

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE STATE OF COLORADO, THE UNITED STATES DEPARTMENT OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF AGRICULTURE

RELATING TO THE RESTORATION OF NATURAL RESOURCES INJURED BY RELEASES OF HAZARDOUS SUBSTANCES FROM THE CALIFORNIA GULCH SUPERFUND SITE

I. INTRODUCTION

This Memorandum of Understanding (MOU) is entered into between the Federal and State officials who act on behalf of the public as trustees for natural resources injured, or potentially injured, by the release of hazardous substances from the California Gulch Superfund Site. The MOU is intended to govern the parties' efforts to coordinate and cooperate in carrying out their respective responsibilities to restore, replace, or acquire the equivalent of the said natural resources, using funds received by the parties pursuant to the Consent Decrees approved by the U.S. District Court for the District of Colorado in the consolidated cases of State of Colorado v. ASARCO Incorporated, et al.; Civil Action No. 83-C-2388, and United States v. Apache Energy and Minerals Company, et al., Civil Action No. 86-C-1675 (hereinafter collectively referred to as "ASARCO/Apache").

II. PARTIES

The following agencies, acting on behalf of their respective Trustees, are parties to this MOU:

- A. Colorado Department of Public Health and Environment (CDPHE);
- B. Colorado Department of Natural Resources (DNR);
- C. Colorado Department of Law (DOL);
- D. United States Department of the Interior (DOI) represented by:
 - 1. U.S. Fish and Wildlife Service (USFWS);
 - 2. Bureau of Land Management (BLM);

3. Bureau of Reclamation (BOR);
- E. United States Department of Agriculture, U.S. Forest Service (USFS).

These parties are referred to throughout this MOU as "Trustees" or "Parties." The DOI has delegated to the USFWS Region 6 (Mountain Prairie) Regional Director the authorities of the DOI Secretary for DOI natural resource trustee concerns related to this Site. Thus, the USFWS Regional Director is DOI's Authorized Official and serves as lead for the DOI bureaus involved in this MOU.

The U.S. Forest Service (USFS) has requested that, for the purposes of this MOU, the DOI USFWS represent the USFS natural resource trustee interests related to the Site.

III. DEFINITIONS

- A. "California Gulch Site" or "Site" is defined as the California Gulch National Priorities List Site located in and near Leadville, Colorado, as well as all locations where waste materials from the Site have affected natural resources.
- B. Whenever the terms "natural resource," "restoration," "or "restore" are used in this MOU, they shall have the same meanings as defined in 43 C.F.R. Part 11. Restoration may include replacement or acquiring the equivalent of resources injured by releases from the Site.
- C. The term "Restoration Plan" means a plan developed by the Trustees that describes and evaluates options for restoring, replacing or acquiring the equivalent of resources injured by releases from the Site.
- D. "Unanimous approval" is defined as an affirmative vote by each Trustee Council representative or an affirmative vote by five of six Trustee representatives with one abstention. As indicated in Part IX of this MOU, each of the State Trustee representatives will have 1 vote for a total of 3 State votes, and each of the DOI bureaus will have 1 vote, for a total of 3 Federal votes.
- E. Unless a term is expressly defined in this MOU, all terms shall have the same meaning as in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 101, 42 U.S.C. § 9601 or the CERCLA Natural Resource Damage Assessment Regulations (43 CFR Part 11).

IV. AUTHORITIES

The Parties to this MOU are natural resource trustees pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675

("CERCLA"); Subpart G of the National Contingency Plan, 40 C.F.R. Part 300.600-615; 43 C.F.R. Part 11; Executive Order 12580; appointment by the Governor of the State of Colorado pursuant to federal law; and other applicable federal and state laws.

V. THE SETTLEMENT

The principal responsible parties at the site, Resurrection Mining, Newmont, ASARCO and the Res-ASARCO Joint Venture, have agreed to settle the Trustees' Natural Resource Damage (NRD) claims. Pursuant to those agreements, the Trustees will have an allowance in the ASARCO bankruptcy proceedings of \$10 million and Resurrection/Newmont agreed to pay \$10.5 million to resolve all outstanding NRD liability.

