

**MEMORANDUM OF UNDERSTANDING  
CONCERNING THE CREATION OF THE TULSA COUNTY SMELTER  
COMPLEX NATURAL RESOURCE DAMAGE ASSESSMENT AND  
RESTORATION TRUSTEE COUNCIL  
BETWEEN:**

CHEROKEE NATION  
AND  
STATE OF OKLAHOMA  
AND  
THE UNITED STATES DEPARTMENT OF THE INTERIOR

**I. INTRODUCTION**

This memorandum of understanding (MOU) is entered into by and between the Cherokee Nation, the State of Oklahoma, and the U.S. Department of the Interior (DOI) (hereinafter collectively referred to as the Trustees) for the Natural Resource Damage Assessment and Restoration (NRDAR) activity in Tulsa County, Oklahoma associated with the Tulsa County Smelter Complex, which is comprised of the Tulsa Fuels and Manufacturing and the Collinsville Smelter sites. The Trustees enter into this MOU in recognition of their common interests in, and responsibilities for, natural resources pursuant to 33 U.S.C. §2702 and 2706, section 311(f) of the Clean Water Act (CWA), 33 U.S.C. §1321(f), and §107(a)(4)(C) and 107(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), including sections 101, 104, 107, and 120, 42 U.S.C. §9607(a)(4)(C) and 9607(f); the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*; and, the Oil Pollution Act of 1990, 33 U.S.C. §2701 *et seq.*; (hereinafter collectively referred to as the Acts). Specifically, the Trustees enter into this MOU to ensure cooperation and coordination between the Trustees in the preparation of the assessments of, as well as the pursuit of claims for, damages to natural resources under the Acts. Additionally, the Trustees enter into this MOU to ensure that natural resource damages jointly recovered from responsible parties, including any interest which may accrue thereon, are used towards the restoration, replacement, rehabilitation, or acquisition of the equivalent of the natural resources or resource services which were injured, destroyed or lost.

**II. PARTIES**

Upon their signature to this MOU, the following officials, or their designees, are Parties

to this MOU and, as authorized and designated pursuant to the authorities set forth in section III below, act on behalf of the public as Trustees for natural resources under this MOU.

1. Principal Chief of the, Cherokee Nation
2. Oklahoma Secretary of Energy and Environment
3. Regional Director, United States Fish and Wildlife Service  
Region 2, U.S. Department of the Interior

### III. TRUSTEE AUTHORITY

The Trustees enter into this MOU in accordance with the natural resource trustee authorities provided for each Trustee by the Acts as well as the National Oil and Hazardous Substances Pollution Contingency Plan [NCP], 40 CFR Part 300; the Natural Resource Damage Assessment Regulations, 43 CFR Part 11 and 15 CFR Part 990; and Executive Order 12580 as amended and other Tribal and Federal laws, regulations and directives. Authority for the Cherokee Nation can be found in their Environmental Code, 27 CNCA § 100, *et seq.* (LA 31-04), Water Quality Code 27 CNCA § 900, *et seq.* (LA 35-04), Hazardous Waste Code, 27 CNCA Sections 1301, *et seq.*, and Hunting and Fishing Code, 29 CNCA § 101, *et seq.* The State of Oklahoma Trusteeship authority is provided in Title 27A Oklahoma statutes 1-2-101 *et seq.*

### IV. EVENTS

This MOU is intended to address all releases, discharges, spills or other incidents, occurrences, or events (hereinafter referred to as Events) at the Tulsa County Smelter Complex, near Collinsville, Tulsa County, Oklahoma and any location where the contaminants come to be located (hereinafter "Site"), which: 1) affect coexisting or contiguous natural resources under the legally authorized trusteeship; and 2) give rise to a claim for natural resource damages under the Acts.

### V. PURPOSE

The Trustees recognize the importance of integrating and coordinating Trustee activities. This MOU is intended to guide and provide a framework for cooperation and coordination among the Trustees, consistent with their duties and responsibilities pursuant to the Acts including, assessing damages and using recovered damages to plan and implement actions appropriate to restore, replace, rehabilitate or acquire the equivalent of natural resources or resource services injured, lost, or destroyed pursuant to the Acts.

