MEMORANDUM OF AGREEMENT RELATING TO THE CLOVIS NATURAL RESOURCE DAMAGE RESTORATION PROJECT BETWEEN THE NEW MEXICO OFFICE OF NATURAL RESOURCES TRUSTEE AND THE U.S. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE

I. INTRODUCTION

This Memorandum of Agreement ("MOA") is between the New Mexico Office of Natural Resources Trustee ("NMONRT") and the United States Department of Interior, Fish and Wildlife Service ("FWS") (collectively referred to as the "Trustees"). The Trustees enter into this MOA 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 hazardous substances from or at the Burlington Northern and Santa Fe Railway Company ("BNSF") facility at Clovis, Curry County, New Mexico ("Clovis Site" or "Site") in accordance with the Consent Decree ("Decree") entered on January 14, 2004, in Civil Action No. 03-1105 in the United States District Court for the District of New Mexico.

II. AUTHORITY

The Trustees enter into this MOA pursuant to the authorities provided to Natural Resources Trustees by the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 9601 to 9675 (2002) ("CERCLA"); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387 (1987); and other applicable state and federal laws and regulations. NMONRT enters into this MOA pursuant to additional authority provided by the New Mexico Natural Resources Trustee Act, NMSA 1978, §§ 75-7-1 to -5 (1993).

III. DEFINITIONS

Unless otherwise expressly provided in this MOA, terms used in this MOA shall have the meanings assigned to them in CERCLA or in regulations promulgated under CERCLA. Whenever the following terms are used in this MOA, the following definitions apply:

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 New Mexico and/or the United States and the "services" that the natural resources provide to other resources and/or humans.

B. Reimbursable Administrative Costs

Reimbursable administrative costs include costs associated with: (a) preparing for and attending meetings of the Clovis Natural Resource Trustee Council (hereafter referred to as the "Clovis Trustee Council" or the "Council"); (b) preparing for and attending restoration working group 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) Trustee monitoring, coordination and oversight of restoration projects. Administrative costs that the Trustees incur on or after January 1, 2007, shall be reimbursable only to the extent such costs do not exceed restoration project budgets that the Trustees have exchanged and approved through the Council. This MOA incorporates by this reference the Trustees' previous agreement to reimbursement of appropriate past costs associated with restoration planning and implementation for the Site that were incurred prior to January 1, 2007.

C. Restoration or Restore

"Restoration" or "restore" means any action or combination of actions to restore, rehabilitate, replace, and/or acquire the equivalent of the natural resources and the "services" the natural resources provided that were injured, lost, or destroyed by the release of hazardous substances.

D. Voting Clovis Trustee Council Members

"Voting Clovis Trustee Council Members" shall mean the primary representatives appointed by 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 Clovis Trustee Council, their respective alternate(s). Participation at a given meeting of the Council may be either in person or by telephone conference. See Section X.

IV. THE SETTLEMENT OF THE NATURAL RESOURCE DAMAGE CLAIMS

Releases of hazardous substances from and at the Site, and the subsequent remedial action, caused injury to, destruction of, or loss of natural resources, specifically Santa Fe Lake and the habitat it provided, resulting in the loss of habitat for fish and wildlife, including migratory birds and aquatic-dependent biota.

The Trustees and BNSF reached a settlement, in lieu of litigation, of civil claims arising from these hazardous substances releases, and this settlement was embodied in the Decree. Pursuant to the Decree, BNSF, without admitting liability or the existence or extent of damages, placed a total of $459,000 into a court registry account ("Clovis Natural Resource Damage Account") for use by the Trustees jointly to plan and implement a wetland acquisition and enhancement project(s) ("Restoration Project") designed to restore, rehabilitate, replace and/or acquire the equivalent of natural resources injured, destroyed or lost as a result of the release of hazardous substances from or at the Site.

The Clovis Trustee Council shall manage the Clovis Natural Resource Damage Account. Any interest accrued on the Clovis Natural Resource Damage Account shall be credited to the

account. Disbursements shall require approval of the Clovis Trustee Council pursuant to this MOA. See Section VII (pertaining to authorization of expenditures).

V. PURPOSE

The purpose of this MOA is to provide a framework for coordination and cooperation between the Trustees in the use of the funds in the Clovis Natural Resource Damage Account to plan and implement the Restoration Project.