The Consent Decrees resolving NRD claims require ASARCO and Res/Newmont to split their payments 50/50 between the State and Federal governments. The State agreed to place its recovery in the Colorado NRD Recovery Fund as a separate and segregated interest-bearing custodial account within the State Treasury, after reimbursing funding sources for past assessment costs. DOI agreed to place its recovery in the DOI NRDAR Fund (Federal Restoration Account) as a segregated interest-bearing account, after reimbursing funding sources for past assessment costs. The Trustees further agreed that the State and DOI would be responsible for routine management of the Colorado NRD Recovery Fund and the Federal Restoration Account, respectively, according to these agencies' established policies. It is anticipated that the United States District Court will approve the Consent Decrees in 2008.

The Trustees hereby agree that funds in the Colorado NRD Recovery Fund and Federal Restoration Account will be used to restore natural resources in the upper Arkansas River watershed, in accordance with federal law. The Trustees further agree to coordinate the use of funds from both accounts. The State and Federal trustees agree to reimburse their past (pre-settlement) assessment costs with their respective shares of settlement recoveries.

VI. PURPOSE

The purpose of this MOU is to provide a framework and process for coordination and cooperation among the Trustees in using funds received from the NRD settlements to restore injured or potentially injured natural resources in the upper Arkansas River watershed. Under the framework of this MOU, the Trustees expect to develop projects to restore, replace or acquire the equivalent of natural resources that have been injured or potentially injured due to releases of hazardous substances from the Site.

Based on extensive public outreach and research, the Trustees identified a series of potential restoration projects that they believe would meet the purpose of this MOU and the law. These potential projects and project categories were set forth in the Preliminary Estimate of Damages (PED), and are expected to form the basis of the Trustees' Proposed Restoration Plan(s) for the upper Arkansas River. These projects will be re-evaluated to take into account

new information since the release of the PED. These projects will include restoration and protection of water quality and aquatic, riparian and upland habitats.

Restoration project costs will include the costs for design, implementation, permitting and other legal requirements, monitoring, and oversight of restoration activities.

For all restoration projects, the Trustees will investigate matching fund sources from local, state, federal, private and non-profit sources to maximize benefits accrued from damage recoveries. If funds exceed the amount needed to implement the Trustees' proposed projects and the reimbursement of assessment costs, the Trustees may solicit proposals for additional restoration projects from interested stakeholders.

VII. ORGANIZATION - NATURAL RESOURCE TRUSTEE COUNCIL AND LEAD ADMINISTRATIVE TRUSTEE

A. Upper Arkansas River Natural Resource Trustee Council

To implement and achieve the stated purposes of this MOU, there is hereby created the Upper Arkansas River Natural Resource Trustee Council ("Council").

Each of the parties, except the USFS, will appoint one primary representative who may designate at least one alternate representative to the Council. No later than twenty (20) working days after the final execution of this MOU, each party shall notify the other parties of the names, addresses, email addresses, telephone numbers, and facsimile numbers of that party's primary and alternate representative(s) to the Council. Communications regarding Council business shall be addressed to the primary representative and, unless the Council directs otherwise, copied to the alternate representatives. Each party shall also notify the other parties of any changes in that party's primary or alternate representative(s) within twenty (20) working days.

The Council may seek advisory participation from members of the general public, from other federal, state or local agencies, and from any other entity as deemed appropriate by the Council.

B. Lead Administrative Trustee

The DOI-USFWS will serve as the Lead Administrative Trustee and the Council may appoint one state agency to serve as the alternate Lead Administrative Trustee, for the purpose of handling administrative matters of the Council. The duties of the Lead Administrative Trustee shall include: scheduling meetings of the Council and notifying Council members of those meetings in a timely manner; preparing agendas for those meetings; acting as a central contact point among members of the Council; establishing a system for and maintaining records and relevant documents; preparing and circulating minutes of Council meetings; and other administrative duties as directed by the Council. The Lead Administrative Trustee shall be responsible for informing the other Council members of all pertinent developments in a timely

manner. The Lead Administrative Trustee and alternate representatives may delegate any of their duties to another Trustee representative. The duties carried out by the Lead Administrative Trustee do not provide the Lead Administrative Trustee with decision-making rights beyond those normally held by each Trustee.

VIII. POWERS, DUTIES, AND RESPONSIBILITIES

The Trustees shall coordinate with each other with regard to Trustee activities necessary to fulfill the purpose of this MOU.

