

APPENDIX A.

MEMORANDUM OF UNDERSTANDING
RELATING TO THE
Advanced Fuel Filtration Systems East Walker River Oil Spill
BETWEEN THE
CALIFORNIA DEPARTMENT OF FISH AND GAME
OFFICE OF SPILL PREVENTION AND RESPONSE,
THE NEVADA DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION,
NEVADA DEPARTMENT OF WILDLIFE
and
THE U.S. FISH AND WILDLIFE SERVICE

I. INTRODUCTION

This Memorandum of Understanding ("MOU") is between the California Department of Fish & Game ("**CDFG**") Office of Spill Prevention and Response ("OSPR"), the Nevada Department of Conservation and Natural Resources' Nevada Division of Environmental Protection ("NDEP"), Nevada Department of Wildlife (NDOW) and the U.S. Fish and Wildlife Service ("FWS") (collectively referred to as the "Trustees"). This MOU is entered into to ensure the coordination and cooperation of the Trustees in restoring, rehabilitating, replacing, and/or acquiring the equivalent **of the** natural resources injured as a result of the release of oil on December 30, 2000 from an Advanced Fuel Filtration **Systems** Inc. ("AFFS") tank truck into the East Walker River.

n. PARTIES

The following officials are executing this MOU as representatives of their respective agencies which act on behalf of the public as Trustees for natural resources under this MOU:

Manager, California-Nevada Operations Office, U.S. Fish and Wildlife Service;

Administrator, California Department of Fish and Game, Office of Spill Prevention and **Response**;

Administrator, Nevada Department of Conservation and Natural Resources, Nevada Division of Environmental Protection; and

Director, Nevada Department of **Wildlife**

m. AUTHORITY

The Trustees enter into this MOU pursuant to the authorities provided to Natural Resource Trustees by the Oil Pollution Act (33 U.S.C. § 2701 *et seq.*); the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*) and the Oil Pollution Act Damage Assessment Regulations (15 c.P.R. Part 990). In addition, the Federal Trustees enter into this MOU pursuant

to the authority provided in Subpart G of the National Contingency Plan (40 C.F.R. §§ 300.600-300.601 *seq.*); and Executive Order 12580 (3 C.F.R., 1987 Comp. p. 193, 52 Fed. Reg. 2923 (January 23, 1987)), as amended by Executive Order 12777 (56 Fed. Reg. 54757 (October 19, 1991)). The CDFG also enters into this MOU pursuant to its natural resource trustee authority under Fish and Game Code sections 711.7 and 1802. The NDEP enters into this MOU pursuant to its authority under the Nevada Revised Statutes (NRS) 445A.300 to 445A.730, inclusive.

IV. DEFINITIONS

Whenever the following terms are used in this MOU, they shall have the following meanings:

A. Natural Resource and Natural Resources

"Natural Resource" and "Natural Resources" mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of California, Nevada, and/or the United States, and the "services" that the resources provide to other natural resources and/or humans.

B. Oil Spill

"Oil Spill" means the discharge of oil from an Advanced Fuel Filtration Systems, Inc. tank truck into the East Walker River, near Bridgeport, California on or about December 30, 2000. Some of the oil flowed downstream into Nevada.

C. Restoration or Restore

"Restoration" or "Restore" mean any action or combination of actions to restore, replace, rehabilitate, and/or acquire the equivalent of the Natural Resources and the "services" that were injured, lost, or destroyed by the Oil Spill.

D. Voting East Walker River Trustee Council Members

"Voting East Walker River Trustee Council members" shall mean the primary representatives appointed and authorized to vote on behalf of each Trustee, or in the event the primary representative(s) is (are) unable to participate at a given meeting of the Council, their respective alternate(s). Participation at a given meeting of the Council may be either in person or by telephone conference. The Council is described further in this MOU.

V. THE SETTLEMENT OF **THE** OIL SPILL

Trustees believe the Oil Spill impacted stream biota, fish species, and other wildlife. In addition to causing wildlife injury, the Trustees believe the Oil Spill has impacted approximately 15 miles of fresh water stream and riparian habitat, and human use, in the East Walker River area.

