

**MEMORANDUM OF AGREEMENT**  
**Between the**  
**STATE OF ARIZONA**  
**And**  
**UNITED STATES DEPARTMENT OF THE INTERIOR**

**Regarding Expenditure of Restoration Funds Obtained Through Natural Resource  
Damage Claims at the ASARCO Ray Mine and Hayden Smelter Complex**

WHEREAS, a Settlement Agreement among Debtor against ASARCO LLC, *et al.*, the United States of America, and the State of Arizona was entered in the United States Bankruptcy Court, Case No. 05-21207 on April 23, 2009 settling natural resource damage claims to Mineral Creek and the Gila River related to releases of hazardous substances from the Ray Mine and Hayden Smelter Complex;

WHEREAS, in settlement of such claims related to natural resource damages, ASARCO LLC conveyed by quit claim deed title to three tracts of land (the "San Pedro River Properties") and associated water rights along the lower San Pedro River to the Arizona Game and Fish Commission;

WHEREAS, the settlement further granted to the United States and the State of Arizona a joint indivisible allowed general unsecured claim in the amount of \$3,773,604; with the United States on behalf of the Department of the Interior granted an additional allowed general unsecured claim of \$226,396;

WHEREAS, funds totaling \$4,440,336.37 including accrued interest were deposited into a site-specific account, Account No. 14X5198-0521, in the Department of the Interior Natural Resource Damage Assessment and Restoration (NRDAR) Fund;

NOW THEREFORE, the United States on behalf of the Department of the Interior, U. S. Fish and Wildlife Service and Bureau of Land Management, and the State of Arizona on behalf of the Director of the Arizona Department of Environmental Quality and Trustee for Natural Resources for the State of Arizona, the Arizona Game and Fish Department and the Arizona State Land Commissioner ("Parties") enter into this Memorandum of Agreement to work cooperatively in jointly expending such funds, including any accrued interest, towards the restoration, replacement, rehabilitation, or acquisition of the equivalent of the natural resources or resource services at or in connection with the Sites (including, but not limited to, the San Pedro River Properties) in accordance with an approved restoration plan.

## **I. PARTIES**

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

For the Arizona Department of Environmental Quality (ADEQ): Director

For the Arizona Game and Fish Department (AGFD): Director

For the Arizona State Land Department (ASLD): Commissioner

For the Department of the Interior (DOI): Regional Director, Southwest Region, U.S. Fish and Wildlife Service (USFWS), as Authorized Official for the Department of the Interior.

For the Bureau of Land Management (BLM): State Director

## **II. AUTHORITY**

The Parties enter into this MOA in accordance with 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 Natural Resource Damage Assessment Regulations, 43 CFR Part 11.

## **III. DEFINITIONS**

- A. The "San Pedro River properties" are the three tracts of land (identified in the map attached as Exhibit A) and any associated water rights: (1) the tract also known as the VS Ranch [illustrated as parcel

#1 in Exhibit A] (approximately 490 acres); (2) the tract located at the southern reach of the Old Camp Grant Military Reservation and approximately 1.0 mile south from Aravaipa Creek [parcel #2 in Exhibit A] (approximately 180 acres); and (3) the tract located approximately 0.5 mile north of the confluence of Aravaipa Creek and the San Pedro River [parcel #3 in Exhibit A] (approximately 325 acres);

- B. Whenever the terms “natural resource”, “restoration”, “or restore” are used in this MOA, they shall have the same meanings as the defined terms in 43 C.F.R. Part 11; and
- C. Unless a term is expressly defined in this MOA, all terms common to the discourse of natural resource damage assessments shall have the same meaning as in CERCLA and the Federal Water Control Act, as amended, 33 U.S.C. §§ 1251-1387, and federal regulations cited above.
- D. “Sites” are defined as the “San Pedro River Properties” and potential parcels located along the Lower San Pedro River watershed for the purpose of restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources.

