

**MEMORANDUM OF AGREEMENT
BETWEEN
NEW MEXICO COMMISSIONER OF PUBLIC LANDS
AND
CENTER OF EXCELLENCE**

This Memorandum of Agreement (MOA) is made and entered into by and between the New Mexico Commissioner of Public Lands (Commissioner)/New Mexico State Land Office (SLO) and Center of Excellence (CEHMM) related to the administration of Candidate Conservation Agreements with the United States Fish & Wildlife Service (Service) for the Texas hornshell mussel and other covered species. The Commissioner and CEHMM may be referred to either individually as a “Party” or collectively as “Parties.”

RECITALS

- A. In 2001, the Service identified the Texas hornshell mussel as a candidate species for protection under the Endangered Species Act (ESA).
- B. On August 10, 2016, the Service proposed the Texas hornshell mussel for listing as an endangered species.
- C. On February 9, 2018, the Service published in the federal register notice of a final rule to list Texas hornshell mussel as an endangered species, with an effective date for listing of March 12, 2018.
- D. A Texas hornshell mussel population currently occupies a reach of the Black River, and efforts are underway to reintroduce the species to the Delaware River. Both rivers are located in Eddy County, New Mexico.
- E. The Commissioner manages, for designated beneficiaries, approximately 79,231 acres of state trust lands and 8,430 acres of trust mineral estate that could be impacted by ESA restrictions due to the Texas hornshell mussel being listed as a federally endangered species.
- F. Prior to the listing of a species, private and non-federal land owners can enter into a Candidate Conservation Agreement with Assurances (CCAA) with the Service. Under a CCAA, land owners or lessees voluntarily commit to implement specific conservation activities that will help stabilize or restore the species (“Conservation Measures”) in exchange for assurances that if the species is listed, their otherwise lawful activities that are covered under the CCAA (“Covered Activities”) will not result in future regulatory obligations in excess of those they agree to at the time they enter into the Agreement.
- G. Also prior to the listing of a species, federal land owners can enter into a Candidate Conservation Agreement (CCA) with the Service. If the species is later listed, the CCA can be the basis for Section 7 consultation under the ESA.

- H. On October 13, 2017, prior to the listing of the Texas hornshell as an endangered species, The State Land Office and the Service entered into a CCAA for state trust lands within the area that could be impacted by a future ESA listing for Texas hornshell mussel (SLO CCAA). Up to the effective listing date, lessees or grantees of state trust lands could participate voluntarily in the SLO CCAA by enrolling all or a portion of their leased state trust land and signing a certificate of inclusion (CI).
- I. Also on October 13, 2017, CEHMM and the Service entered into a CCAA for private lands and a CCA for federal lands within the area that could be impacted by an ESA listing for Texas hornshell mussel. Up to the effective listing date, private landowners could enroll in the CEHMM CCAA by signing a CI, and federal land lessees could enroll in the CEHMM CCA by signing a Certificate of Participation (CP). The CEHMM CCAA and CCA (CEHMM CCA/A) are nearly identical to each other.
- J. Some land owners or lessees in the area that could be impacted by a species listing have property interests on a combination of private, state trust, and federal land, and wished to participate in more than one candidate conservation agreement.
- K. Coordination on the implementation of the SLO CCAA and CEHMM CCA/A would provide significant advantages for the Parties and participants, including:
- a. limiting up-front costs and providing consistent processes and requirements for participants that enroll in the SLO CCAA and one or both of the CEHMM CCA/As;
 - b. fostering communication about issues of mutual concern to the Parties; and
 - c. ensuring that the development, selection, and timing of habitat protection and restoration projects will result in the intended benefits to the species.
- L. Therefore, both Parties desire to enter into this MOA for the purpose of defining, formalizing, and maintaining a cooperative relationship for the administration of the SLO CCAA and CEHMM's CCAA and CCA (CCA/A). This MOA shall supersede the prior Memorandum of Agreement between the Parties, which was effective on September 14, 2017.

AGREEMENT

The Parties shall coordinate and cooperate on the implementation of the SLO CCAA and CEHMM CCA/A pursuant to the following:

1. Duty of the Commissioner

Nothing in this agreement may, or is intended to, modify or limit the Commissioner's duty and authority to act in the best interest of the trust.

