

# MEMORANDUM OF AGREEMENT

## AMONG

### STATE OF UTAH NATURAL RESOURCE TRUSTEES AND UNITED STATES DEPARTMENT OF THE INTERIOR

#### I. INTRODUCTION

This Memorandum of Agreement (MOA), executed by the Officers of the State of Utah Natural Resource Trustees and the United States Department of the Interior (DOI) (individually referred to as Trustee, or collectively referred to as the Trustees), is entered into in recognition of their common interests and/or responsibilities as designated natural resource trustees. This MOA addresses the Trustees' coordination and cooperation in: 1) the initiation and conduct of natural resource damage assessments; 2) settlement negotiations, development of positions for covenants not to sue or administrative releases from liability; and/or 3) development and support of claims for litigation for injuries to natural resources resulting from discharges of oil or releases of hazardous substances. The MOA further addresses the application of any natural resource damages jointly recovered via any of those mechanisms toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

#### II. PARTIES

The following Trustees or their designees are Parties to this MOA and act on behalf of the public as Trustees for natural resources under this MOA:

1. The Deputy Director of the Utah Department of Environmental Quality, acting on behalf of the Governor of the State of Utah,
2. The Director of the Utah Department of Natural Resources, acting on behalf of the Governor of the State of Utah, and
3. The Director of the Office of Restoration and Damage Assessment, acting on behalf of the Secretary of the United States Department of the Interior.

Notwithstanding any other provision of this MOA, any natural resource trustee (as defined in 40 C.F.R. §§ 300.600- 300.612) who is not a Party to this MOA and who has a natural resource interest that is affected by a discharge of oil or release of a hazardous substance shall not be precluded by this MOA from participating in the natural resource damage assessment process. At the election of such trustee, he or she may be added as a Party by addendum to this MOA, as necessary. Such other trustees may include, but are not limited to, Tribal governments, other Federal agencies, foreign countries, and affected trustee agencies from other states, provided that statutory authority exists for designating such other entities as a Trustee under this MOA.

### III. GEOGRAPHIC SCOPE

This MOA addresses natural resources within the boundaries of the State of Utah belonging to, managed by, held in trust by or otherwise controlled by the Federal and/or State Trustees which may be affected as a result of discharges or substantial threats of discharges of oil as defined by the Federal Water Pollution Control Act (FWPCA or Clean Water Act), 33 U.S.C. §§ 1251 - 1387., and the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701- 2762., or injured as a result of releases of hazardous substances as defined by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 . This MOA also addresses injuries that may occur from discharges or releases in waters outside of the State's boundary with the potential of migrating into the State.

### IV. PURPOSE

The Trustees recognize the importance of coordinating and cooperating in natural resource damage assessment and restoration activities among themselves and with the lead response or corrective action agencies to minimize and assess injury to, destruction of, or loss of natural resources resulting from actual or threatened discharges of oil or releases of hazardous substances, including the consequences of removal, remedial, and corrective actions. The Trustees' primary goals are to seek compensation for the public for losses caused by discharges (or substantial threats of discharges) of oil or releases of hazardous substances and ensure the restoration, replacement, rehabilitation, and/or acquisition of the equivalent of those affected resources and/or their services. In order to achieve these goals, the Trustees' activities will primarily involve:

- A. coordination of all planning, assessments and investigations to determine what natural resources and their services have been injured and the extent of such injuries as well as identification and implementation of appropriate restoration projects to compensate the public for the loss(es);
- B. to the extent practicable, coordination with the lead response agency to prevent and minimize injury to natural resources and their services as part of the removal, remedial or corrective action and, as appropriate, incorporation of restoration actions in the response;
- C. determination of conditions upon which the Trustees, individually or collectively, may grant covenants not to sue or other type of judicial or administrative release from liability during consent decree or other negotiations;
- D. otherwise assessing and determining injury, seeking damages for injuries to natural resources and/or the services they provide and developing and implementing restoration projects to compensate for the injured resources and /or their services; and
- E. identification of possible restoration actions and the planning, implementing, and monitoring of selected restoration actions to compensate the public for the loss of natural resources and/or their associated services.

The purpose of this MOA is to provide a framework for such coordination and cooperation among the Trustees for natural resource damage assessment and restoration (NRDAR), and for the implementation of the activities of the Trustees in furtherance of their

natural resource trustee responsibilities for those natural resources affected by those discharges or releases mentioned above. While this document is designed to eliminate the need for site- or incident-specific MOAs, such additional MOAs may be useful or necessary in some cases.