## VI. NATURAL RESOURCES TRUSTEE COUNCIL

- A. Organization. The Trustees hereby establish the Tulsa County Smelter Complex Natural Resource Damage Assessment and Restoration Trustee Council to implement this MOU. The Council shall be comprised of Designated Representatives for the Tribal, State, and Federal Trustees who are listed as parties under Section II of this MOU or other agencies, when necessary or appropriate. The Trustee Council may seek advisory participation from the United States Department of Justice, the DOI, Office of the Solicitor, the Oklahoma Attorney General's Office, the Cherokee Nation Attorney General, and other tribal legal counsel or other agencies, when necessary or appropriate.
- B. Designation of Representatives. Each Trustee hereby designates the primary representative identified in Appendix A as their voting representative on the Council. To insure continuity in the Council's work, each Trustee hereby designates the alternate representative(s) identified in Appendix B as their alternate representative on the Council. In the absence of the Primary representative the alternate representative has voting status for the individual trustee. Each Trustee affirmatively agrees that its representatives, absent compelling circumstances, shall attend each meeting of the trustee council. However, it is acceptable for the Trustee to send additional individuals under the authority of the Trustee to meetings for information purposes.
- C. Changing Representatives. A Trustee may change its designated or alternate Council representative by providing written notice, along with the representative's name, address, telephone and facsimile numbers, to the Lead Administrative Trustee (LAT).
- D. Consultants. Consultants are only allowed to attend Trustee council meetings when accompanied by the Trustee (or the Trustee's representative) they are employed by.
- E. Communications.
1. Internal: All correspondence and communications solely to or between the Trustee representative(s) pertaining to activities, which are subject to coordination and cooperation under this MOU, shall be sent to the primary representative of each Trustee designated herein.
  2. External: All information provided to the public with regard to restoration planning and projects will duly note the joint effort of the Trustee Council, and include references to each Trust agency.
- F. Duties and Responsibilities. The Trustee Council shall coordinate all Trustee activities and matters within the scope of this MOU, including any NRDAR activities

undertaken by one Trustee that may affect another Trustee's interest. Actions to be taken or authorized by the Trustee Council in implementing this MOU will include, but are not limited to:

1. Conducting scientific and technical studies, sampling and other matters related to the assessment of natural resource damages resulting from events;
2. Seeking compensation from responsible parties for the damages assessed by the Trustees and for the costs of planning and implementing the assessment;
3. Participating in negotiations with responsible parties in concert with attorneys for the Trustees;
4. Overseeing the development and implementation of a plan for the restoration, replacement, rehabilitation, and/or acquisition of the equivalent of natural resources, or resource services, injured, destroyed or lost in accordance with applicable laws;
5. Coordinating Trustee decision-making, planning, and project contracting, technical or otherwise, and ensuring such actions are conducted in accordance with applicable administrative procedures and/or legal requirements;
6. Reviewing, revising and approving work products, contracts, assessment plans or other documents, or any NRDAR activity that affects a Trustee's natural resources in the Site. Comments for revisions or request for extension of time will be provided by each Council representative to the LAT or such other recipient as is mutually agreed by the Council within 30 days, or other timeframe agreed upon by the Council;
7. Making all necessary decisions, on a case by case basis and in accordance with applicable law, for the management and administration of funds pursuant to Section VIII of this MOU;
8. Establishing protocols, standards, procedures, budgets, or other directions as necessary to support access to, or the use of, damages and/or interest;
9. Taking other actions as the Trustee Council determines necessary or appropriate to implement this MOU, including fulfilling responsibilities of the Trustees under applicable Tribal or Federal laws;
10. Designating a LAT. The duties of the LAT include the following:

- a. Scheduling meetings, preparing agendas and recording actions of the Trustee Council meetings
- b. Acting as the central contact for the Trustee Council;
- c. Maintaining records and documents received or generated by the Trustee Council;
- d. Preparing, issuing or arranging for public notices or reports as determined necessary by the Trustee Council;
- e. Maintaining records of fund expenditures and receipts related to events; and
- f. Providing all Trustees with written notice of all actions by electronic mail, facsimile or U.S. mail, to all Trustees after every meeting within seven days and;
- g. Other duties as agreed upon by the Trustee Council.

The parties agree that the LAT shall not act as final arbitrator of disputes between Trustees. The LAT possesses no decision-making rights beyond those normally held as an individual Trustee and is not authorized to act on behalf of the Trustees, except as provided for in Section F(10) of this agreement.

## VII. DECISION-MAKING AUTHORITY

All decisions by the Trustee Council implementing this MOU shall be by unanimous approval, except for as provided by paragraph A of this section, of the parties with concurrent, legally authorized, trusteeship over the coexisting or contiguous natural resources which are specifically involved in the event or events for which the decision is being made.