The Trustees can use the funds in the Clovis Natural Resource Damage Account only to restore, rehabilitate, replace, and/or acquire the equivalent of the natural resources injured at the Clovis Site via implementation and monitoring of an approved restoration plan ("Restoration Plan"), as required by law. The Trustees commit to the expenditure of these funds for the design, implementation, permitting, monitoring and oversight of the Restoration Project, and for the costs of complying with the requirements of the law to conduct a restoration planning and implementation process. The Trustees may use jointly no more than the amount allocated in the budgets attached hereto as Exhibit A and incorporated by this reference in this MOA for restoration planning activities. This allocation may be adjusted based on post-settlement assessment work to be completed as part of the restoration planning process carried out by the Clovis Trustee Council.

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 and implemented after providing public notice, opportunity for public input, and consideration of all public comment. The Trustees retain the ultimate authority and responsibility to determine the use of funds in the Clovis Natural Resource Damage Account 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 Decree.

Interest earned on the Clovis Natural Resource Damage Account and any excess funds from the Restoration Project may be used for any additional activities that compensate for the natural resources injured from the Clovis Site.

VI. ORGANIZATION - CLOVIS TRUSTEE COUNCIL

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

Each Trustee hereby respectively designates the following person as its primary representative on the Clovis Trustee Council:

For NMONRT: Rebecca de Neri Zagal
New Mexico Office of Natural Resources Trustee
610 Gold Avenue SW, Suite 236
Albuquerque, NM 87102
(505) 243-8087
(505) 243-6644 (Fax)
Rebecca.nerizagal@state.nm.us

For FWS: Laila Lienesch
Regional Office – Southwest Region
U.S. Fish & Wildlife Service
500 Gold Ave SW, Room 4012
Albuquerque, NM 87102
(505) 248-6494
(505) 248-6788 (Fax)
Laila_Lienesch@fws.gov

To insure continuity in the Clovis Trustee Council's work, each Trustee shall designate an alternate representative to the Council and shall notify the designated primary representative for the other Trustee of the alternate's name, address, telephone, facsimile number and e-mail addresses. This designation and notification shall be made within fourteen (14) days of the execution of this MOA. Communications regarding Clovis Trustee Council business shall be addressed to the primary representatives. A Trustee may contact the other Trustee's alternate representative only upon the direction of the other Trustee's primary representative.

A Trustee may change its primary or alternate representative by providing written notice to the other Trustee's primary representative to the Clovis Trustee Council. In the event a Trustee's primary representative can no longer serve in that capacity, the Trustee must designate a new primary representative to the Council within fourteen (14) days of the need for such new designation.

VII. DECISION MAKING

A. Unanimous Approval of Voting Members Required. The Trustees agree that decisions implementing this MOA and the Decree shall require the unanimous approval of the Voting Clovis Trustee Council Members. Such decisions shall be recorded in writing, either by resolution signed by the Voting Clovis Trustee Council Members participating in the Council meeting or in minutes approved as to content and form by the Voting Clovis Trustee Council Members participating in the Council meeting.

B. Authorization of Expenditures

All decisions authorizing expenditures of funds from the Clovis Natural Resource Damage Account, including without limitation disbursements to Trustees for their costs, require unanimous approval of the Voting Clovis Trustee Council Members, and such decisions shall be memorialized in a Clovis Trustee Council resolution signed by the Voting Clovis Trustee

Council Members or their designated agency representatives. Such resolutions may cover the entire sum approved for a given project, a project phase, or particular activities. The Council shall document use of funds from the Clovis Natural Resource Damage Account, and the Lead Administrative Trustee shall provide an accounting to the Clovis Trustee Council in a quarterly statement of account activity including all deposits, disbursements and interest earned.

The Clovis Trustee Council may unanimously approve an initial upfront allocation to cover Trustee costs associated solely with restoration planning, based on (i) a reasonable accounting of personnel participation and expenditures prior to MOA finalization; and (ii) a preliminary estimate of expenditures during the first year this MOA is in effect, such estimate not to exceed the administrative amount provided in the budgets attached hereto as Exhibit A. Use of any such upfront allocation must be documented and an accounting provided to the Clovis Trustee Council. Thereafter, funds in the Clovis Natural Resource Damage Account may be disbursed to a Trustee only pursuant to the attached budgets, which have been duly approved by the Clovis Trustee Council. No additional funds in excess of the amount provided for in the attached budgets shall be used for administrative activities associated with restoration planning.

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 natural resources. If unanimous agreement cannot be reached between the members of the Clovis 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.