## V. AUTHORITY

The Trustees enter into this MOA in accordance with the legal authorities provided for each Trustee by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 C.F.R. Part 300), CERCLA, the FWPCA, OPA, the CERCLA NRDAR Regulations, 43 C.F.R. Part 11, the OPA NRDAR regulations, 15 C.F.R. Part 990, any amendments to the foregoing, and any other applicable laws or authorities. The State Trustees enter into this MOA pursuant to designation by the Governor of the State of Utah under CERCLA, the FWPCA, OPA, and any other applicable laws or authorities. Nothing in this MOA shall be construed to interfere or conflict with the natural resource damage assessment regulations in 43 C.F.R. Part 11 or 15 C.F.R. Part 990, as applicable to the site or incident.

## VI. TRUSTEE FUNCTIONS

Consistent with the applicable NRDAR regulations as well as their individual authorities and policies, the Trustees or their representatives or designees may employ one or more of several types of actions, depending on the circumstances of each discharge or release, in order to carry out their responsibility to minimize injury to natural resources, assess the nature and extent of injuries, determine damages and to seek restoration. The measure of natural resource damages includes the cost of restoring or rehabilitating the injured natural resources and/or their services to a condition where they can provide the level of services available at baseline, or replacing or acquiring equivalent natural resources capable of providing such services, or a combination thereof. Damages also include compensation for interim service losses or diminution in value pending restoration, assessment costs, and funds needed for restoration planning, implementation, oversight, and monitoring. The Trustees recognize that there shall be no double counting of damages. Trustee actions may include, but are not limited to:

- A. Performing preliminary assessments to determine the potential threat or the nature and extent of threats to natural resources;
- B. Preventing injury, destruction, or loss through requests for initiation of removal or remedial actions by authorized agencies, or by seeking injunctive relief where authorized by law;
- C. Performing emergency restoration actions and seeking cost recovery for those actions;
- D. Minimizing residual natural resource injuries by participating in removal, remedial, or corrective actions as advisors to the lead response or corrective action agency, and seeking restoration and compensation for any past or residual injury at response or corrective action sites or oil spill incidents;

- E. Negotiating a judicial covenant not to sue for natural resource damages for releases covered by CERCLA, OPA, or FWPCA, where appropriate, through the U.S. Department of Justice and the Office of the Utah Attorney General;
- F. Negotiating cooperative funding agreements with a potentially responsible party and/or interagency agreements between the Federal Lead Administrative Trustee and the U.S. Coast Guard National Pollution Funds Center;
- G. Performing natural resource damage assessments pursuant to applicable regulation, including but not limited to investigating natural resources and their services that may have been affected by a discharge or release and determining the extent and duration of injuries;
- H. Negotiating administrative or judicial agreements for resource protection measures, restoration, and/or compensation for natural resource damages;
- I. Referring claims for natural resource damages for litigation; and/or
- J. Preparing restoration plan(s).
- K. Identifying, planning and implementing selected restoration actions.

## VII. RESTORATION GOAL

The goal of restoration is to assure that no net loss of natural resources and/or their services occurs. Prior to the consideration of restoration alternatives, the Trustees will strive to have any continuing releases that would impede natural recovery or limit the effectiveness of restoration activities controlled. In addition, the restoration of the chemical and physical quality of the environment and the ecological and natural resource services it provides to baseline and/or no effects levels will be sought. Methods to accelerate the rate of return of injured habitats or ecosystems to baseline levels of services will be used whenever possible. Key species should be restored to baseline levels and lost services should be replaced as directly as possible. Consistent with the guidelines above, and regardless of whether restoration action addresses restoration to baseline conditions or addresses interim losses, the restoration actions considered should have, as closely as possible, a demonstrable direct link to the injuries or losses caused by the release or discharge. Projects with less direct benefits to injured resources or lost services (*e.g.*, out-of-kind restoration or restoration distant from the site of injury) generally will be considered when there are compelling reasons for such alternatives (*e.g.*, high levels of residual on-site contamination or restoration more effective in breeding habitat than on-site). When acquisition is included as an alternative, it will be supported by endowment funds to cover long-term operation and maintenance wherever possible.

