FWS shall be electronically wired to the U.S. Department of the Interior Restoration Fund 0371, Washington, D.C.;

WHEREAS, any funds not used by the FWS for implementation, project monitoring, management and oversight of the Whitfield Wildlife Area Riparian Zone Project described in Section 1.b) are to be transferred to the ONRT to be used for additional habitat restoration activities as described in Sections 2.b) and 2.c).


2. \$276,088.75 shall be disbursed on or about May 1, 2007, payable to the ONRT for:

- a) \$23,438.00 for ONRT staff expenses incurred for evaluation and selection of potential restoration projects, and for preparation, review and finalization of a restoration plan;
- b) ONRT staff expenses for monitoring, management, and oversight of the City of Albuquerque Open Space Division Bosque Revegetation Project implementation (\$16,643.00); and
- c) City of Albuquerque Open Space Division Bosque Revegetation Project funding for the City of Albuquerque Open Space Division via professional services agreement (\$236,007.75 plus accrued interest).

WHEREAS, funds payable to the ONRT shall be made by check. Payment and accompanying transmittal notice shall reference: "AT&SF Albuquerque (Tie-Treater) Habitat Restoration." Payment shall be sent to: New Mexico Environment Department, Financial Services Bureau, c/o Charles Martinez, P.O. Box 26110, Santa Fe, NM 87502-0110;

WHEREAS, any funds not used by the ONRT for project monitoring, management and oversight of the City of Albuquerque Open Space Division Bosque Revegetation Project described in Section 2.b) are to be used for additional habitat restoration activities as described in Section 2.c).

NOW THEREFORE BE IT RESOLVED that the Tie-Treater Trustee Council agrees by unanimous consensus that the above-described funds should be withdrawn from the Court Registry Account and distributed for the purposes set out above, in accordance with law.

  
REBECCA de NERI ZAGAL, Executive Director  
New Mexico Office of Natural Resources Trustee

4-12-2007  
Date

  
BENJAMIN TUGGLE, Authorized Official (or his acting)  
U.S. Department of Interior  
Fish and Wildlife Service

4-13-2007

Date

## **EXHIBIT B**

### **Disbursement Instructions for United States Habitat Resources Damages Payments**

The United States shall deposit Habitat Resources Damages Payments in the amount of \$143,131.00 into a segregated subaccount of the U.S. Department of the Interior Restoration Fund, for the purposes of reimbursing planning and oversight costs and financing habitat restoration work as provided in the Consent Decree. Disbursement instructions are the following:

Payment by wire transfer (funds guaranteed; fees, if any, to be deducted from transferred funds)

NRDA account number: 14X5198 (NRDAR)

DOI Fund #: 0371

Location name: AT&SF Albuquerque (Tie-Treater) Superfund Site

Site location: Albuquerque, Bernalillo County, New Mexico

**For FEDWIRE transfers**, account number is: Treasury NYC 021030004

Receiver name: DOI Restoration Fund  
ALC 1401001

Receiver tax ID number: 53-0196949

Receiver Address: 7401 West Mansfield Avenue  
Mailstop D-2777  
Lakewood, CO 80235

A copy of payment documents shall be sent to:

Bruce Nessler  
United States Department of the Interior  
Attn: Restoration Fund Manager  
1849 C Street NW  
Mailstop 4449  
Washington, DC 20240

Karen Cathey, NRDA Coordinator  
United States Fish and Wildlife Service  
P.O. 1306  
Room 4012  
Albuquerque, NM 87103



Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ #: 90-11-2-07889/1)  
P.O. Box 7611  
Washington, D.C. 20044-7611

and

Rebecca Neri Zagal  
New Mexico Office of Natural Resources Trustee  
610 Gold Ave. SW, Suite 236  
Albuquerque, NM 87102-3188

## **EXHIBIT C**

### **Disbursement Instructions for State Habitat Resources Damages Payments**

The State shall deposit Habitat Resources Damages Payments in the amount of \$276,088.75, plus any additional Habitat Damages distributed to the State, into a segregated subaccount of the N.M. Natural Resources Trustee Fund, for the purposes of reimbursing planning and oversight costs and financing habitat restoration work as provided in the Consent Decree. Disbursement instructions are the following:

Payment by check (funds guaranteed; fees, if any, to be deducted from transferred funds)

Payment and accompanying transmittal notice shall reference: "AT&SF Albuquerque (Tie-Treater) Habitat Restoration." Payment shall be sent to: New Mexico Environment Department, Financial Services Bureau, c/o Charles Martinez, P.O. Box 26110, 1190 St. Francis Dr., Santa Fe, NM 87502-0110.

A copy of payment documents shall be sent to:

Rebecca Neri Zagal  
New Mexico Office of Natural Resources Trustee  
610 Gold Ave. SW, Suite 236  
Albuquerque, NM 87102-3188

Karen L. Reed, Esq.  
New Mexico Attorney General's Office  
P.O. Drawer 1508  
Santa Fe, NM 87504-1508

and

Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ #: 90-11-2-07889/1)  
P.O. Box 7611  
Washington, D.C. 20044-7611

## **EXHIBIT D**

### **Disbursement Instructions for State Groundwater Damages**

The State shall deposit Groundwater Damages funds in the amount of \$692,961.83, plus any additional earned interest, into a segregated subaccount of the N.M. Natural Resources Trustee Fund, for the purposes of reimbursing planning and oversight costs and financing groundwater restoration work as provided in the Consent Decree. Disbursement instructions are the following:

Payment by check (funds guaranteed; fees, if any, to be deducted from transferred funds)

Payment and accompanying transmittal notice shall reference: "AT&SF Albuquerque (Tie-Treater) Groundwater Restoration." Payment shall be sent to: New Mexico Environment Department, Financial Services Bureau, c/o Charles Martinez, P.O. Box 26110, Santa Fe, NM 87502-0110.

A copy of payment documents shall be sent to:

Rebecca Neri Zagal  
New Mexico Office of Natural Resources Trustee  
610 Gold Ave. SW, Suite 236  
Albuquerque, NM 87102-3188

Karen L. Reed, Esq.  
New Mexico Attorney General's Office  
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