#### **IV. STATEMENT OF OBJECTIVES**

The Parties agree that the amount of \$4,440,336.37 plus any accrued interest, shall be used for the benefit of natural resources or resource services injured or lost and that such benefits will accrue as the result of actions to restore, replace, rehabilitate, and/or acquire the equivalent of natural resources or resource services injured or lost. In accomplishing this shared objective, the Parties will coordinate with one another to:

- A. Develop and implement a Restoration Plan;
- B. Provide for public review of the Draft Restoration Plan and to consider public comments received on such Plan before the Restoration Plan is adopted by the Parties;
- C. Provide for expenditures of restoration funds as necessary or appropriate to develop or implement the Restoration Plan; and

- D. Minimize administrative costs associated with development of the Restoration Plan and implementation of the projects selected thereunder.

## **V. NATURAL RESOURCES SETTLEMENT RESTORATION COUNCIL**

A. Organization. The Parties hereby establish the Arizona ASARCO Settlement Restoration Council (Council) to implement this MOA. The Council shall be comprised of one primary representative and at least one alternative representative of each Party to this Agreement.

B. Designation of Council Representatives. Each Party designates the following person as its representative on the Council:

For ADEQ:

Linda Taunt  
1110 W. Washington Street  
Phoenix, AZ 85007  
(602) 771-4416  
[taunt.linda@azdeq.gov](mailto:taunt.linda@azdeq.gov)

For AGFD:

Michael Ingraldi  
5000 W. Carefree Highway  
Phoenix, Arizona 85086  
(928) 532-5625  
[mingraldi@frontiernet.net](mailto:mingraldi@frontiernet.net)

For ASLD:

Stephen Williams  
1616 W. Adams  
Phoenix, Arizona 85007  
(602) 542-2693  
[swilliams@land.az.gov](mailto:swilliams@land.az.gov)

Vanessa Hickman  
1616 W. Adams  
Phoenix, Arizona 85007  
(602) 542-4622  
[vhickman@land.az.gov](mailto:vhickman@land.az.gov)

For USFWS:

Carrie Marr  
2321 W. Royal Palm Rd, Suite 103  
Phoenix, AZ 85021-4957  
(602) 242-0210  
carrie\_marr@fws.gov

Jean Calhoun  
2321 W. Royal Palm Road Suite 103  
Phoenix, Arizona 85021-4957  
(602) 242-0210  
jean\_calhoun@fws.gov

For BLM:

Elroy Masters  
1 North Central Avenue, Suite 800  
Phoenix, Arizona 85004  
(602) 417-9346  
elroy\_masters@blm.gov

C. Changing Representatives. A Party may change its designated Council representative by providing notice to each of the other Parties' designates to the Council.

D. Communications. All correspondence and communications to or between the Parties pertaining to activities which are subject to coordination and cooperation under this Agreement shall be sent to the Council representative of each Party.

E. Duties and Responsibilities. The Council shall coordinate all activities and matters within the scope of this MOA. Actions to be taken or authorized by the Council in implementing this MOA will include but are not limited to:

1. Overseeing the development and the implementation of a restoration plan.
2. Coordinating decision making, planning, project contracting and implementation in accordance with applicable administrative procedures and/or legal requirements (e.g., National Environmental Policy Act, State/Federal permitting requirements).

3. Making decisions and taking actions as are necessary to manage, administer and/or oversee projects developed or implemented with restoration funds.

E. **Lead Administrative Party.** The Council shall appoint one member of the Council, from among those who agree to such appointment, to serve as the Lead Administrative Party (LAP). The duties of the LAP shall include scheduling meetings of the Council and notifying Council representatives of meetings on timely basis; preparing agendas for those meetings; acting as central contact for the Council; facilitating decision-making by the Council; establishing and maintaining records and relevant documents, including the administrative record (e.g., documents used to prepare the restoration plan); preparing and circulating minutes of Council meetings; and other administrative duties as directed by this MOA or by the Council. The LAP shall be responsible for informing the other Council representatives of all pertinent developments on a timely basis. The LAP may delegate any of its duties to another Council representative with the concurrence of the Council. Assigned duties do not provide the LAP with decision-making rights beyond those normally held by each Party. Arizona Game and Fish Department representative Michael Ingraldi has been appointed the LAP.