### A. Absentee Voting Procedures

If a Trustee(s) is absent from a vote the LAT will contact the absent Trustee(s) via telephone and/or electronic mail. Within five (5) working days after receiving notice from the LAT, the absent Trustee(s) shall provide written notice (electronic mail is acceptable) of their decision on the vote to the LAT. If the absent Trustee(s) does not provide notice of their decision to the LAT within five (5) work day the LAT shall make written contact via certified mail to the absent Trustee(s) to solicit a vote. After the LAT has contacted the absent Trustee(s) via certified mail to solicit a vote, a written response (electronic mail is acceptable) from the absent Trustee(s) to the LAT must be provided within five (5) working days. This response shall specifically state the absent Trustee(s) vote. In the event that the absent Trustee(s) fails to respond within the five (5) working days after certified notification, the Trustee Council will proceed as if the absent Trustee(s) agrees with the proposed vote. The council will record the vote as "passed" with a notation of the absent Trustee.

#### B. Dispute Resolution

If unanimous agreement cannot be reached among the Trustee representatives, a Trustee Representative may initiate dispute resolution. The matter in dispute shall first be elevated to the respective Tribal, State, and Federal Trustees. Trustee administrative costs associated with dispute resolution will not be reimbursable from settlement funds. The Trustees further agree that, while recognizing the areas of expertise and authority of the Trustees, decision-making deliberations will focus on the Trustees' mutual purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources and/or resource services. If necessary, the Trustees may establish further mechanisms by which disputes may be resolved. The Trustees agree before activating dispute resolution outside the process discussed herein, to determine how the process will proceed and be funded.

#### VIII. FUNDS

The Trustees agree to cooperate in good faith and take actions necessary to establish, maintain, and utilize, to the extent consistent with applicable law, joint court registry account(s), or otherwise utilize the DOI, NRDAR Fund, for purposes of receiving, depositing, holding, disbursing, and expending all funds recovered jointly due to an undivided interest of the trustees, and the interest earned thereon, recovered, obtained or received by the Trustees from parties responsible for natural resource injuries arising out of an event under this MOU. The Trustees agree to deposit funds recovered jointly due to an undivided interest for injury to natural resources, obtained or received jointly by or on behalf of the Trustees as a result of joint assessment and restoration activities under Federal and/or Tribal natural resource damage assessment regulations, in a joint account(s), unless all Trustees agree that funds recovered require different treatment.

Disbursement of any funds obtained or received by, or on behalf of, any Trustee as a result of joint assessment and restoration activities with respect to an event will be by written agreement and shall otherwise follow the Decision Making provisions in Section VII, regardless of the location where the funds are held.

The Trustees agree that they will use all recovered damages for natural resource injuries for activities that would restore, replace, rehabilitate or acquire the equivalent of the injured resource. Said activities shall be consistent with Trustee Council approved plans to address those injuries to natural resources and the services that they provide. In accordance with their decision making process in Section VII, the Trustees will establish standards and procedures governing the use of all natural resource damages jointly 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 event and the reduced or lost services provided by those resources.

The Trustees agree to pursue the recovery of reasonable costs (past, current and future) for the initiation of damage assessment and for the planning, conducting, evaluating, and coordinating of all natural resource damage assessment activities pursued by the Trustee Council with respect to natural resource injuries or lost services resulting from an event. The Trustees agree to request that recovered costs be separately reimbursed to each individual Trustee agency claiming same. Recovered costs will be disbursed by electronic transfer or by check to each recovering agency as soon as possible. For recovered costs not separately reimbursed, the Trustees agree that the reasonable costs, which are jointly agreed upon, shall be reimbursed to each Trustee out of any damage assessment cost recoveries or payments thereon.

#### IX. CONFIDENTIALITY

The Trustees agree that the free and open exchange of information and sharing of ideas and opinions with other Trustees is crucial to achieving the Trustee's close and common interests and the goals of this MOU. The Trustees also recognize that all written or oral communications relating to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation. The Trustees agree that all scientific data arising out of the Trustee Council's review of the injury to natural resources resulting from events shall eventually be made public and that such data shall be made public as soon as its publication will not prejudice the accomplishment of the purposes of this Agreement. Finally, it is understood and agreed upon that all information required to be disclosed pursuant to the Freedom of Information Act, other Federal laws or Tribal law shall be released unless a privilege held by any Trustee could preclude the release of information.

The Trustees agree that a "designated privileged communication" or "designated privileged document" is a communication which occurs, or a document which is drafted, with an expectation of confidentiality and includes, but is not limited to, communications between the Trustees' attorneys or their staffs, agents, consultants, and/or experts in anticipation of litigation, in the seeking or giving of legal advice, and/or in the context of pre-decisional Trustee deliberations.

