

**MEMORANDUM OF UNDERSTANDING
AMONG THE STATE OF MONTANA, THE CONFEDERATED SALISH AND KOOTENAI TRIBES, THE
UNITED STATES DEPARTMENT OF AGRICULTURE, AND
THE UNITED STATES DEPARTMENT OF THE INTERIOR
RELATING TO THE RESTORATION OF NATURAL RESOURCES
INJURED BY RELEASES OF HAZARDOUS SUBSTANCES FROM THE SMURFIT-STONE
/FRENCHTOWN MILL AND LIBBY ASBESTOS SITES.**

I. INTRODUCTION

The Trustees for natural resources within the Clark Fork River watershed, where the Smurfit-Stone/ Frenchtown Mill Site is located, include the Governor of the State of Montana represented by the Montana Natural Resource Damage Program (NRDP), the Confederated Salish and Kootenai Tribes, the U.S. Department of Agriculture (USDA), on behalf of the U.S. Forest Service (USFS), the U.S. Fish and Wildlife Service (FWS), on behalf of the U.S. Department of the Interior (DOI) , (collectively referred to as the "Trustees", and each, individually, as a "Trustee").

The Trustees for natural resources at the Libby Asbestos Site include the Governor of the State of Montana represented by NRDP, the Confederated Salish and Kootenai Tribes, FWS, on behalf of DOI, (collectively referred to as the "Trustees", and each, individually, as a "Trustee"). The State of Montana is currently involved in a mediation process ordered by the United States Bankruptcy Court for the District of Delaware to resolve, among other things, the State's claim for natural resource damages at Libby Operable Unit 3.

Collectively, the sites covered by this MOU are "Sites."

This MOU refers to "Trustee representatives" to mean the staff who are implementing the basic actions under this MOU. The Trustees have authority to: (1) initiate and conduct natural resource damage assessments; (2) recover damages from responsible parties for injuries to natural resources resulting from releases or threat of releases of hazardous substances; and (3) apply any natural resource damages recovered toward the restoration, rehabilitation, replacement, and/or acquisition of the equivalent natural resources. The Trustee representatives hereby enter into this Memorandum of Understanding (MOU) to coordinate their joint efforts to fulfill respective responsibilities in assessing injuries to natural resources and ecological services injured as the result of releases of hazardous substances from the Sites for the purpose of restoring, replacing, or acquiring the equivalent of the injured natural resources and resource services.

II. PARTIES

The following Trustees or their representatives are Parties to this MOU, and act on behalf of the public as Trustees for natural resources:

- A.** State of Montana Governor, represented by NRDP. The parties recognize that the NRDP representatives will engage in discussions on strategy, but formal written decisions on topics such as settlement and documents that go out for public comment remain with the Governor;
- B.** Confederated Salish and Kootenai Tribes;
- C.** USFS, USDA (Smurfit Stone/Frenchtown Mill Site only);
- D.** The Regional Director of FWS, DOI Unified Regions 5 and 7 (Missouri Basin and Upper Colorado River Basin), acting on behalf of the Secretary of the United States Department of the Interior;
- E.** Additional Trustees, recognized under 40 C.F.R. §§ 300.600- 300.612, for natural resources at the Sites covered by this MOU may become a party to this MOU, with the agreement of all the Trustee representatives for the Sites as set forth herein.

III. AUTHORITIES

The Parties enter into this MOU pursuant to the following authorities:

- A.** Comprehensive Environmental Response, Compensation and Liability Act, Title 42 U.S.C. §§ 9601-9628 (CERCLA);
- B.** Federal Water Pollution Control Act (FWPCA or Clean Water Act), 33 U.S.C. §§ 1251 - 1387;
- C.** National Contingency Plan, Title 40 C.F.R. Part 300;
- D.** The CERCLA Natural Resource Damage Assessment and Restoration (NRDAR) Regulations, Title 43 C.F.R. Part 11;
- E.** Executive Order 12580 – Superfund Implementation, as amended by Executive Order 13016;
- F.** Other applicable federal and state laws.

IV. DEFINITIONS

- A.** Whenever the terms “natural resource”, “restoration”, or “restore” are used in this MOU, they shall have the same meanings as the defined terms in 43 C.F.R. Part 11 and CERCLA.