F. **Decision making.** All decisions by the Council implementing this MOA shall be by unanimous consent. The Council will attempt to resolve disputes through good faith discussions aimed at achieving consensus. The Parties further agree that deliberations will focus on the mutual purpose of restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources. In the event unanimity cannot be achieved, the matter in dispute will be elevated to management for each Party for resolution by informal letter. The following timelines and levels should be followed for resolution of all unresolved disputes:

#### **Level One**

Council Representatives

#### **Level Two**

AGFD      AGFD Habitat Branch Chief

ADEQ      Water Quality Division Director

ASLD	Deputy State Land Commissioner
FWS	Arizona Ecological Services Field Office Supervisor
BLM	Deputy State Director, Resources

### **Level Three**

ADEQ	Director
FWS	Region 2 Director
BLM	State Director
AGFD	Director
ASLD	Commissioner

The Parties shall first attempt to resolve any disputes concerning the implementation of this Agreement through good faith informal negotiations among Council Representatives. The Parties should attempt to resolve the dispute with informal negotiations within 5 days from the time the dispute arises.

The Parties further agree that deliberations will focus on the mutual purpose of restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources. Administrative costs associated with dispute resolution shall not be reimbursable from restoration funds.

A dispute shall be considered to have arisen when one Party sends the LAP a written Notice of Dispute (by letter, fax, or email is acceptable). The Notice shall describe the dispute with enough specificity to allow the other Parties to identify the issues involved and respond effectively. To the extent practicable, such Notice will be provided at least 30 days prior to the initiation of any field, monitoring, or restoration work which is the subject of the disagreement. Upon receipt of a written Notice of Dispute, the LAP shall promptly notify the other Parties that such Notice has been submitted and shall schedule a meeting of the Level Two Panel as promptly as possible. The Level Two Panel should within 10 working days

attempt to:

- Identify the substance of the dispute;
- Identify those aspects of the dispute on which Parties agree;
- Identify those aspects of the dispute on which the Parties do not agree; and
- Work towards resolution.

If the Level Two Panel is unable to reach consensus, the dispute will be elevated to the Level Three Panel. The Level Three Panel, employing such procedures as it deems appropriate, shall reach a decision, which will be deemed the final decision of the Council.

This Agreement is intended to improve the internal management of the restoration planning and implementation process. It does not create any rights or benefits substantive or procedural, enforceable by law or equity by a party against the United States, its agencies or instruments, its officers, employees or any other person.

## **VI. RESTORATION FUNDS**

A. The Department of Interior Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198-0521 shall serve as a repository for such funds pending joint decisions regarding the use of these funds by the Council.

B. Use of Funds. The Parties recognize and agree that the restoration funds may be used only to plan and implement appropriate actions to restore, replace, rehabilitate, and/or acquire the equivalent of natural resources or resource services injured, destroyed or lost as a result of releases from the ASARCO Ray Mine and Hayden Smelter Sites. Therefore, the Parties shall use the funds in the Restoration Account, including all interest earned on such funds, for restoration activities at or in connection with the Sites (including, but not limited to the San Pedro River Properties conveyed from ASARCO to the Arizona Game and Fish Commission) as they direct in one or more jointly executed Council Resolution(s) in the format shown in Exhibit B. Such uses will include administrative costs or expenses in coordinating and effecting the development or implementation of the Restoration Plan. Administrative costs or expenses include, but are not limited to, direct and indirect costs, associated with preparation or review of documents pertinent to the development or implementation of the Restoration Plan, administration, management or oversight of contracts or projects, and travel.



C. Reimbursable Administrative Costs. Reimbursable administrative costs include costs associated with: (a) preparing for and attending meetings of the Council; (b) preparing for and attending restoration meetings; (c) any other activities and matters necessary or advisable to conduct a restoration planning and implementation process, as authorized by this MOA; and (d) monitoring, coordination and oversight of restoration projects. Administrative costs shall be reimbursable only to the extent such costs do not exceed restoration project budgets that the Parties have exchanged and approved through the Council.

## **VII. CAP ON USE OF FUNDS FOR ADMINISTRATION AND OVERSIGHT**

The Restoration Council shall cap administrative and oversight costs at \$170,000 through the end of restoration planning (i.e., preparation of the restoration plan and the public comment period). The Restoration Council shall meet again after restoration planning is complete to determine the budget for restoration implementation.