Accordingly, except as provided below or otherwise provided herein, the Trustees shall treat all designated privileged documents generated, and designated privileged communications, by, between or among the Trustees as privileged attorney-client communications, attorney work product or protected by other applicable privileges such as the deliberative process privilege (or as a combination thereof). The Trustees shall

protect and maintain these documents and communications in such a manner as to insure that no intentional or unintentional disclosure is made which would compromise any asserted privilege.

Unless otherwise specifically provided, the Trustees shall each be entitled to assert an applicable privilege with respect to any document or communication jointly transmitted, prepared, or funded by the Trustees. Each Trustee shall be entitled to assert an applicable privilege with respect to any document or communication transmitted, prepared, or funded solely by that Trustee. Nothing herein in any way affects or limits the authority of any signatory to waive any privilege and release any documents, information, analyses, opinion, conclusion, or advice that are subject to privileges held exclusively by that signatory.

The transmittal of any designated privileged documents or designated privileged communications between or among any of the Trustees or federal response action agencies or other federal trustees (and their counsel, representatives, contractors and consultants) does not waive, or imply any waiver, of any privilege or right which the transmitting trustee may assert with respect to that document or communication.

If a subpoena, discovery request, or other request in any form, for a designated privileged document or information produced or created from the Trustee Council is received by any Trustee, a copy of the subpoena or request will be immediately forwarded to counsel for the Trustee to which the privilege applies and to the trustee representative(s) who originally generated the document or communication requested. The Trustee who receives such a request shall also provide a draft of the Trustee's intended response to such request to each signatory to this MOU not less than fourteen (14) days prior to the date that the Trustee intends to issue its response. To the extent that applicable law may require a response more promptly that is consistent with the above temporal requirement, the Trustees agree to act in good faith to meet any such requirements.

An agreement between the Trustees to release a designated privileged document or communication shall not be construed as a waiver of privilege or confidentiality regarding any other documents or communications.

At the request and option of any Trustee, designated privileged documents shall be returned to the originating Trustee or destroyed, subject to the provisions of the Federal Records Act, 44 U.S.C. § 2901, et seq.

Cherokee Nation Freedom of Information Act, 75 CNCA 1-1 et seq. Section 1-6A(7) and (8) is Matters Exempt From Disclosure, including attorney work product, etc. Data and expert reports generated by or for the Cherokee Nation in relation to NRDAR claims, or



generated by or for the DOJ/Trustee Council and subject to the nondisclosure agreement under the applicable MOU, should be exempt.

The Trustees acknowledge that certain information concerning lost services or damages associated with cultural, religious or traditional practices unique to a tribal resources may be sensitive, and that there may be reasons other than pure legal requirements that justify treating such information differently so that it is not publicly distributed. In the event that the Cherokee Nation identifies such an issue relating to data generated in connection with the Events described under paragraph IV of this MOU, the Tribe(s) shall notify the Council(s) and the parties shall attempt to reach a separate agreement regarding that information.

#### X. RESERVATION OF RIGHTS

The Trustees understand that this document is not intended to create or waive any legal rights or obligations among the Trustees or any other person or entity not a party to this MOU. Nothing in this MOU is to imply that any signatory trustee is in any way abrogating or ceding any responsibilities or authority inherent in its ownership, management, control, or trusteeship over natural resources.

#### XI. MODIFICATION OF AGREEMENT

Any modification of this MOU shall be in writing and upon approval of all Trustees currently parties to the MOU.

#### XII. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement by the Trustees. At any time the Trustees determine that there is no purpose served by this MOU, the MOU will terminate, as to the Trustee making such a declaration upon the declaration, in writing, of such a finding. Any Trustee may withdraw from this MOU at any time for any reason. In the event any Trustee withdraws from the MOU, it must provide thirty days written notice before the withdrawal can become effective. In the event of such withdrawal, this MOU remains in full force and effect for the remaining Trustees. The Trustees specifically agree that the provisions of Article IX of this agreement (confidentiality) shall remain binding upon any Trustee after it has declared that the MOU serves no purpose, or should such Trustee withdraw from this agreement.

In the event of the withdrawal of any Trustee, or at the termination of this MOU, 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 VIII of this MOU.

In the event that a Trustee(s) misses three (3) consecutive meetings, the LAT will contact the absent Trustee via certified mail to determine if the absent Trustee intends on withdrawing from the Trustee Council. If the absent Trustee does not respond in five (5) business days after certified notification the LAT will send a final certified letter to the absent Trustee confirming withdrawal from the Trustee Council.