- B.** The term “assessment” means the activities undertaken by the Trustee representatives to identify and quantify injuries to natural resources and the services that they provide, both for human and ecological use, caused by releases of hazardous substances, pollutants, and contaminants from activities at the Sites. The results of assessment activities will enable the Trustee representatives to evaluate and propose options for restoring, replacing, or acquiring equivalent resources or resource services to make the public whole.
- C.** The term “cultural resource” refers to any definite location of past human activity identifiable through field survey, historical documentation, or oral evidence and includes archaeological or architectural sites, structures, or places; and places of traditional cultural or religious importance to specified groups whether or not represented by physical remains.
- D.** The term “consensus” shall be taken to be approval by all Trustee representatives. A representative may choose to abstain. Each Trustee receives only one vote.
- E.** The term “vote” or “voting” refers to approval or disapproval of a document or other decision by the Trustee Council representatives. Generally, these will be recorded through written correspondence, such as e-mail or by signing a letter or document. Unless noticed ahead of time, voting and other formal decisions will not occur in a meeting format.
- F.** Unless a term is expressly defined in the MOU, all terms common to the discourse of the natural resource damage assessments shall have the same meaning as in the CERCLA and the Federal Water Pollution Act, as amended, and the authorities cited above.

V. PURPOSE

The purpose of this MOU is to provide a framework for coordination and cooperation among the Trustee representatives in conducting the appropriate assessment and restoration activities for the Sites. This approach includes cooperation and coordination with the response agencies, in their efforts to plan and ensure the implementation of necessary response actions. Under the framework established in this MOU, the Trustee representatives’ goals are to:

- A.** Conduct an assessment of natural resource damages for injury to, destruction of, or loss of natural resources and natural resource services pursuant to CERCLA

Section 9607(f)(2)(B), and potentially including those of cultural significance to Native Americans;

- B.** Communicate with Trustee representatives regarding assessment and restoration planning activities, as appropriate;
- C.** Engage in restoration planning;
- D.** Seek natural resource damages, including compensation for the interim lost use value of resource services caused by releases of hazardous substances;
- E.** Implement restoration, replacement, rehabilitation, and/or acquisition of the equivalent of the injured natural resources and natural resource services; and
- F.** Coordinate Trustee activities relating to impacted natural resources with corrective and/or response actions carried out by other federal or state agencies in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.

VI. ORGANIZATION

A. Trustee Council Formation and Decisions

To implement this MOU, there is hereby created a Trustee Council for each site (the “Trustee Council” or “Council”). Each Trustee Council will generally be composed of staff for each Trustee, as outlined below. The mission of each Trustee Council shall be to implement in a coordinated manner the responsibilities of trusteeship on behalf of the public, pursuant to the declared goals set forth in Article V. The Trustee representatives agree that discussions will focus on the Trustee representatives’ mutual goals of assessing, restoring, rehabilitating, replacing, and/or acquiring the equivalent of the affected natural resources and services, rather than on individual control or trusteeship over those resources.

Each of the participating Trustee agencies will designate one primary staff representative and at least one alternate staff representative via email. The e-mail will share pertinent contact information. Each Trustee representative shall notify the other Trustee representative via email of any changes in that Trustee’s primary or alternate staff representatives or legal representatives within twenty (20) business days of the change.

Written communications between the staff representatives will generally be by email and will be sent to both the primary and the alternate and legal

representatives (if identified). The Trustee representatives will meet in person, by telephone conference call, or internet meeting software. If a Council representative is unable to travel to a meeting, that representative may participate by telephone conferencing or internet software or through other means mutually agreed upon amongst the Trustee representatives.

B. Consensus Agreement of Members

The Trustee representatives agree that, except as specifically delegated to a specific Trustee here in Article VI, decisions implementing this MOU shall require the consensus agreement of the Trustee Council representatives, as defined in Article IV, Definitions. Any discussions regarding strategy will be subject to the Confidentiality Provisions contained in Section I. Any action that requires a formal decision from the Trustee Council, such as agreeing to a document in 43 CFR Part 11, will be recorded in writing, generally within the document itself. Required decisions will otherwise be recorded by email or letter. Documents will be maintained in the records of the Trustee Council consistent with 43 CFR § 11.90.