A settlement of civil claims arising from the Oil Spill has been reached between the Trustees and the responsible party, Advanced Fuel Filtration Systems Inc., in lieu of litigation, and has been embodied in a Settlement Agreement. Pursuant to the Settlement Agreement, the AFES paid a total of \$418,000.

The Settlement Agreement required payment of \$350,000 (the "NRD money") to be paid to the U.S. Department of the Interior ("DOI") for use by the Trustees for restoration activities and projects. The remaining \$68,000 of the \$418,000 is not subject to this MOU.

On behalf of the Trustees, DOI has deposited the NRD money into the Natural Resources Damage Assessment and Restoration Fund created pursuant to 43 U.S.C. § 1474b ("NRDAR Fund") as natural resource damages. The NRD money deposited into the NRDAR Fund will be maintained in a segregated account within the NRDAR Fund designated as the "East Walker River Restoration Fund" for the purpose of restoring the injured natural resources for which the United States and the States are co-trustees, without apportionment.

DOI shall manage and invest such funds. DOI will not make any administrative charges against these funds. Any return on investments or interest accrued on the "East Walker River Restoration Fund" is to be used for the benefit of the resources injured by the Oil Spill. Disbursements shall require approval of the Natural Resource Trustee Council created pursuant to Section VII of this MOU (hereafter referred to as the "East Walker River Trustee Council" or the "Council"). (See, Section VIII. below pertaining to authorization of expenditures.)

VI. MOU **PURPOSE** and FUNDING

The purpose of this MOU is to provide a framework for coordination and cooperation among the Trustees in the use of the NRD money from the Oil Spill settlement for wildlife projects, habitat restoration and protection, and human use projects.

The Trustees commit to the expenditure of the NRD money for the design, implementation, permitting (as necessary), and oversight of Restoration projects, and for the costs of complying with the requirements of the law to conduct a Restoration planning and implementation process. The Trustees share joint responsibilities regarding the injured wildlife, habitat, and human use losses.

The Trustees presently intend to apply approximately \$140,000 of the NRD money to fund Restoration projects benefiting in-stream and riparian habitat; approximately \$105,000 will be allocated for recreational fishing improvements; approximately \$55,000 will be allocated for continued benthic macro-invertebrate (BMI) surveys of the stream recovery; and approximately \$50,000 will be allocated for Trustee Council administration. However, ultimately these allocations may be adjusted based on actual restoration costs and needs as part of the Restoration planning process carried out by the Trustee Council.

to addition, the FWS shall retain and utilize for restoration planning and oversight the remaining balance of the \$50,000 payment made to it by AFFS pursuant to a Letter dated February 12, 2001.

Use of any allocation must be documented and an accounting **provided** to the East Walker River Trustee Council. Thereafter, these monies may only be disbursed to a Trustee agency pursuant to a budget, which has been duly approved by the East Walker River Trustee Council.

Interest earned on the "East Walker River Restoration Fund" NRD account and any excess funds from any of the categories above, may be used for any of the purposes described in this section. Priority consideration will be given to additional restoration projects which address those resources injured by the Oil Spill.

The Trustees will prepare a proposed Restoration Plan, containing details for specific projects and project selection criteria, upon which the public will be invited to offer comments. A final Restoration Plan will be developed after consideration of all public comments. The Trustees retain the ultimate authority and responsibility to determine the use of funds received for Natural Resource Damages in accordance with the provisions of applicable federal and state law, any applicable regulations governing use of recoveries for Natural Resource Damages, and the terms of the Settlement Agreement.

YO. ORGANIZATION - AFFS EAST WALKER RIVER TRUSTEE COUNCIL AND LEAD TRUSTEES FOR SPECIFIC PROJECTS

To implement this MOU, there is hereby created the East Walker River Trustee Council to which each of the Trustees will appoint one primary representative and at least one alternate representative. Each party to this agreement shall have one vote that shall be cast by the party's primary representative, or in the absence of the primary representative, by an alternate representative.

