

## **MEMORANDUM OF AGREEMENT**

### **BEAVER CREEK SPILL**

This Memorandum of Agreement (MOA or Agreement) is among the Confederated Tribes of the Warm Springs Reservation of Oregon (Tribe), the National Oceanic and Atmospheric Administration (NOAA), and the United States Department of the Interior (DOI), collectively referred to as the "Trustees."

#### **I. PURPOSE**

On March 4, 1999, an American Transport, Inc. (ATI) gasoline tank truck and trailer, overturned on U.S. Route 26 in Wasco County, Oregon, resulting in a spill of approximately 6,000 gallons of gasoline (hereafter the "Beaver Creek Spill"). The gasoline flowed overland and was released into the ground water and into Beaver Butte Creek just above the confluence with Beaver Creek, a tributary to the Warm Springs River. The land and streams are part of the Warm Springs Reservation of Oregon. The spill resulted in injuries to anadromous and resident fish, vegetation, and other natural resources. This MOA is entered into to ensure the coordination and cooperation of the Trustees in conducting natural resource damage assessment activities and actions to restore, replace or acquire the equivalent of injured natural resources or natural resource services (hereafter collectively "restoration") and in overseeing the expenditure of jointly recovered funds from any Beaver Creek Spill settlement.

#### **II. AUTHORITY**

The following officials are the signatories to this MOA and are authorized under the Oil Pollution Act, 33 U.S.C. Section 2701, *et seq.* (OPA), the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300, Subpart G, and other applicable laws

and regulations to act as Trustees for natural resources affected by releases of petroleum products at or from the Beaver Creek Spill:

1. General Manager, Department of Natural Resources, Confederated Tribes of the Warm Springs Reservation of Oregon, for the Tribe.
2. Director, NOS Office of Response and Restoration, for NOAA.
3. Regional Director, U.S. Fish and Wildlife Service, authorized official for the Department of the Interior.

### **III. SCOPE**

This MOA is intended to address the assessment and recovery of damages for, and the restoration of natural resources injured, destroyed or lost as a result of, the Beaver Creek Spill.

### **IV. TRUSTEE COORDINATION**

The Tribe, NOAA, and DOI agree to coordinate any damage assessment activities and restoration actions to fulfill their responsibilities as trustees under applicable federal, state, and tribal laws and regulations.

### **V. SETTLEMENT NEGOTIATIONS**

The Trustees may enter into settlement negotiations with American Energy Inc. (the successor to ATI) the responsible party (RP) for the purpose of resolving any natural resource damage claims. Settlement negotiations will be coordinated among the Trustees. No Trustee will conduct independent settlement negotiations with the RP without first providing written notice to all other Trustees ten days in advance of the commencement of negotiations or such shorter notice as may be agreed to by the other trustees in the circumstances.

## **VI. CONFIDENTIALITY**

The status of the parties as co-Trustees requires that they carry out their damage assessment and settlement negotiation process in a coordinated fashion and that they protect the integrity of the claim determination and analysis process and the confidentiality of information and strategies. The Trustees agree to share among each other certain confidential information, legal strategies and theories, documents, and other confidences ("Confidential Information") regarding the assessment and collection of natural resource damages associated with the Beaver Creek Spill. The Trustees agree that the sharing of such Confidential Information among Trustees is being done for the purpose of asserting common claims and asserting and protecting the rights and interests of respective clients, and that any other publication or use is not authorized or permitted. The attorney-client and attorney work product privileges are intended to remain attached to Confidential Information so shared and exchanged and the sharing and exchange of such Confidential Information does not waive any privilege attaching thereto or to any Confidential Information not shared or exchanged. Each Trustee agrees not to reveal to any person not party to this Agreement, to the extent permitted by applicable law, any such Confidential Information without the prior written consent of the party who contributed or caused the same to be contributed to the joint effort.