This Section does not preclude a Party from proceeding independently on any aspect of a natural resource damage assessment claim when that Party determines, in its sole discretion, that action is necessary and appropriate. Each Party reserves the right to initiate and conduct litigation against any potentially responsible party and to engage in individual settlement negotiations, subject to the obligation to communicate with other Parties, as set forth in this MOU. Notwithstanding the foregoing, if a Party is subject to a court order that in any way conflicts with that Party's obligations under this MOU (including without limitation the obligation to communicate and consult), the terms of that court order shall supersede this MOU and govern the subject Party's obligations.

C. Dispute Resolution

The Trustee representatives agree that decision-making (to be made in writing) will focus on the Trustees' mutual and common purposes of restoring injured natural resources and natural resource services rather than on individual Trustee control or trusteeship over those resources. In the event that consensus approval cannot be reached among the representatives of the Trustee Council, the matter in dispute will be elevated with the Trustee agencies for resolution. If necessary, the Trustee representatives may establish further mechanisms to

resolve disputes. If consensus cannot be achieved, each Trustee may take individual positions or actions on its own behalf, but such individual positions or actions shall not constitute or be regarded as the positions or actions of the Council.

D. Lead Administrative Trustee

The Trustee Council shall appoint one member of each Council, from among those members who agree to such appointment, to serve as Lead Administrative Trustee ("LAT"). The duties of the LAT shall include, but are not limited to:

1. Scheduling meetings of the Council and notifying Council members of those meetings on a timely basis;
2. Preparing agendas for those meetings;
3. Acting as a central contact point for the Trustee Council;
4. Facilitating discussion by the Trustee Council;
5. Establishing and maintaining records and relevant documents, including the Administrative Record; and
6. Other administrative duties as directed by this MOU or by the Council.

The LAT shall be responsible for informing the other Trustee Council members of all pertinent developments in a timely manner. The LAT may delegate any LAT duties to another Trustee representative with the concurrence of the Council. Assigned duties do not provide the LAT with decision-making rights beyond those normally held by each Trustee.

E. Trustee Powers, Duties, and Responsibilities

The Trustee representatives shall coordinate with each other to perform activities necessary to conduct assessments and to restore, replace, or acquire the equivalent of resources or natural resource services injured due to releases of hazardous substances, pollutants, and contaminants from the Sites. No Trustee shall be required to participate in assessment or restoration activities without funding secured for the Trustee's participation.

To the extent authorized by applicable laws, regulations, and policies, the Council may take the following actions, among others, to implement the Trustees' natural resources responsibilities:

1. Select the LAT;
2. Designate committees and subcommittees as necessary for the efficient operation of the Trustee Council;
3. Confer as necessary and communicate and/or coordinate with the response agencies regarding the design and implementation of response actions at the Sites and conduct of any studies as they may mutually benefit clean-up and restoration efforts;
4. Oversee the management and administration of funds used in the assessment of natural resource injuries;
5. Prepare and oversee the planning and implementation of assessment activities for the determination and quantification of injured natural resources;
6. Perform any scientific and technical studies necessary for conducting the assessment, and/or arrange, through one or more of the Trustees, contracts with professional consultants, technical or otherwise, that the Council deems necessary for completing such work;
7. Solicit and evaluate public input on assessment and restoration planning;
8. Identify projects to restore, replace, or acquire the equivalent of resources and natural resource services that have been injured due to releases of hazardous substances, pollutants, and contaminants from the mining activities.
9. Evaluate alternative response actions to address risks that have been identified in conjunction with possible alternative resource restoration actions;
10. Develop and implement a strategy to seek to have responsible parties perform and/or fund or effect the restoration of injured natural resources and provide compensation for interim losses of services;
11. Oversee the protection of cultural resources per Section 106 of the National Historic Preservation Act (36 C.F.R. Part 800 16 U.S.C. 470 as amended 2006) during the management and administration of funds, planning, design, and implementation of restoration efforts, including studies and other tasks associated with the CERCLA/NRDAR process; and
12. Perform any other functions necessary in accord with the goals and intent of this MOU.