Prior to, or within twenty (20) working days after the final execution of this MOU, each Trustee shall notify the other Trustees of the names, addresses, email addresses, telephone numbers, and facsimile numbers of that Trustee's primary and alternative representatives to the East Walker River Trustee Council. Communications regarding East Walker River Trustee Council business shall be addressed to the primary and, unless the East Walker River Trustee Council directs otherwise, copied to the alternate representative and the Trustee legal representatives.

Designated representatives of the Legal Advisor of CDFG/OSPR, Nevada Office of the Attorney General, and the DOI's Office of the Solicitor shall serve as legal counsel to the East Walker River Trustee Council. The East Walker River Trustee Council will seek advisory participation from other federal, state, or local agencies or any other entity as deemed appropriate by the East Walker River Trustee Council.

YIII. DECISION MAKING

A. Unanimous Approval of Voting Members Required

The Trustees agree **that**, except as specifically delegated to a specific Trustee **pursuant** to Section IX, below, decisions implementing this MOU and the Settlement Agreement shall require the unanimous approval of the voting East Walker River Trustee Council members. Such decisions shall be recorded in writing, either by resolution signed by the voting Council members participating in the Council meeting, or in minutes approved as to content and form by the voting East Walker River Trustee Council members participating in the Council meeting.

B. Authorization of Expenditures

All decisions authorizing expenditures of funds, including without limitation disbursements to Trustee agencies for agency costs, shall be memorialized in a Council resolution signed by the participating voting members. Such resolutions may cover the entire sum approved for a given project, project phase, or for particular activities. Approval authority for individual invoices associated with a particular project or activity may be delegated by the East Walker **River** Trustee Council to one or more of the Council members. In all cases, use of funds must be documented and an accounting provided to the East Walker River Trustee Council.

C. Dispute Resolution

The Trustees agree that decision making deliberations will focus on the Trustees' mutual purposes of restoring injured Natural Resources and diminished services rather than on individual Trustee control or trusteeship over those resources. In the event that unanimous agreement cannot be reached among the members of the East Walker River Trustee Council, the matter in dispute will be elevated within the Trustee agencies for resolution. If necessary, the Trustees may establish further mechanisms to resolve disputes, including consideration of trusteeship authority.

IX. POWERS, DUTIES, AND RESPONSIBILITIES OF COUNCIL

A. East Walker River Trustee Council

On **behalf** of the Trustees, the East Walker River Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the procedures contained in Section VIII (Decision Making), above. The East Walker River Trustee Council, in its discretion, may take whatever actions it deems necessary to fulfill the trust responsibilities of each Trustee under, and to effectuate the purposes of, applicable Federal and State law. Any Trustee on the East Walker River Trustee Council may convene a meeting of the full East Walker River Trustee Council. It is expected that the East Walker River Trustee

Council, in accordance with applicable laws and policies, may take the following actions to address the Trustees' Natural Resources Restoration responsibilities:

1. Oversee the development and implementation of the Restoration Plan and ensure public notice, opportunity for public input, and consideration of all public comments prior to preparing the final Restoration Plan;
2. Arrange for the letting of contracts, through one or more of the Trustees, that the East Walker River Trustee Council determines are necessary with consultants or contractors best qualified to provide services to the East Walker River Trustee Council;
3. Oversee the management and administration of monies received in the settlement for the purpose of implementing the Restoration Plan, which may include the transfer of funds to a trust fund account established with the National Fish and Wildlife Foundation or other similar non-profit organization;
4. Authorize or direct the Lead Trustee for specific projects to approve disbursements from the NRDAR Fund (or, as appropriate, from a Trust Fund account established with the National Fish and Wildlife Foundation or other similar non-profit organization) for specific Restoration Plan project costs, and to take all steps necessary to effect the disbursements when so directed by the East Walker River Trustee Council;
5. Select alternative Restoration projects if (1) any of the preferred Projects described in the final Restoration Plan prove infeasible, impractical, or otherwise not in the public interest, or (2) any funds remain after the successful implementation of the projects described in the final Restoration Plan, provided that such alternative projects address the injuries caused by the Oil Spill, are subject to public review and comment, and otherwise meet the requirements of applicable Federal and State law; and
6. Delegate specific duties to individual Trustee representatives. Certain duties set out below are hereby delegated to the Lead Trustee for specific projects.