## **VIII. RESERVATION OF RIGHTS**

Each Party reserves the right to take whatever actions necessary to pursue and/or to preserve any legal remedies or responsibilities available to that Party, and nothing in this MOA is intended to waive or foreclose any such right. The Parties further agree that declaratory relief and injunctive relief are to be the exclusive remedies requested by any Party or any claim of breach of this MOA and that neither monetary damages, costs or attorneys fees shall be available as a remedy against any Party in any such proceeding.

## **IX. MODIFICATION OF AGREEMENT**

This MOA may be amended by written agreement of the Parties where the Parties determine an amendment is necessary to accomplish the objectives of this MOA consistent with the requirements of applicable law.

## **X. WITHDRAWAL**

In the event any Party withdraws from this MOA, such withdrawal must be in writing and submitted to all other Parties at least 30 days in advance of the effective date of withdrawal. In the event of such withdrawal, this MOA remains in full force and effect for the remaining Parties.

## **XI. TERMINATION**

This MOA is effective upon the signatures of the Parties, identified in Part I, until terminated by agreement of the Parties. At any time the Parties find by a consensus vote that the purposes underlying this MOA have been achieved, the MOA will terminate. In the event of termination of this MOA, each Party agrees to cooperate in preparing a full and complete accounting and status report of all accounts managed jointly by the Parties.

## **XII. LIMITATION**

Nothing in this MOA shall be construed as obligating the United States or the State of Arizona, and their officers, agents, or employees, to expend any funds in excess of appropriations authorized by law.

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

The rights and responsibilities contained in this MOA are subject to the availability of funding and are intended to be guidance for the respective Parties.

## **XIV. AUDITS**

Pursuant to A.R.S. §§ 35-214, 35-215, and 41-1279.04, as amended, all books, accounts, reports, files and other records relating to this MOA shall be subject at all reasonable times to inspection and audit by the Parties for five years after completion of this MOA.

## **XV. NONDISCRIMINATION**

During the performance of this MOA, the Parties will not discriminate against any person because of age, race, religion, color, national origin, handicapping condition, marital status, political affiliation, or sex. In the event that it applies, the Parties agree to comply with the Governor's Executive Order No. 99-4, entitled "Prohibition of discrimination in State Contracts – Non-Discrimination in

Employment by Government Contractors and Subcontractors” and any successive related orders.

#### **XVI. EFFECTIVE DATE**

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA. The date of execution shall be the date of the final Party's signature. The provisions of this MOA shall apply to and be binding upon the Parties and their successors and assigns.

#### **XV. EXHIBITS**

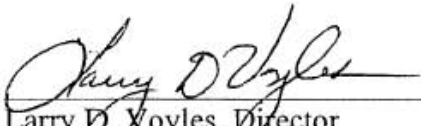
The following exhibits are incorporated herein by reference:

- A. San Pedro River Properties Map
- B. [Sample] Council Resolution for the expenditure of funds from DOI NRDAR Fund Account No. 14X5198-0521.

The Parties hereto have signed this MOA on the date appearing under their signatures.

\_\_\_\_\_  
Benjamin H. Grumbles, Director  
Arizona Department of Environmental Quality  
Trustee for Natural Resources for the State of Arizona

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Larry D. Voyles, Director  
Arizona Game and Fish Department

Date: 7/1/2010

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Benjamin H. Grumbles, Director  
Arizona Department of Environmental Quality  
Trustee for Natural Resources for the State of Arizona

Date: July 16, 2010

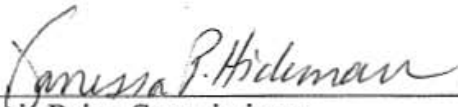
\_\_\_\_\_  
Maria Baier, Commissioner  
Arizona State Land Department

Date: \_\_\_\_\_



\_\_\_\_\_  
Benjamin N. Tuggle, Regional Director  
U.S. Fish and Wildlife Service  
Authorized Official for Department of the Interior

Date: 7/21/2010

*for*   
\_\_\_\_\_  
Maria Baier, Commissioner  
Arizona State Land Department

Date: 7-30-10

\_\_\_\_\_  
Benjamin N. Tuggle, Regional Director  
U.S. Fish and Wildlife Service  
Authorized Official for Department of the Interior