To the extent authorized by applicable laws and policies, the Council may take the following actions, among others, to implement the Trustees' natural resource restoration responsibilities:

- A. Develop and select projects to restore, replace or acquire the equivalent of resources that have been injured or potentially injured due to releases of hazardous substances from the Site, consistent with paragraph VI (Purposes).
- B. Select final projects for implementation in accordance with the criteria developed by the Council and in accordance with the Restoration Plan, and any applicable federal laws, after consideration of public comment;
- C. Develop the Restoration Plan(s). Any Plans for restoration projects to be paid for with federal funds will comply with the National Environmental Policy Act. Any Plan will be provided to the public for comment;
- D. Arrange, through one or more of the Trustees, contracts with professional consultants, technical or otherwise, or any other parties as the Council deems necessary;
- E. Promote partnerships in the funding and implementation of proposed projects ;
- F. Fund selected projects from the Colorado NRD Recovery Fund and the Federal Restoration Account;
- G. Implement and oversee implementation of restoration projects;
- H. Monitor the management and evaluate the effectiveness of projects that have been implemented;
- I. Provide information to the public at all phases of the process, including reporting on the effectiveness of projects that have been implemented;
- J. Coordinate with CDPHE and U.S. EPA regarding the ongoing remediation at the

Site;

- K. Oversee and review the management and administration of funds in the Colorado NRD Recovery Fund and the Federal Restoration Account,
- L. Appoint committees and subcommittees, as necessary, for the efficient operation of the Council; and
- M. Perform any other functions necessary in accordance with the purpose of this MOU.

IX. DECISION MAKING

For Council decision-making, each of the State of Colorado Parties to this agreement shall have one vote, for a total of three votes, which shall be cast by the Party's primary representative, or in the absence of the primary representative, by an alternate representative or by proxy. The Federal Parties to this agreement shall have a total of three votes that shall be cast by the three voting DOI bureaus' primary representatives, or in the absence of the primary representatives, by alternate representatives or by proxy. The USFS will vote through the DOI USFWS representative.

The Trustees agree that the Council decisions pursuant to this MOU shall require unanimous approval of the voting representatives, as defined in Section III.D. The decisions made by the voting representatives shall be recorded in writing, either by resolution signed by the voting representatives, or in minutes approved as to content and form. The voting representatives shall memorialize all decisions authorizing expenditures of received settlement funds in signed Council resolutions. The budget and other documents describing the work to be conducted will be attached to the resolutions and maintained in the records of the Council.

The Trustees agree that decision making deliberations will focus upon the Trustees' mutual goals of restoring, rehabilitating, replacing and acquiring the equivalent of the injured natural resources and services, rather than on individual Trustee control or trusteeship over those resources.

If the Council is unable to reach unanimous agreement on a matter under consideration, any Trustee representative may invoke dispute resolution by notifying the other Trustee representatives in writing that it is doing so. When dispute resolution is invoked, the Council representatives agree to elevate the matter in dispute within their agencies within ten working days of the notice triggering dispute resolution. The parties expect that any matter in dispute will be resolved through informal discussions between senior managers. In the event that the parties are unable to resolve a dispute by elevating the matter within their agencies, the Council representatives will determine a process for resolving such dispute.

Whether a restoration project or projects are selected for joint funding or funding by either the federal or state trustees, each trustee representative agrees to raise any comments or

concerns regarding such project(s) to the Council and to work within the Council to resolve differences before raising them in a public forum or during a formal public comment period.

The Parties understand that there may be disagreements about whether a specific, proposed project qualifies as restoration or is otherwise a project appropriate to be selected for implementation. In the event of such disagreements, the Parties may elevate the matter within their respective agencies under the dispute resolution mechanism described above. As an alternative, the dissenting Party may agree to defer to the proponent's interpretation and approve the project on the condition that the project be funded entirely from the proponent's funds.

A Council representative may vote by proxy when the primary and alternate representatives are unavailable for a meeting. A proxy will have full voting rights of the primary representative.

Council meetings may be convened by representatives coming together or by telephone conference call. If a Council representative is unable to travel to a meeting, that representative may participate by telephone conference.