F. Coordination with Potentially Responsible Parties (PRPs)

The Trustee representatives agree that they will endeavor to have coordinated communications with PRPs regarding the Sites. This agreement shall not preclude a Trustee representative or its agent from having separate communications with the PRPs on matters within the scope of the MOU where circumstances require; provided that if it is allowed to do so consistent with any applicable court order and its own authority such Trustee representative notifies the other Trustee representatives in advance and summarizes the substance and outcome of the communication immediately thereafter. In instances where it is not possible or appropriate to notify the Trustee representatives in advance, the Trustee representative shall notify the LAT as soon as possible after the communication with the PRP. In circumstances where a Party's communications with a PRP are governed by the terms of a confidentiality order issued by a court of competent jurisdiction, the terms of that confidentiality order shall govern the Party's obligations under this MOU.

G. Natural Resource Damages

In recognition of the Congressional intent under CERCLA to restore natural resources and their services injured, destroyed, or lost as a result of a release of hazardous substances, the measure of recoverable damages for NRDAR contemplated under this Agreement includes all allowable damages under state or federal law, including, but not limited to:

- a. The costs of restoring injured natural resources and their services;
- b. Interim lost use or diminution of value of the injured natural resources pending natural recovery or restoration of the injured natural resources;
- c. Reasonable assessment costs of the NRDAR; and
- d. Trustee oversight costs associated with administering or implementing restoration projects for injured natural resources.

H. Use of Funds

While this MOU establishes the framework for operations of the Trustee Councils and provides that the Councils will establish procedures for disbursing funds available to it for purposes of NRDAR activities, the MOU does not provide for services between individual Trustees. Nothing in the MOU shall obligate any federal government Trustee to expend any funds in excess of appropriations authorized by law or to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341. Nothing in this MOU shall obligate the Montana Natural Resource Damage Program to pay or expend funds or provide services in the absence of

funding secured specifically for this purpose. Nothing in this MOU shall obligate any tribal Trustee to pay or expend funds or provide services in the absence of funding secured specifically for this purpose.

The parties recognize that the recovery and expenditure of any natural resource damages must be approved by the Trustees directly, including the Governor of the State of Montana.

The amount of each Trustee's reasonable assessment costs, and future administrative costs, if any, shall be specifically identified as such in each claim, collection, settlement, or recovery of damages. Reasonable assessment costs include the costs of damage assessment activities incurred by natural resource trustees in accordance with the FWPCA, CERCLA, 43 C.F.R. Part 11, and the Comprehensive Environmental Cleanup and Responsibility Act, § 75-10-701, *et seq.* (CECRA), as applicable. Such costs include administrative costs, legal costs, and other costs necessary to carry out a damage assessment; monitoring and oversight costs; costs associated with public participation; enforcement costs (under state law), and overhead/indirect costs that are necessary to carry out a damage assessment and restoration planning, implementation, and monitoring. The Trustee representatives agree to request that the potentially responsible party separately reimburse each individual Trustee agency for past and future assessment costs. Each Trustee's recovered individual assessment costs may be used at its individual discretion in accordance with the FWPCA, CERCLA, 43 C.F.R. Part 11, and CECRA, as applicable. The Trustee representatives agree to mutually establish appropriate parameters, including but not limited to, direct costs, overhead/indirect cost rates, budgets, estimates, documentation procedures, and limitations upon administrative expenses for any joint accounts and joint court registry accounts. Costs for administering any fund established by the Parties shall be jointly reviewed and approved by the Trustee Council prior to incurring any costs.

I. Confidentiality

The Council will determine what decisions, activities, and positions it will communicate to non-Trustee parties before any such communications occur pursuant to this Article. The Trustee representatives agree that it is generally in the public interest that, after it has been validated, scientific data originating from the assessment of injuries to natural resources be released to the public.

The Trustee representatives agree to a general policy of making scientific data available to the public.