A. Trustee re-entry

If a Trustee has withdrawn from the Trustee Council (either specifically or through failure to respond to notification within the required time frame) and wants to rejoin the Trustee Council, the Trustee will advise the LAT in writing via certified mail of its intent to rejoin the Trustee Council. The Trustee Council will hold a vote to determine if the Trustee will be allowed back into the Trustee Council. If the Trustee Council agrees, the Trustee may resume its involvement in the Trustee Council. Upon re-entry the Trustee shall be prospective only and may not challenge any previous decisions made by the Trustee Council and cannot re-initiate a vote unless there is new information that may affect the Trustee Council's decision.

XIII. LIMITATION

Nothing in this MOU shall be construed as obligating any signatory to this agreement to expend any funds in excess of appropriations authorized by law.

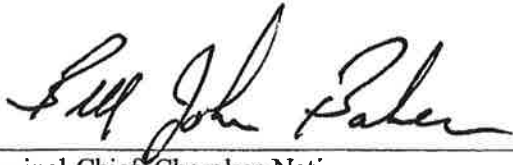
XIV. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this MOU 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 MOU creates any rights or causes of action in persons not parties to this agreement.

XV. EXECUTION: EFFECTIVE DATE

This MOU may be executed in counterparts. This Agreement shall be effective upon execution by all Parties. The date of execution shall be the date of the final Party's signature. A copy with all original executed signature pages affixed shall constitute the original MOU.

**Memorandum of Understanding**  
**Tulsa County Smelter Complex Natural Resource Damage Assessment and Restoration**  
**Trustee Council**

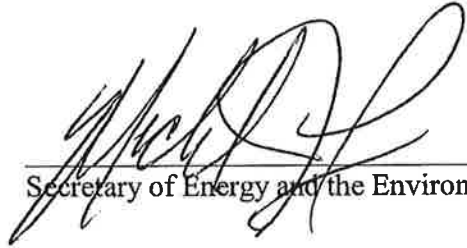


Principal Chief, Cherokee Nation

11-2-15

Date

**Memorandum of Understanding  
Tulsa County Smelter Complex Natural Resource Damage Assessment and Restoration  
Trustee Council**

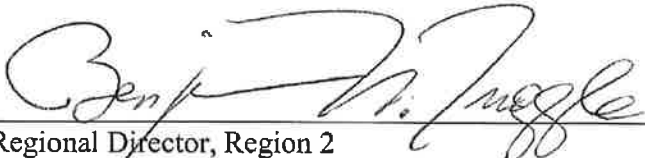


Secretary of Energy and the Environment

17 MARCH 2016

Date

**Memorandum of Understanding  
Tulsa County Smelter Complex Natural Resource Damage Assessment and Restoration  
Trustee Council**

  
Regional Director, Region 2  
Authorized Official, Department of the Interior

November 9, 2015  
Date

## APPENDIX A

### Designated Representatives:

#### Cherokee Nation:

Nancy John, Director, Cherokee Nation Environmental Programs

Address: Cherokee Nation  
PO Box 948  
Tahlequah, OK 74465

Telephone No.: (918) 453-5102  
Fax No.: (918) 45-2904  
E-Mail Address: [njohn@cherokee.org](mailto:njohn@cherokee.org)

#### State of Oklahoma

Jay Wright, Environmental Programs Manager

Address: Oklahoma Department of Environmental Quality  
PO Box 1677  
Oklahoma City, OK 73101

Telephone No.: (405) 702-1017  
Fax No.: (405) 702-1001  
E-Mail Address: [Jay.Wright@deq.ok.gov](mailto:Jay.Wright@deq.ok.gov)

#### Department of the Interior:

Suzanne Dunn, Contaminants Biologist, U.S. Fish and Wildlife Oklahoma Ecological Services

Address: U. S. Fish and Wildlife Service  
9014 E. 21<sup>st</sup> Street  
Tulsa, OK 74129

Telephone No.: 918-382-4521  
Fax No.: 918-581-7467  
E-Mail Address: [Suzanne\\_dunn@fws.gov](mailto:Suzanne_dunn@fws.gov)

## APPENDIX B

### Alternate Representatives:

#### Cherokee Nation:

<u>Jason White,</u>	Environmental Specialist II, Cherokee Nation Environmental Programs
Address:	Cherokee Nation PO Box 948 Tahlequah, OK 74465
Telephone No.:	(918) 453-5110
Fax No.:	(918) 453-2904
E-Mail Address:	<u><a href="mailto:jwhite@cherokee.org">jwhite@cherokee.org</a></u>

#### State of Oklahoma

#### Department of the Interior:

Address:	U. S. Fish and Wildlife Service 9014 E. 21 <sup>st</sup> Street Tulsa, OK 74129
Telephone No.:	
Fax No.:	918-581-7467
E-Mail Address:	