X. FUNDS

The Trustees intend to administer the settlement proceeds received and coordinate expenditures of those funds in a cooperative manner. The Trustees agree that these funds will be used for restoration projects consistent with a Restoration Plan or Plans approved by the Council. Under this MOU, the Trustees will establish procedures for the financial operations of the Council. These procedures may include: arranging contract administration through a Trustee agency, directing disbursements from the State and federal accounts; withholding payment on matters in dispute; providing for periodic reporting on the status of the accounts; and any other procedures that the Council deems necessary. The State of Colorado, in managing the Colorado NRD Recovery Fund, and the Department of the Interior, in managing the Federal Restoration Account, shall follow all applicable rules and regulations pertaining to these accounts.

The Trustees also agree that NRD settlement proceeds may be used by the Trustees for their expenses related to this MOU. These funds will be used solely for work related to the Site in a manner consistent with state or federal regulations, policies and guidelines. Trustee representatives shall provide the Council with an annual status and accounting report on their use of these funds. The Trustees, annually and on an ongoing basis, will carefully review expenditures to confirm that no more money than necessary is being used for administrative costs rather than restoration projects. The State and Federal Trustees agree that funds not to exceed 20% of the respective State and Federal recoveries may be used for their respective future administrative costs, oversight, and monitoring during the planning and implementation of restoration actions.

The Trustees agree that for each project that is funded and each project-related disbursement made, the portion of costs to be allocated from the Colorado NRD Recovery Fund

and from the Federal Restoration Account will be determined by the Trustees.

The Trustees agree that if there are additional recoveries on the Trustees' claims, the recovered sums may be added to the Colorado NRD Recovery Fund and the Federal Restoration Account, depending on the terms of the associated consent decree. If any additional funds are added to these accounts from future recoveries, they will be managed in accordance with this MOU and any procedures established under this MOU.

While this MOU establishes the framework for operations of the Council and provides that the Council will establish procedures for disbursing the funds in the Colorado NRD Recovery Fund and the Federal Restoration Account, it does not provide for services between the Trustees. In that regard, this MOU is neither a fiscal nor a funds obligation document. Any transfer of funds between the parties shall be handled in accordance with applicable laws, regulations, and procedures including those for government procurement. Such transfers or activities will be outlined in separate agreements that shall be made in writing by duly authorized representatives of the parties and shall be independently authorized by appropriate statutory authority. Also, nothing in this MOU shall be construed as obligating the Trustees to expend any funds in excess of appropriations authorized by law or to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

XI. CONFIDENTIALITY

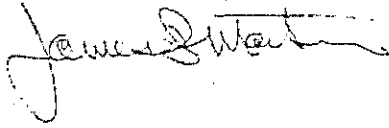
The Trustees acknowledge that the restoration planning pursuant to this MOU may involve confidential Trustee deliberations, and agree to maintain such confidentiality. As a rule, the Council will implement a general policy of making the results of such deliberations and the Trustees' technical information available to the public, whenever possible. The Trustees also agree that information subject to public disclosure under the Freedom of Information Act and the Colorado Open Records Act shall be released. All parties agree to notify the other parties in writing of each request for information no more than five (5) working days from the date the request is received.

XII. GENERAL PROVISIONS

- A. **Reservation of Rights.** All Parties understand that this document is not intended to create any legal rights or obligations among the Parties or any other persons not a party to this MOU. Nothing in this MOU is intended to imply that any signatory Trustee agency is in any way abrogating or ceding any responsibility or authority inherent in its trusteeship over natural resources, nor its prerogatives regarding agency appropriated funds or staff.
- B. **Participation in Similar Activities.** This MOU in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations or individuals.

- C. **Third Party Challenges or Appeals.** Nothing in this MOU creates any right or cause of action in persons not a party to this agreement. Nothing in this MOU shall be construed as a basis for any third-party challenge or appeal.
- D. **Modification.** Modification of this MOU must be in writing and approved by all Trustees party to this MOU.
- E. **Withdrawal.** Any Party may withdraw from this MOU at any time upon 30 days written notice to the other Parties. Within 60 working days of withdrawing, said Party will provide a full and complete status report of all project work and an accounting of all project funds they have been allocated through the Trustee Council
- F. **Execution and Counterparts.** This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU.
- G. **Effective Date and Termination.** This MOU shall be in effect from the date of the signature of the last Trustee to sign the MOU until terminated by mutual agreement. In the event of termination of this MOU, each party agrees to cooperate in preparing a full and complete accounting and status report of all accounts managed by the Trustees.