B. Lead Trustee for the Restoration Projects

A Lead Trustee (State or Federal) shall be designated for each project selected in the Restoration Plan. Each Lead Trustee shall, for those projects for which it has been designated:

1. Ensure that the amounts allocated toward the Project(s) are well managed for the benefit of the injured resources;

2. Ensure that the Project(s) and any use of funds for the Project(s), comply with all applicable laws, including the National Environmental Policy Act ("NEPA") (42 U.S.c.A. §§ 4321 et seq.), the Endangered Species Act ("ESA") (16 U.S.C. § 1531 et seq.), and the California Environmental Quality Act ("CEQA") (Pub. Resources Code §§ 21000 et seq.)
3. Provide for the East Walker River Trustee Council's approval a detailed statement of the proposed projects, project schedules, and estimated budgets for the life of the project(s), including an estimate of any contract, administrative, or overhead costs to be charged to the Project(s);
4. Obtain the East Walker River Trustee Council's written authorization to commence the Project(s);
5. Oversee, coordinate, and monitor the progress of the Project(s);
6. Submit quarterly reports (unless otherwise agreed) to the East Walker River Trustee Council which shall include a progress report, and an estimate of funds spent;
7. Establish and maintain records and relevant documents and provide these on a timely basis to the Lead Administrative Trustees for inclusion, as appropriate, in the administrative record;
8. Provide a final accounting to the East Walker River Trustee Council when the Project(s) is(are) completed and an interim accounting at any other time requested;
9. Prepare agenda items for meetings of the East Walker River Trustee Council regarding the Project(s);
10. Inform the other Trustees of all pertinent developments regarding the Project(s) on a timely basis; and
11. Carry out such other duties as directed by the East Walker River Trustee Council.

C. Lead Administrative Trustees

There shall be two Co-Lead Administrative Trustees, the CDFG and the USFWS. Except as otherwise specified below, the Co-Lead Administrative Trustees may carry out their responsibilities jointly and/or divide their administrative duties between themselves. The Co-Lead Administrative Trustees shall carry out the following duties:

1. Coordinate and monitor all aspects of the Natural Resource Restoration process even if not specifically addressed above;
2. Schedule, provide notice of, and prepare agendas for general meetings of the East Walker River Trustee Council;
3. Act as the central contact points for the East Walker River Trustee Council;
4. Establish and maintain records and relevant documents other than those regarding specific Restoration projects and with the assistance of all Trustees establish and maintain any administrative record that is required; and
5. Carry out such other duties as directed by the East Walker River Trustee Council;
6. The USFWS Lead **will** perform routine administrative duties related to the NRDAR Fund account with the approval of the East Walker River Trustee Council, e.g., investments, disbursements, and distribution of regular Statements of Account Activity; and
7. The USFWS Lead will prepare procedures for disbursements and advance payments from the NRDAR Fund account for approval by the East Walker River Trustee Council;

The Co-Lead Administrative Trustees may delegate any of their duties to another Trustee with the concurrence of the East Walker River Trustee Council.

X. CONFLICT OF INTEREST

An East Walker River Trustee Council representative will abstain from discussing and voting on any issue coming before the East Walker River Trustee Council in which that representative has a personal financial interest. The Trustee Council representative will identify this conflict to the East Walker River Trustee Council prior to consideration and voting on the issue(s).

XI. TELECONFERENCING

A Trustee Council meeting may be convened by telephone conference call. Should a Trustee Council representative(s) be unable to travel to a meeting, then that representative(s) may participate by telephone conference and may vote by telephone on any issue requiring a vote by the voting East Walker River Trustee Council members.

XU. CONFIDENTIALITY

The Trustees agree that it is generally in the public interest that scientific data arising out of their **review** of the injury to Natural Resources caused by the Oil Spill be made public. Public sharing of scientific **data**, wherever possible, will **be** the general policy of the Trustees. However, nothing in this MOU is intended as, nor shall it **be** construed to be, a general waiver of any attorney-client privilege or any protection afforded under the work product doctrine or any other doctrine or privilege under applicable law that has been or may be asserted in this matter and shall be without prejudice to any assertion of privilege or protection as to other documents or communications concerning the same or similar subject matter(s).