The Trustee representatives also agree that information subject to public disclosure upon request and pursuant to the Freedom of Information Act (FOIA) and state law shall be released. However, the Trustee representatives to this MOU recognize that written and oral communications related to the assessment and recovery of damages for injury to natural resources may be undertaken in anticipation of litigation. Accordingly, all oral and written communications and work products that are treated as privileged attorney-client communications, attorney work products or protected by other applicable privilege or other legal classification (or a combination thereof) and are exchanged within each Trustee Council, will be protected from disclosure by virtue of this MOU as well as under applicable federal, tribal, and state law. The purpose of the confidentiality provisions in this Agreement is to promote open communication and sharing of documents between and within the Parties' respective organizations related to the CERCLA response actions and the natural resource damage assessment and recovery process, while preserving the privilege and confidentiality of information collected and documents prepared, edited, or discussed. All documents and information (including oral and video communications) that fall within one or more of the legal privileges associated with such activities and are properly designated as confidential and/or privileged (or words of similar import) are intended to be treated by the recipient Party as confidential and/or privileged to the extent permitted by law.

It is the Parties' view and intent that sharing information, including certain documents, factual materials, mental impressions, memoranda, reports, and other information, some of which may be confidential and/or privileged, is to the Parties' mutual benefit and common interest.

The exchange of such information and/or documents consistent with these confidentiality provisions in this Agreement is not a public disclosure under federal or Montana law. However, information that is otherwise discoverable and not privileged shall not become privileged simply because it was shared between one or more Party.

No Party shall have authority to waive any applicable privilege or doctrine on behalf of any other Party, nor shall any waiver of an applicable privilege or doctrine by one Party be construed to apply to the other Parties. Any third-party

consultant or contractor who is retained by a Party to work on a Site will be allowed access to the documents or communications covered by this Agreement, if the consultant or contractor agrees in writing to be bound by this Agreement. The Parties agree to only consult/contract with individuals on a Site that agree to be bound by the confidentiality provisions in this Agreement.

All Trustees agree to notify the other Trustees in writing of each request for information that would, fairly construed, seek disclosure or production of confidential or privileged information or documents that such Party received pursuant to the confidentiality provisions in this Agreement, no more than five (5) days from the date when the request is received. In the event that any Trustee receives a request for documents under the FOIA, 5 U.S.C. § 552 as amended, or under State of Montana law, §§ 2-6-1001, MCA, *et seq.*, or pursuant to any other applicable federal, tribal, or state law, the request will be forwarded to the Trustees or Trustees to which the privilege applies or who originally generated or contributed the requested record. The Trustee parties to this MOU agree to enable any Party claiming privilege or some other defense related to disclosure with respect to a particular document the reasonable opportunity to prevent disclosure under FOIA, PRA, or otherwise.

In circumstances where a Party's communications are governed by the terms of a confidentiality order issued by a court of competent jurisdiction, the terms of that confidentiality order shall govern the Party's obligations under this MOU.

The confidentiality requirements of this Agreement, as applied to all confidential and/or privileged information or documents, shall survive all of the following: (a) withdrawal by a Party from this Agreement; (b) termination of this Agreement; (c) the final disposition of actions at the Sites.

J. Protection of Cultural Resources

The location of cultural resources will not be disclosed to the public as stipulated in the Archaeological Resources Protection Act (ARPA as amended 1998, 16 U.S.C. 470hh), the National Historic Preservation Act (36 CFR Part 800, 16 U.S.C. 470w-3 as amended 2006), and Exemption 3 of the Freedom of Information Act (FOIA as amended 2007) or (Trustee) Tribal Laws and Ordinances.

All information identified by a Trustee Tribe or tribal member concerning cultural resources, traditional uses of culturally important biological resources, and their

locations is proprietary to the holder and confidential. If a Trustee tribal government or a tribal member should share information regarding these resources with one or more Trustees, the Trustees shall not divulge this information to any non-Trustee party, unless required by law or agreed to in advance by the Tribal Council.

VII. General Provisions

A. Reservation of Rights

Except for the confidentiality provisions contained in Article VI, Section I, of this MOU, all Trustees understand that this document is not intended to create any legal rights or obligations among the Trustees or any other persons not a party to this MOU. Nothing in this MOU is intended to imply that any signatory Trustee agency is in any way abrogating or ceding any responsibility or authority inherent in its trusteeship over natural resources.

B. Participation in Similar Activities

This MOU in no way restricts the Trustees from participating in similar activities with other public or private agencies, organizations, or individuals that do not conflict with the purposes of or action taken pursuant to this MOU. However, the Trustee representatives and the LAT are not authorized to enter into settlements on behalf of other Trustees, and a Trustee party does not represent another Trustee in any litigation that may be commenced by other Trustees.