VIII. POWERS, DUTIES, AND RESPONSIBILITIES

A. Clovis Trustee Council

On behalf of the Trustees, the Clovis Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOA in accordance with the procedures contained in Section VII (Decision Making). The Clovis Trustee Council, in its discretion, may take whatever actions it determines are necessary or prudent to fulfill the trust responsibilities of each Trustee and to effectuate the purposes of applicable federal and state law, consistent with the agreements provided in this MOA. Any Trustee on the Clovis Trustee Council may convene a meeting of the Clovis Trustee Council. It is expected that the Clovis Trustee Council, in accordance with applicable laws, may take the following actions to address the Trustees' natural resource restoration responsibilities:

Oversee the development and implementation of the draft Restoration Plan and other required environmental documentation, to ensure public notice, opportunity for public input, and consideration of public comments prior to preparing the final Restoration Plan;

Select a Lead Administrative Trustee for the Council and mutually agree to the assignment of specific tasks or functions to individual Trustee representatives;

Enter into contracts that the Clovis Trustee Council determines necessary or prudent to implement and monitor the Restoration Project, through one or more of the Trustees;

Consult with other state and federal agencies and public or private entities, as appropriate;

Oversee the management and administration of funds in the Clovis Natural Resource Damage Account, ensure such funds are used to implement the selected Restoration Project, review cost packages submitted for reimbursement of costs and review budget proposals submitted as justifications for expenditures of advanced funds;

Authorize or direct the Lead Administrative Trustee to approve disbursements from the Clovis Natural Resource Damage Account for specific Restoration Project costs;

Select an alternative Restoration Project if (1) the preferred Restoration Project described in the final Restoration Plan proves infeasible, impracticable, or otherwise not in the public interest, or (2) any funds remain in the Clovis Natural Resource Damage Account after the successful implementation of the Restoration Project described in the final Restoration Plan; provided that such alternative Restoration Project benefits the natural resources injured by hazardous substances released from or at the Clovis Site, is subject to public review and comment, and otherwise meets the requirements of applicable federal and state law;

Ensure that the Restoration Project and any use of funds for the Restoration Project comply with all applicable laws, including the National Environmental Policy Act, 42 U.S.C. §§ 4321 to 4370 (1970), and the Endangered Species Act, 16 U.S.C. §§ 1531 to 1544 (1988); and

Delegate specific duties as mutually agreed upon to individual Trustee representatives. Certain duties set out below are hereby delegated to the Lead Administrative Trustee.

B. <u>Lead Administrative Trustee for the Restoration Project</u>

A Lead Administrative Trustee (state or federal) shall be designated for the Restoration Project selected in the Restoration Plan. The Lead Administrative Trustee shall:

Ensure that the amounts allocated toward the Restoration Project are well managed for the benefit of the injured natural resources;

Provide for the Clovis Trustee Council's approval a detailed statement of project schedules and estimated budgets for the life of the Restoration Project, including an estimate of any contract, administrative, or overhead costs to be charged to the Restoration Project;

Obtain the Clovis Trustee Council's approval to commence the Restoration Project;

Oversee, coordinate, and monitor implementation and operation of the Restoration Project;

Submit quarterly reports (unless otherwise agreed) to the Clovis Trustee Council, which shall include a progress report and an accounting of funds expended;

Establish and maintain records and relevant documents, including budget proposals or cost packages, and provide these on a timely basis to the Clovis Trustee Council for inclusion, as appropriate, in the administrative record;

Provide a final accounting to the Clovis Trustee Council when the Restoration Project is completed, and provide an interim accounting yearly and/or at any other time requested;

Prepare agenda items in cooperation with members of the Clovis Trustee Council for meetings regarding the Restoration Project;

Inform the other Trustee of all pertinent developments regarding the Restoration Project on a timely basis; and

Carry out such other duties as directed by the Clovis Trustee Council.

IX. CONFLICT OF INTEREST

A Clovis Trustee Council representative shall abstain from discussing and voting on any issue coming before the Clovis Trustee Council in which that representative has a personal interest. A Council representative with a potential conflict shall disclose such conflict to the Clovis Trustee Council prior to consideration and voting on the issue to which such conflict pertains.

X. TELECONFERENCING

A Clovis Trustee Council meeting may be convened by telephone conference call, and the Council may take any action authorized during such call, as if authorized in person.