We, the undersigned authorized representatives, hereby agree to the terms and conditions set forth in this Memorandum of Understanding:



06/23/08

James B. Martin
Executive Director, Colorado Department of Public Health
and Environment

Date

Ronald W. Cattany
Director, Division of Reclamation, Mining and Safety
Colorado Department of Natural Resources

Date

John Suthers
Attorney General, State of Colorado

Date

Stephen Guertin
Regional Director, Region 6, US Fish and Wildlife Service
Authorized Official, U.S. Department of the Interior

Date

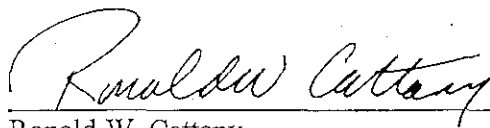
Rick D. Cables
Regional Forester, U.S. Department of Agriculture
Forest Service

Date

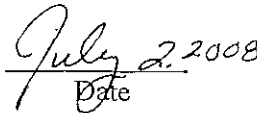
We, the undersigned authorized representatives, hereby agree to the terms and conditions set forth in this Memorandum of Understanding:

James Martin
Executive Director, Colorado Department of Public Health
and Environment

Date



Ronald W. Cattany
Director, Division of Reclamation, Mining and Safety
Colorado Department of Natural Resources



Date

John Suthers
Attorney General, State of Colorado

Date

Stephen Guertin
Regional Director, Region 6, US Fish and Wildlife Service
Authorized Official, U.S. Department of the Interior

Date

Rick D. Cables
Regional Forester, U.S. Department of Agriculture
Forest Service

Date

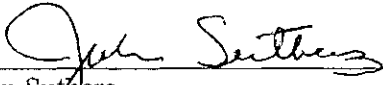
We, the undersigned authorized representatives, hereby agree to the terms and conditions set forth in this Memorandum of Understanding:

James Marlin
Executive Director, Colorado Department of Public Health
and Environment

Date

Ronald W. Cattany
Director, Division of Reclamation, Mining and Safety
Colorado Department of Natural Resources

Date



John Suthers
Attorney General, State of Colorado

6/24/08

Date

Stephen Guertin
Regional Director, Region 6, US Fish and Wildlife Service
Authorized Official, U.S. Department of the Interior

Date

Rick D. Cables
Regional Forester, U.S. Department of Agriculture
Forest Service

Date

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James Martin
Executive Director, Colorado Department of Public Health
and Environment

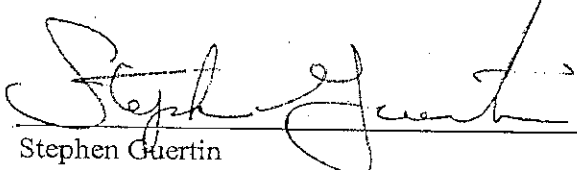
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Ronald W. Cattany
Director, Division of Reclamation, Mining and Safety
Colorado Department of Natural Resources

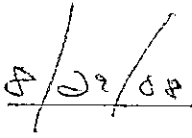
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John Suthers
Attorney General, State of Colorado

Date



Stephen Guertin
Regional Director, Region 6, US Fish and Wildlife Service
Authorized Official, U.S. Department of the Interior



Date

Rick D. Cables
Regional Forester, U.S. Department of Agriculture
Forest Service

Date

We, the undersigned authorized representatives, hereby agree to the terms and conditions set forth in this Memorandum of Understanding:

James Martin
Executive Director, Colorado Department of Public Health
and Environment

Date

Ronald W. Cattany
Director, Division of Reclamation, Mining and Safety
Colorado Department of Natural Resources

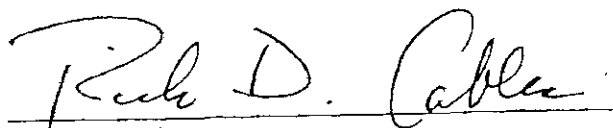
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John Suthers
Attorney General, State of Colorado

Date

Stephen Guertin
Regional Director, Region 6, US Fish and Wildlife Service
Authorized Official, U.S. Department of the Interior

Date



Rick D. Cables

Regional Forester, U.S. Department of Agriculture
Forest Service

May 27, 2008

Date