## VIII. TRUSTEE ORGANIZATION

The Trustees and their representatives recognize the importance of planning and coordinating their efforts in order to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable Federal and State law. The Trustees and/or Trustee representatives will coordinate their efforts to ensure the following, as applicable:

- A. that any time a Trustee becomes aware that a discharge (or substantial threat of discharge) of oil or release of a hazardous substance has injured, is injuring, or may injure natural resources, the Trustee will promptly notify the other Trustees;
- B. that sites with co-Trustee interests are brought to the attention of response agencies, including, but not limited to, CERCLA National Priorities List (NPL) sites, Resource Conservation and Recovery Act (RCRA) facilities, State sites, instantaneous discharges of oil or releases of hazardous substances, and fishing, hunting and gathering, and recreational closures or advisories due to the discharge (or substantial threat of discharge) of oil or release of hazardous substances;
- C. that where possible, Trustees coordinate written comments to the lead agency On Scene Coordinators or Remedial Project Managers or their equivalent on all lead agency directed scopes of work, work plans, assessments and investigations, including remedial investigations, feasibility studies, and remedial designs; and
- D. that State and Federal agencies, departments, and offices coordinate in consent decree, administrative agreement, or other types of negotiations.

Notification, including by telephone, electronic mail, letter, or other method to or between the Trustees, pertaining to activities which are subject to coordination and cooperation under this MOA shall be sent to the Trustees.

For each individual site or incident involving significant participation by two or more State and/or Federal Trustees, the Trustees agree to create a council (Trustee Council) representing the Trustees with an interest in potentially affected resources, which will implement this MOA. Creation of a Council for a particular site or incident under this MOA shall be documented by letter(s) or resolution(s) between the Trustees and will be appended to this MOA, and will be placed in the administrative record for the particular case.

Each Trustee will designate a primary representative to serve on the Trustee Council, however additional representatives may participate in the Council as appropriate. Each representative on the Trustee Council shall have the level of knowledge and expertise needed to effectively guide the damage assessment and restoration process. In addition, each Trustee agrees that the primary representative to the Trustee Council will have, at a minimum, the level of authority necessary to make decisions on issues presented to the Council.

The Trustee Council will designate a Lead Administrative Trustee (defined in 40 C.F.R. § 300.5) or the functional equivalent for individual sites or incidents for administrative purposes. The Trustee Council may seek additional legal or scientific expertise outside its membership when needed. The Trustee Council may also establish committees and subcommittees as necessary for the efficient operation of the Council. Each Trustee agency will notify all the Trustees when Trustee Council representatives resign and agree to inform other Trustee Council representatives about who the replacement will be. For individual incidents, the Trustee Council will attempt to name the Lead Administrative Trustee (or the functional equivalent) within 24 hours of Trustee notification in order that a Trustee point-of-contact is established as rapidly as possible. In addition, where appropriate, the Federal Trustee shall be the Federal Lead Administrative Trustee as required by the National Pollution Funds Center for the purposes of accessing and utilizing the assets of the U.S. Coast Guard's Federal Oil Spill Liability Trust Fund.

## **IX. TRUSTEE COUNCIL DUTIES AND RESPONSIBILITIES**

On behalf of the Trustees, the Trustee Council shall coordinate and authorize (consistent with applicable law, policy, mandated areas of jurisdiction, and areas of special expertise) all Trustee activities and matters under this MOA in accordance with the decision-making requirements contained in Section XI. The Trustee Council may take whatever action it determines is appropriate to fulfill the responsibilities of the natural resource Trustees under and to effectuate the purposes of applicable Federal and state law. It is expected that the Trustee Council may, as appropriate and consistent with each representative's delegated Trustee authority, take any of the following actions, among others, while focusing on their individual authority and the natural resources and services under their jurisdiction related to a particular site or incident:

- A. Develop and approve a case work plan and budget.
- B. Oversee and implement the work plan.
- C. Conduct or oversee scientific and technical studies, sampling, and other matters related to the determination of injuries and/or the assessment of damages for natural resources and their services which may have been lost, injured or destroyed.
- D. Seek compensation from potentially responsible parties for damages and/or restoration costs and for the costs of planning and implementing the assessment and/or restoration.
- E. Participate in negotiations with potentially responsible parties.
- F. In accordance with applicable law and respective agency policy and delegation of authority, supervise, manage and obligate any money jointly paid to the Trustees (either Advanced Funding, or recovered damages) for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources and/or their services.
- G. Oversee the development, implementation, and appropriate monitoring of a plan(s) for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those natural resources and/or their services that may be injured, destroyed or lost.
- H. In accordance with applicable law, arrange contracts with professional consultants that the Trustee Council determines are necessary to fulfill Trustee duties and responsibilities pursuant to applicable statutes and regulations.
- I. Communicate with potentially responsible parties or their agents and with other persons or entities. The Parties agree that the Trustee Council will endeavor to have coordinated communications with potentially responsible parties or their agents and with other persons or entities on matters related to natural resource damage assessment and restoration and claims for those damages. No Trustee or Trustee Council representative will speak on behalf of the other Trustees without express authorization. To the maximum extent possible, Trustees and Trustee Council representatives will endeavor to provide notice to other Trustees and to provide them with an opportunity to participate in communications with potentially responsible parties before speaking with potentially responsible parties and others. The above agreement shall not preclude a Trustee or Trustee Council