The parties to this MOU further agree that whenever a request for production of any written communication is received pursuant to any applicable Federal or State law, the request will be forwarded for response to the Trustee to which any privilege or protection may apply, **or** whose representatives originally generated or contributed to the record requested. Nothing contained herein shall **be** construed as prohibiting or restraining a Trustee or the East Walker River Trustee Council from agreeing to release any record. Nothing contained herein shall be construed as requiring a Trustee or the East Walker River Trustee Council to release privileged or protected communications.

XID. RESERVATION **OF** RIGHTS

Nothing in this MOU is to imply that any signatory government is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over Natural Resources.

XIV. LIMITATION

Nothing in this MOU shall be construed as obligating the United States, the State of California **or** any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XV. THIRD-PARTY CHALLENGES OR APPEALS

Nothing in this MOU may 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.

XVI. MODIFICATION **OF AGREEMENT**

Modification of this MOU must be in writing and approved by all parties to this MOU.

XVII. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. At any time that the Trustees determine that the purposes set forth in this MOU have been satisfied, the MOU may be terminated. In the event any Trustee withdraws from the MOU such withdrawal must be in writing and provided to the other parties to this MOD at least thirty days in advance of the withdrawal.

In the event of the withdrawal of any Trustee or the termination of this MOD, the Trustees shall give a full and complete accounting to the East Walker River Trustee Council of all restoration funds received, deposited, held, disbursed, managed, expended, or otherwise controlled by a Trustee in any joint or separate account as a result of the Oil Spill, pursuant to the Settlement Agreement or this MOD.

XVIII. SEVERABILITY

The terms of this MOU are severable. If any term or condition of this MOU is determined by a court of competent jurisdiction to be invalid, it shall be considered deleted and shall not invalidate any of the remaining terms and conditions.

XIX. EXECUTION: EFFECTIVE DATE

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOD and be retained by the Lead Administrative Trustee that maintains records, (see section IX. C. 4, above). The date of execution shall be the date of the signature of the last Trustee to sign the MOD.

SIGNATURES:

Dated: DEC 21, 2005

CALIFORNIA DEPARTMENT OF FISH AND GAME

By:



Lisa Cultis
Acting Administrator
Office of Oil Spill Prevention and Response

Dated: 12/30, 2005

**NEVADA DIVISION OF ENVIRONMENTAL
PROTECTION**

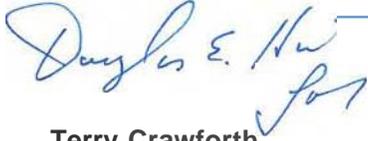
A handwritten signature in black ink, appearing to read "L. Drozdoff" with a small "F61" written below it.

By:

Leo Drozdoff
Administrator

Dated: 12/7, 2005

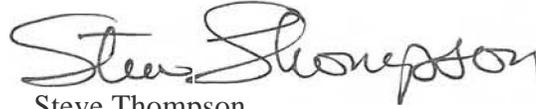
NEVADA DEPARTMENT OF WILDLIFE

By:  _____
Terry Crawforth
Director

Dated: 12/07/, 2005

UNITED STATES FISH AND WILDLIFE SERVICE

By:

A handwritten signature in black ink that reads "Steve Thompson". The signature is written in a cursive style with a large, looped "S" at the beginning.

Steve Thompson

Manager

California- Nevada Operations Office

Appendix B.
Restoration Projects Not Under Consideration
by the East Walker River Trustee Council

A. In-stream/Riparian Restoration Projects

A list of in-stream/riparian restoration project proposals received but not considered by the Trustees during the public comment/solicitation period will be provided in this section of the final DRP/EA document.

B. Recreational Fishing/Human Use Improvements

A list of recreational fishing/human use improvement proposals received but not considered by the Trustees during the public comment/solicitation period will be provided in this section of the final DRP/EA document.