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2. **Governance, Stakeholder Input, and Coordination of Conservation Activities**
 - A. The Parties shall maintain separate Executive Committees to administer their respective candidate conservation agreements. The Executive Committees shall have joint meetings at least annually to discuss matters of mutual concern.
 - B. The Commissioner shall provide staff to participate in the Stakeholder Committee, Implementation Committee, and Technical Working Group(s), or other such governance and stakeholder involvement structure as is described in the final CEHMM CCA/A.
3. **SLO-CEHMM CCAA Coordinating Committee (CCAACC)**
 - A. The Parties shall each select technical staff from their respective entities to serve on the CCAACC.
 - B. The purpose of the CCAACC is to:
 - i. develop and maintain consistent administrative processes for managing and tracking enrollments;
 - ii. develop and maintain agreed-upon methods of communication for coordination under this MOA;
 - iii. develop and maintain consistent protocols for desk-top and field oversight of enrollee activities, including activity notices, routing and siting, implementation of mitigation and conservation measures, and long-term monitoring;
 - iv. develop and maintain guidance documents or other materials to be used when determining specific conservation measures for participants' CIs or CPs;
 - v. identify and implement improvements in coordination between the SLO and CEHMM;
 - vi. communicate about field-level issues of mutual concern; and
 - vii. address other areas that arise during the implementation of the conservation agreements.
4. **Enrollment of Lands**
 - A. The Commissioner will administer enrollment of Participants that are only enrolled in the SLO CCAA.
 - B. CEHMM will administer enrollment of Participants that are only enrolled in the CEHMM agreements.
 - C. For Participants that are enrolled in the SLO CCAA and CEHMM CCA/A, SLO and CEHMM will coordinate to administer enrollment requirements.
 - D. For enrollments involving oil and gas exploration or production on split estates, subsurface estate ownership shall determine which CCAA or CCA applies.

5. Monitoring

- A. The Commissioner shall monitor Participants' compliance with CIs on state trust lands.
- B. CEHMM shall monitor compliance with CIs/CPs on lands enrolled under the CEHMM agreements
- C. The Parties may elect to coordinate on compliance monitoring for Participants with enrollments in the SLO CCAA and CEHMM CCA/A.

6. Certification

- A. The Commissioner shall determine whether to certify to the Service that the participant has met the conditions of the CI for activities on state trust lands.
- B. CEHMM shall determine whether to certify to the Service that the participant has met the conditions of the CI/CP for activities on lands enrolled under the CEHMM agreements.
- C. The Parties may elect to coordinate on certification for Participants with enrollments in the SLO CCAA and CEHMM CCA/A.

7. Reporting

The Parties shall jointly prepare annual reports to the Service.

8. Enrollment Fees and Habitat Conservation Fees

- A. Participants enrolling in more than one CCA/A will not be required to pay duplicate enrollment fees. Participating Landowners shall instead remit to CEHMM a single enrollment fee to enroll state trust land, federal land, private land, or any combination thereof.
- B. CEHMM shall collect and account for funds collected from all participants as enrollment fees or habitat conservation fees.
- C. Participants shall pay habitat conservation fees to CEHMM (or have them deducted from the remaining balance of their enrollment fees) regardless of which candidate conservation agreement(s) they are enrolled in and regardless of the land ownership of the surface disturbing activity.
- D. CEHMM shall maintain records of the location, land ownership, and amount of habitat conservation fees charged to participating companies.
- E. Unless otherwise authorized in writing by the Commissioner or the Commissioner's designated representative, funding generated from new surface disturbing activities on state trust land shall be allocated for Conservation Projects on state trust land to benefit the Covered Species and any for costs authorized under Section 11.

- F. Enrollment fees and habitat conservation fees for the SLO CCAA shall be the same amount as fees for the CEHMM CCA/A, as described in the final CEHMM CCA/A schedule of fees.
- G. For new surface disturbances that involve a combination of state trust land and non-state trust land, SLO shall calculate and assess habitat conservation fees based on the acreage of new surface disturbance on enrolled state trust lands and CEHMM shall calculate and assess habitat conservation fees based on the acreage of new surface disturbance on enrolled private or federal lands.

9. New Surface Disturbances

- A. The Parties shall inform each other when they receive or obtain notice of a SLO CCAA Participant's new surface disturbance on state trust lands.
- B. The Commissioner shall be responsible for responding to notices of new surface disturbances and consulting with Participants on state trust lands.
- C. CEHMM shall be responsible for responding to notices of new surface disturbances and consulting with Participants on lands enrolled under the CEHMM agreements.
- D. For new surface disturbances on parcels or units that include both state trust land and non-state trust land, the Parties shall coordinate on consulting with Participants for new surface disturbances.

10. Compliance with CIs and CPs

- A. The Parties shall notify each other per the terms of Section 19, Notices, if a Participant enrolled in both the CEHMM CCA/A and the SLO CCAA has been issued a deficiency notice for noncompliance with a CI or CP.
- B. The Parties shall notify each other per the terms of Section 19, Notices, if a Participant enrolled in both the CEHMM CCA/A and the SLO CCAA has been issued a Conservation Measure Violation (CMV) and of the final outcome of an appeal, if any.

11. Overhead and Direct Costs

- A. CEHMM shall retain ten percent (10%) of funds derived from enrollments or activities on state trust lands to cover overhead costs for program administration, including contract administration, accounting, accounts receivable, accounts payable, invoice tracking, purchasing, utilities, and office rental.
- B. CEHMM may charge direct costs to the SLO CCAA Participant account to provide the following services:
 - i. providing notice to SLO of new applications for drilling or injection permits filed by SLO Participants with the New Mexico Energy, Minerals, and Natural Resources Department, Oil Conservation Division;

- ii. as requested by phone or email by SLO staff, conducting site visits with SLO Participants to provide guidance on siting of new surface disturbances, determining applicable conservation measure requirements;
 - iii. as requested by phone or email by SLO staff, conducting site visits to evaluate SLO Participants' compliance with conservation measures for annual certification to the Service;
 - iv. when discovered by CEHMM staff incidental to conducting field work for the CEHMM CCA/A or other CEHMM work, investigating and documenting conditions that indicate potential SLO Participant non-compliance with conservation measures, or that occur on State Trust Land and pose a potential for harm to the Covered Species; and
 - v. other support requested in writing by the Commissioner.
- C. For any site visits, compliance evaluations, or other support provided pursuant to sections 11.B.ii, iii, iv, and v, CEHMM shall prepare a brief standard report for SLO that describes the work performed, any findings, and direct costs charged to the SLO CCAA Participant account.