## **VII. REPLACEMENT /RESTORATION FUNDS**

A. The Trustees recognize that their coordinated activities may result in the recovery of funds, the commitment of services and/or the use of land for the purpose of restoring natural resources and/or natural resource services injured, destroyed, or lost as a result of the Beaver Creek Spill. Prior to the receipt of any such funds, the Trustees will determine the appropriate place for the deposit of the funds. The depository so chosen by the Trustees will be

referred to as the Beaver Creek Spill NRD Fund ("Beaver Creek NRD Fund"). Any interest earned on the money deposited in the Beaver Creek NRD Fund shall be credited to the fund and shall be subject to the terms of this MOA. No money shall be expended from the Beaver Creek NRD Fund except to the extent such expenditure is consistent with this MOA, any Consent Decree or other agreement which embodies a settlement between the Trustees and the RP, and any applicable law.

B. Use of Beaver Creek NRD Fund Money

1. The funds in Beaver Creek NRD Fund shall be spent on planning and implementing actions to restore, replace or acquire the equivalent of resources and resource services injured, destroyed or lost by the Beaver Creek Spill.

2. To the extent practicable, the Trustees will use the funds in the Beaver Creek NRD Fund for natural resource restoration or replacement activities within close proximity to the Beaver Creek Spill site and within the same river system so as to provide equivalent habitat, resources and services.

3. The funds in the Beaver Creek NRD Fund will only be spent in compliance with applicable state, federal, and tribal laws and regulations.

4. The Trustees' goal is to minimize the amount of the funds placed in the Beaver Creek NRD Fund that are spent on administrative charges and expenses. Administrative charges and expenses may include, but are not limited to, salary, travel and overhead of Trustee committee members and trustee staff costs associated with administering the Beaver Creek NRD Fund and managing the Trustee decision making and restoration implementation process..

5. Funds in the Beaver Creek NRD Fund shall not be used on additional natural resource damage assessment studies, unless the Trustees agree that such further assessment activities are necessary for the fulfillment of their trustee responsibilities.

C. In addition, the Trustees will seek to recover reimbursement of past damage assessment costs. The Trustees intend that payments of past damage assessment costs be made directly to each Trustee.

### **VIII. TRUSTEE COUNCIL**

A. There is established a Trustee Council ("Council"), which shall be the mechanism through which the Trustees will coordinate their natural resource damage assessment and restoration related activities regarding the Beaver Creek Spill. Each of the Trustees may have more than one representative on the Council, but only one representative of each Trustee will be designated by the respective Trustee as a voting member of the Council. Within 30 days of the effective date of this Agreement, each Trustee shall provide the name of its voting member and an alternate voting member to the Lead Administrative Trustee.

B. The Council shall be responsible for:

1. Conducting any natural resource damage assessment or other studies, data gathering and/or analysis for purposes of identifying, quantifying and valuing injuries to natural resources resulting from releases of petroleum products at or from the Beaver Creek Spill, or planning efforts to restore injured natural resources;

2. Developing joint Trustee positions on how natural resources damage claims regarding the Beaver Creek Spill should be presented, prosecuted or settled;

3. Planning and implementing restoration actions to benefit the natural

resources that have been injured by releases of petroleum products at or from the Beaver Creek Spill;

4. Authorizing disbursements from the Beaver Creek NRD Fund;

5. Deciding other matters relating to the use, handling and accounting of funds, goods and in-kind services recovered or made available as a result of the resolution of natural resource damage claims regarding the Beaver Creek Spill; and

6. Adopting such bylaws, statements of Council policy or position, cost accounting procedures or cost reimbursement guidelines consistent with this Agreement as are needed to carry out this Agreement or to implement any settlements of natural resource damage claims.

C. All decisions of the Trustees under this Agreement shall be by consensus. In the event that consensus is not reached by the voting representatives of the Council, the Council should conduct extensive good faith discussions directed toward obtaining consensus among all Trustees. In the event consensus cannot be reached, the matter in dispute shall be presented to higher level officials of the Trustees for resolution. The Trustees may adopt further procedures for dispute resolution.