member from having separate communications with the potentially responsible parties on matters within the scope of the MOA where circumstances warrant, provided that each Trustee or Trustee Council representative notifies the other Trustees and agrees to provide documentation of the communication for the Administrative Record, if appropriate. Nothing in this Section purports to or shall prohibit the respective Trustees from fulfilling the mandates of their Office or Department. Where a Trustee Council has been created for a particular site or incident, each Trustee agrees to provide to the other Trustees copies of any documents reflecting such Trustees' negotiations and work pertaining to natural resource damage claims.

- J. Ensure adequate public participation.
- K. Maintain an administrative record of assessment and restoration activities.

## **X. LEAD ADMINISTRATIVE TRUSTEE**

The duties of a Lead Administrative Trustee (or the functional equivalent) for any site or incident shall include, but are not limited to:

- A. coordinating the development of a case work plan and budget for approval by the Trustee Council;
- B. coordinating and monitoring the progress of the formulation of technical and legal positions for covenants not to sue, administrative agreements, or other negotiations;
- C. preparing Trustee Council Resolutions for approval by the Trustees;
- D. developing a draft restoration plan and, as applicable, National Environmental Policy Act analysis;
- E. coordinating and monitoring the preparation of all appropriate documentation of the natural resource damage assessment and restoration process in accordance with applicable laws;
- F. preparing all press releases and other public informational documents for approval by the Trustee Council;
- G. scheduling meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis;
- H. preparing agendas for those meetings;
- I. acting as a central contact point for the Trustee Council;
- J. establishing and maintaining the administrative record for both the injury assessment and restoration as directed by the Trustee Council; and
- K. performing other administrative duties as directed by the Trustee Council.

The Lead Administrative Trustee (or the functional equivalent) will be responsible for informing the other Trustee Council representatives of all pertinent developments on a timely basis. The Lead Administrative Trustee (or the functional equivalent) may delegate any of his/her duties to another Trustee representative with the concurrence of the Council. Assigned duties do not provide the Lead Administrative Trustee (or the functional equivalent) with decision-making rights for other Trustees or beyond those normally held by each Trustee.

## **XI. DECISION MAKING**

All decisions by the Trustee Council implementing this MOA, including selection of the Lead Administrative Trustee (or the functional equivalent) for a particular site or incident, shall be by consensus. Consensus on a Council action is reached when all Trustee Council members agree or do not object to the proposed recommendation or action. 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. In addition, site- or incident-specific agreements among Trustees, or among Trustees and other parties, as appropriate, may address decision-making as to a particular site, incident, or issue.

This Section does not preclude a Trustee from proceeding independently on any aspect of a natural resource damage assessment claim when necessary and appropriate. Each Trustee reserves the right to initiate and conduct litigation against any potentially responsible party and to engage in individual pre-litigation settlement negotiations, subject to the obligation to communicate with other Parties, as set forth in this MOA.

## **XII. FUNDS**

Each Party to this MOA shall be solely responsible for any costs it incurs in fulfilling its obligations under this MOA, and no Party shall have any claim against any other Party for reimbursement of such costs unless provided for and enforceable under a separate written agreement or memorandum signed by representatives of the Parties. The Parties may agree to share the cost of contractors, experts, and/or the cost of studies and other work performed by another Party. Any such cost sharing arrangement shall comply with Section XVII of this MOA.

The Lead Administrative Trustee (or the functional equivalent) will be responsible for developing a strategy to manage funds jointly recovered through settlement or litigation and for presenting it to the Trustee Council for approval. The funds management strategy may include items such as a timeline for restoration expenditures, investment strategy, and other considerations, as appropriate, to timely compensate the public for injured resources and lost services and may be updated periodically, as necessary. The Lead Administrative Trustee (or functional equivalent) will be responsible for preparing Trustee Council resolutions for the investment of joint Trustee funds and/or for the distribution of any joint Trustee funds recovered through settlement or litigation, and for soliciting a vote and obtaining all Trustees written approval of the investment and dispersal of joint funds. All Trustees must agree on the investment of joint funds and the dispersal of jointly recovered funds. The Lead Administrative Trustee (or the functional equivalent) will also be responsible for communicating the Trustees' investment strategy and investment instructions and/or dispersal of funds for restoration planning and implementation to the fund manager(s) of any such joint funds.