C. Third Party Challenges or Appeals

This MOU is not intended to, nor shall it, vest rights in persons who do not represent the Trustees or who are not parties hereto. Nothing in this MOU creates any cause of action in persons not parties to this MOU. Nothing in this MOU shall be construed as a basis for any third-party challenge or appeal.

D. Modification

It is acknowledged that additional agreements may be executed by the Trustees and their representatives with regard to natural resource damage claims that may arise after the execution of this MOU and after planning for the restoration,

replacement, rehabilitation, and/or acquisition of equivalent natural resources and resource services that may be injured, destroyed, or lost. Therefore, any modifications of this MOU must be in writing and, to be effective, approved by all Trustee representatives.

E. Cost Records Maintenance

The Trustee representatives agree to maintain adequate records that document the reasonable assessment costs each has incurred in connection with and arising from the NRDAR process, assessment, and pursuit of any claims for injury to natural resources, for the purpose of recovery of such costs when appropriate.

F. Withdrawal

Any Trustee may withdraw from this MOU upon written notice in accordance herewith. In the event any Trustee withdraws from the MOU, such withdrawal must be in writing and submitted to all other Trustees representatives at least thirty (30) business days in advance of the effective date of withdrawal. In the event of such withdrawal, this MOU remains in full force and effect for the remaining Trustees. A withdrawing Trustee agrees to prepare a full and complete accounting and status report of its Trustee accounts. At least two Trustees must remain parties to the MOU for the MOU to remain in effect.

G. Execution and Counterparts

This MOU may be executed in counterparts. A printed copy with all original executed signature pages affixed shall constitute the entire, original MOU. The terms and provisions of this MOU shall be binding on each Trustee upon execution by that Trustee representative.

H. Effective Date and Termination

The Effective Date of the MOU shall be the date on which the last Trustee representative to sign the MOU does so sign, except that as other duly designated Trustees may elect to become a party to this MOU, their participation will commence on the date this MOU is signed. If at any time the Trustee representatives by consensus find that the purposes underlying the

MOU have been achieved, the MOU will terminate upon such a finding. In the event of termination of this MOU, each Trustee representative agrees to cooperate in preparing a full and complete accounting and status report of all funds that it has received for the purposes described in this MOU.

We, the undersigned authorized representatives, hereby agree to the terms and conditions set forth in this Memorandum of Understanding:

Signature Page

Harley Harris

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Harris
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5/20/22

Harley Harris
Supervising Assistant Attorney General
State of Montana
Natural Resource Damage Program

Date



Tom McDonald, Chairman
Tribal Council
Confederated Salish and Kootenai Tribes

07/13/2022

Date

Matt Hogan
Regional Director
U.S. Fish and Wildlife Service
Department of Interior Regions 5 and 7

Date

Leanne Marten
Regional Forester
Forest Service
Northern Regional Office, Engineering

Date

MOU have been achieved, the MOU will terminate upon such a finding. In the event of termination of this MOU, each Trustee representative agrees to cooperate in preparing a full and complete accounting and status report of all funds that it has received for the purposes described in this MOU.

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Harley Harris
Supervising Assistant Attorney General
State of Montana
Natural Resource Damage Program

Date

Tom McDonald, Chairman
Tribal Council
Confederated Salish and Kootenai Tribes

Date

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Matt Hogan
Regional Director
U.S. Fish and Wildlife Service
Department of Interior Regions 5 and 7

Date

Leanne Marten
Regional Forester
Forest Service
Northern Regional Office, Engineering

Date

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5/20/22

Harley Harris
Supervising Assistant Attorney General
State of Montana
Natural Resource Damage Program

Date

Tom McDonald, Chairman
Tribal Council
Confederated Salish and Kootenai Tribes

Date

Matt Hogan
Regional Director
U.S. Fish and Wildlife Service
Department of Interior Regions 5 and 7

Date



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MARTEN
Date: 2022.07.22 10:59:15 -06'00'

Leanne Marten
Regional Forester
Forest Service
Northern Regional Office, Engineering

Date