Date: \_\_\_\_\_

Approximate ASARCO Property Boundaries  
San Pedro River, Arizona

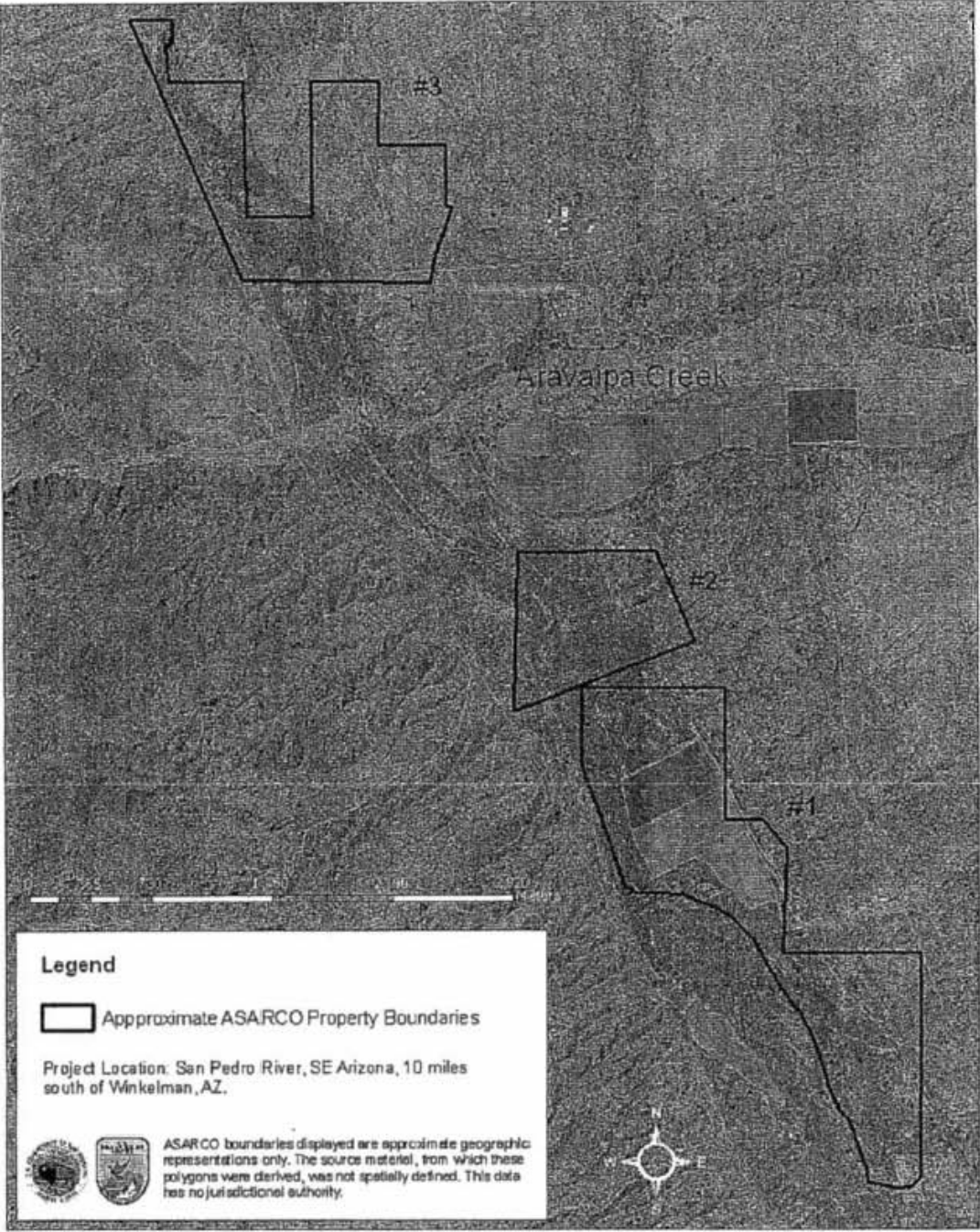


EXHIBIT A