#### **IX. LEAD ADMINISTRATIVE TRUSTEE**

A. For purposes of facilitating the exchange of information and the coordination of positions among the Trustees, one Trustee shall be designated the Lead Administrative Trustee. Determination of the Lead Administrative Trustee shall be by consensus of the Trustees.

B. The Lead Administrative Trustee shall be responsible for:

1. Scheduling of meetings of the Trustees and preparation of proposed agendas for those meetings;
2. Acting as a central contact point for the Trustees where needed to facilitate communication between the Trustees and RP;
3. Preparation of such minutes, resolutions, and other documents as needed to record actions and decisions of the Council;
4. Maintenance of the administrative record covering the assessment and resolution of natural resource damage claims for the Beaver Creek Spill and the planning and implementation of efforts to restore injured natural resource; and
5. Such other duties as are agreed upon by the Trustees.

C. Designation of a Lead Administrative Trustee shall not preclude the Trustees' determination on a case-by-case basis to assign responsibility for specific tasks to another Trustee.

D. The Trustees agree that NOAA shall initially serve as Lead Administrative Trustee. The Trustees may by consensus change the designation of Lead Administrative Trustee without the need for an amendment to this Agreement. Such a change in the designation of Lead Administrative Trustee shall be confirmed in a writing signed by the appropriate representatives of all Trustees.

#### **X. DISPOSITION OF EXCESS FUNDS**

In accordance with section 1006(f) of OPA, 33 U.S.C. § 2706(f), sums recovered for natural resource damages in excess of amounts required for implementation of restoration actions and reimbursement of damage assessment costs shall be deposited in the Oil Spill Liability Trust Fund established by 26 U.S.C. § 9509 (OPA Fund). The Trustees agree that if

they have not adopted a restoration plan and begun implementing the restoration projects identified in the plan within five years following the recovery of such damages they will authorize the transmission of all unexpended damages from the Beaver Creek NRD Fund to the OPA Fund.

## XI. MISCELLANEOUS PROVISIONS

A. Effective Date; Amendment and Termination. This Agreement shall be effective when executed by all of the Trustees and may not be amended except by written agreement of all Trustees. A Trustee may give 30 days' written notice to terminate its participation in this Agreement. Upon such termination and withdrawal of any Trustee, the Agreement shall continue to be effective as to the remaining Trustees. *Provided, however,* it is the intent of the Trustees that the provisions of Section VI. Confidentiality of this MOA regarding the use and maintenance of Confidential Information shall survive the termination of this MOA.

B. Commitment of Resources. Nothing in this Agreement shall be construed as obligating NOAA, FWS, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

C. Reservation of Rights. It is recognized that each Party to this Agreement has and reserves all rights, powers and remedies now or hereafter existing at law or in equity, or by statute or treaty or otherwise, except as specifically agreed herein, and that nothing in this Agreement waives or forecloses the exercise of any such rights, powers or remedies.

D. Modification of Agreement. Modification of this MOA must be in writing and approved by all Trustees currently party to this MOA.

For the Confederated Tribes of the Warm Springs Reservation of Oregon

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Robert Brunoe, General Manager  
Department of Natural Resources

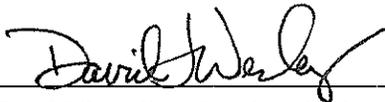
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Date

For the National Oceanic and Atmospheric Administration

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David Kennedy, Director  
NOS Office of Response and Restoration

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Date

For the Department of the Interior

  
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4/29/05

For: David B. Allen, Regional Director  
U.S. Fish and Wildlife Service, Region 1, Portland, OR

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Date

For the Confederated Tribes of the Warm Springs Reservation of Oregon

  
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Robert Brunoe, General Manager  
Department of Natural Resources

11-10-05

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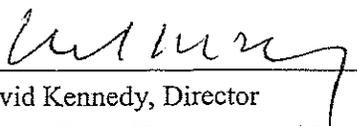
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