XI. 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 release of hazardous substances from or at the Clovis Site be made public. Public disclosure of scientific data, when appropriate, will be the general policy of the Trustees. However, the Trustees recognize that oral and written communications that are privileged attorney-client communications, attorney work product, or protected by other applicable privileges (or a combination thereof) ("Privileged Communications") will be protected from disclosure to the extent possible under applicable federal and state law. Nothing in this MOA is intended as, nor shall it be construed to be, a

general waiver of any attorney-client privilege, joint enforcement 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 the provisions of this MOA shall not prejudice any assertion of privilege or protection as to other documents or communications concerning the same or similar subject matter(s).

The Trustees further agree that whenever a request for documents or information production of any written communication is received pursuant to any applicable federal or state law, the recipient Trustee shall forward a copy of the request to the other Trustee expeditiously. Nothing contained in this MOA shall be construed as requiring a Trustee or the Clovis Trustee Council to release Privileged Communications.

XII. RESERVATION OF RIGHTS

Nothing in this MOA is intended 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. The terms of this MOA shall not be construed as a waiver of any right, privilege or presumption on the part of either of the Trustees, including the right of issuing orders and recovering costs. The Trustees' performance of responsibilities contained in this MOA is subject to the availability of funding, and such performance or nonperformance is not intended to be the basis for any challenges or appeals or to create any causes of action.

XIII. LIMITATION

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

XIV. THIRD-PARTY CHALLENGES OR APPEALS

Nothing in this MOA may be the basis of any third-party challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this MOA.

XV. MODIFICATION OF AGREEMENT

Modification of this MOA must be in writing and approved by the Trustees.

XVI. MATCHING FUNDS

It is the Trustees' intention to pursue matching funds. If matching funds are collected, they shall be expended in the same way as the funds in the Clovis Natural Resource Damage Account.

XVII. TERMINATION

This MOA shall be in effect from the date of execution until termination by mutual agreement of the Trustees. At any time, the Trustees may terminate this MOA by mutual agreement. In the event any Trustee unilaterally withdraws from the MOA prior to complete satisfaction of the purposes set forth in this MOA, such withdrawal must be in writing and provided to the other Trustee at least sixty (60) days in advance of the effective date of withdrawal. In such event, the remaining Trustee shall continue to implement the agreed upon Restoration Project(s) and shall have authority to disburse funds consistent therewith. If the Clovis Trustee Council has not approved Restoration Project(s) prior to the withdrawal, the remaining Trustee shall select and implement appropriate Restoration Project(s) pursuant to law.

The withdrawing Trustee shall retain authority to review and approve Restoration Project(s) only to ensure such projects are consistent with the Decree and all applicable legal requirements, and such approval shall constitute approval for the remaining Trustee to disburse funds from the Clovis Natural Resource Damage Account. The withdrawing Trustee shall execute any documents that the United States District Court for the District of New Mexico requires to memorialize such approval. If the Trustees disagree whether a Restoration Project is consistent with the Decree and all applicable legal requirements, then the Trustees shall follow the dispute resolution procedures set forth in this MOA.

Upon termination of this MOA, whether through mutual agreement or unilateral withdrawal, the Trustees shall give a full and complete accounting to the Clovis 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 release of hazardous substances from or at the Clovis Site, pursuant to the Decree or this MOA.

XVIII. SEVERABILITY

The terms of this MOA are severable. If any term or condition of this MOA is determined by a court of competent jurisdiction to be invalid, it shall be considered deleted, and the remaining terms and conditions shall continue to be valid and enforceable.

XIX. EXECUTION: EFFECTIVE DATE

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA and be retained by the Lead Administrative Trustee. The date of execution shall be the date of the signature of the last Trustee to sign the MOA. The provisions of this MOA shall apply to and be binding upon the Trustees and their successors and assigns.

SIGNATURES:

FOR THE NEW MEXICO OFFICE OF NATURAL RESOURCES TRUSTEE:

Dated: 2/12/07

MARTIN HEINRICH, State Trustee
New Mexico Office of Natural Resources Trustee
610 Gold Avenue, SW, Suite 236
Albuquerque, New Mexico 87102
(505) 243-8087

FOR THE U.S. DEPARTMENT OF THE INTERIOR:

Dated: 2/26/07

BENJAMIN TUGGLE, Authorized Official
U.S. Department of the Interior
500 Gold Avenue, SW, Room 8100
Albuquerque, New Mexico 87102
(505) 248-6282