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 CERCLA, the FWPCA, OPA, 43 C.F.R. Part 11, and 15 C.F.R. Part 990, 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; and overhead/indirect costs that are necessary to carry out a damage assessment and restoration planning, implementation, and monitoring. The Trustees agree to request that potentially responsible parties 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 CERCLA, the FWPCA, and OPA, 43 C.F.R. Part 11, and 15 C.F.R. Part 990, as applicable. The Trustees 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 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.

### **XIII. CONFIDENTIALITY**

The Trustees support an open government policy of providing access to scientific information created or obtained by the Trustees during the damage assessment and restoration process. The Parties understand that all communications, whether written, oral, or electronic, related to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation. Accordingly, the Trustees shall treat all communications and work product as privileged attorney-client communication, attorney work product, or protected by other applicable privilege (or combination thereof), as appropriate, and shall protect such communications and work products from disclosure to the maximum extent possible under applicable law, including Federal and State rules of evidence and discovery and Federal and State open records and meetings laws. The Trustees further understand that information created or obtained under this MOA by the Trustees, the Utah Department of Environmental Quality, the Utah Department of Natural Resources or by the Department of the Interior may be subject to disclosure under the *Utah Governmental Records Access and Management Act* and/or the *Freedom of Information Act*. All Parties agree to notify other Parties, in writing, of each request for information no more than five (5) days from the date of receipt of such request.

#### **XIV. RESERVATION OF RIGHTS AND PARTICIPATION IN SIMILAR ACTIVITIES**

All Parties understand that this document is not intended to create any further legal rights or obligations among the Trustees or any other persons not a party to this MOA. Nothing in this MOA is to imply that any signatory government is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources. This instrument in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations and individuals.

#### **XV. MODIFICATION OF AGREEMENT**

This MOA may be modified only by a written document signed by all Trustees. It is acknowledged that additional agreements may be executed by the Trustees with regard to natural resource damage claims that arise and for planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. These site- or incident-specific agreements shall not be considered modifications of this MOA.

#### **XVI. TERMINATION**

This MOA shall be in effect from the date of execution, unless terminated in advance by action of the Trustees. At any time the Trustees determine that there is no purpose served by this MOA, the MOA will terminate upon such a finding. Any Trustee may withdraw from this MOA at any time for any reason. In the event any Trustee withdraws from the MOA, it must provide thirty (30) days written notice before the withdrawal can become effective.

In the event of the withdrawal of any Trustee, or at the termination of this MOA, each Trustee agrees to cooperate in preparing a full and complete accounting for and status report of all accounts managed jointly by the Trustees or their representatives pursuant to Section XII of this MOA.

This MOA is subject to renewal by action of the Trustees for five year terms in successive periods.

#### **XVII. LIMITATION**

Nothing in this MOA shall be construed as obligating the United States, the State of Utah or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law, or to expend funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or State law. This MOA does not apply to any site which is the subject of pending, settled or completed natural resource damage litigation under CERCLA, the FWPCA,

and/or OPA as of the effective date of this MOA. This MOA does not apply to or replace site- or incident-specific MOAs in existence as of the effective date of this MOA.

This document is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the Trustees will be handled in accordance with applicable laws, regulations, and procedures including those governing procurement by each Party of goods and services. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the Trustees and shall be independently authorized by appropriate statutory authority.

### **XVIII. THIRD PARTY CHALLENGES OR APPEALS**

The rights and responsibilities contained in this MOA are subject to the availability of funding and are intended to be guidance for the respective Trustees. The provisions in this MOA shall not be construed as a 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 agreement.

### **XIX. EXECUTION AND EFFECTIVE DATE**

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA. The effective date of the MOA shall be the date on which the last Trustee to sign the MOA does so sign, except that as other duly designated Trustees may elect to become a party to this MOA, their participation will commence on the date this MOA is signed.

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UNITED STATES DEPARTMENT OF THE INTERIOR



\_\_\_\_\_  
State of Utah Lead Trustee  
Brad T Johnson, Deputy Director  
Utah Department of Environmental Quality

4/27/2016

Date



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State of Utah Co-Trustee  
Mike Styler, Director  
Utah Department of Natural Resources

April 25, 2016

Date

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UNITED STATES DEPARTMENT OF THE INTERIOR

*Steve Glomb*

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Steve Glomb, Director  
Office of Restoration and Damage Assessment  
U.S. Department of the Interior

4/11/16

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Date