12. Use of Funds for Conservation Projects

- A. With the exception of the provisions of Section 11, Overhead and Direct Costs, and unless otherwise authorized in writing by the Commissioner, funding that is derived from activities on state trust lands shall be used for Conservation Projects only on state trust lands.
- B. When a Conservation Project involves both state trust land and lands enrolled under the CEHMM agreements, the costs for the project shall be charged to the Land Office account based on the on-the-ground costs for the portion of the project that occurs on state trust lands versus CEHMM enrolled land, unless otherwise agreed upon in writing in advance of the project by the Commissioner and CEHMM.
- C. CEHMM shall use a procurement process for Conservation Project contracts that is substantially consistent with New Mexico state procurement requirements. The Commissioner shall assist CEHMM with ensuring this consistency.
- D. The Parties shall develop a mutually agreed-upon process for the selection of contractors to implement Conservation Projects on state trust lands, to include a dispute resolution process should the Parties be unable to agree on the selection of a contractor.

13. Accounting and Expenditures

- A. CEHMM shall establish a separate restricted account for funds associated with the SLO CCAA.
- B. On an annual basis or on request, CEHMM shall provide the Commissioner with an accounting of:

- i. enrollment payments received from Participants enrolling their activities on state trust lands;
- ii. payments received or deducted from state trust land Participants' accounts for new surface disturbances;
- iii. payments to contractors for Habitat Projects on state trust lands;
- iv. overhead charges; and
- v. direct costs charged by CEHMM that are associated with enrollments or activities on state trust lands.

C. Accounting and expenditure reports shall be provided by email and hard copy, per the requirements of Section 19, Notices.

14. Term

This MOA shall not become effective until approved and signed by CEHMM and the Commissioner. It shall be ongoing unless terminated pursuant to Section 15, Termination, or Section 16, Appropriations.

15. Termination

This MOA may be terminated by either Party upon delivery of a written notice per the requirements of Section 19, Notices, to the other Party at least 30 days prior to the date of termination. By such termination, neither party may nullify or void any obligation required to have been performed prior to termination. CEHMM shall retain any funds that have been encumbered for approved projects or expenses prior to notice of termination, and such funds will remain subject to the reporting requirements of Section 13, Accounting and Expenditures. Any unencumbered funds derived from enrollments or activities on state trust lands may remain with CEHMM to be used to benefit the Covered Species, subject to the reporting requirements of Section 13, or, at the Commissioner's discretion, be transferred to another entity to be used for the same purpose of benefitting the Covered Species.

16. Appropriations

This MOA's terms are contingent on sufficient appropriations being granted by the New Mexico State Legislature and the Commissioner for the implementation of the SLO CCAA and the performance of this agreement. If sufficient appropriations are not granted, this MOA shall terminate upon the Commissioner's written notice per the terms of Section 19, Notices, to CEHMM.

17. Payment

Neither Party's performance of an obligation under this MOA or delivery of a good or service in connection with this MOA shall give that Party a right to be paid by the other Party.

18. Amendment

Any amendments or changes to this MOA shall be in writing and approved by both Parties.

19. Notices

Any notices and reports required under this MOA shall be sent by email or hard copy delivered by hand, US Mail, or commercial courier to the following addresses, which may be changed by written notice or email to the other Party:

Lisa Henne, Associate Counsel
New Mexico State Land Office
310 Old Santa Fe Trail
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
Lhenne@slo.state.nm.us

Emily Wirth, Executive Director
CEHMM
505 N. Main
Carlsbad, NM 88220
Emily.wirth@cehmm.org


20. Applicable Law

The laws of the State of New Mexico shall govern this MOA. Venue shall be proper only in Santa Fe County in accordance with NMSA 1978, Section 38-3-1(G). By execution of this MOA, both Parties acknowledge and agree to the exclusive jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this MOA.

21. Liability

Neither Party shall be responsible for any liability incurred as a result of the other party's acts or omissions in connection with this MOA. Any liability incurred by the Commissioner under this MOA is subject to the immunities and limitations of the New Mexico Tort Claims Act, NMSA 1978 Sections 41-4-1, *et seq.*, as amended.

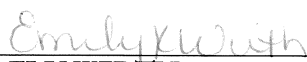
Agreed to this 7th day of September, 2019



STEPHANIE GARCIA RICHARD
COMMISSIONER OF PUBLIC LANDS
NEW MEXICO STATE LAND OFFICE

9.9.19

Date



EMILY WIRTH
EXECUTIVE DIRECTOR
CENTER OF EXCELLENCE

9/5/19

Date

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