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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) **MEMORANDUM IN SUPPORT OF**
) **STATE OF IDAHO'S AND IDAHO**
) **POWER COMPANY'S JOINT**
) **MOTIONS TO ENTER AND**
) **MODIFY PARTIAL DECREES**

FACTS

On March 26, 2009, the State of Idaho and Idaho Power Company filed a joint motion requesting that this Court enter an order withholding rulings on the pending summary judgment motions, to allow time for review and implementation of a proposed settlement. The proposed settlement contemplated, among other things, submission to the Court of a proposed dismissal stipulation and proposed partial decrees for the hydropower water rights at issue in this consolidated subcase. *State Of Idaho's And Idaho Power Company's Joint Motion To Temporarily Withhold Rulings On Pending Summary Judgment Motions* at 2 (Mar. 26, 2009).

The following day, this Court entered an order providing that it would withhold any rulings on the pending summary judgment motions for a period of ninety (90) days. *Order Re: Rulings On Pending Summary Judgment Motions* at 2 (Mar. 27, 2009). The order further provided that this Court would enter summary judgment rulings at an appropriate time in the normal course of the Court's work if the proposed partial decrees and dismissal motion had not been submitted prior to the expiration of the ninety (90) day period. *Id.*

On June 25, 2009, the State and Idaho Power jointly filed the following motions:

1. *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37* (including proposed partial decrees);
2. *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026* (including proposed partial decrees);

3. *State Of Idaho's And Idaho Power Company's Joint Motion To Consolidate Water Right 02-10135 Into Consolidated Subcase 00-92023*; and

4. *State Of Idaho's And Idaho Power Company's Stipulation And Motion To Dismiss Complaint And Petition For Declaratory And Injunctive Relief* (including proposed dismissal order).

The State and Idaho Power requested a status conference to determine whether there was any opposition to the above-listed filings ("*Joint Motions*"), and this Court set a status conference for July 21, 2009. *Order Setting Status Conference On The State Of Idaho's And Idaho Power Company's Joint Motion To Dismiss; Joint Motion To Modify Partial Decrees; Joint Motion To Consolidate; And Joint Motion For Entry Of Partial Decrees* at 2 (June 26, 2009). On the day of the status conference, various ground and surface water users' entities ("*Upper Snake Water Users*") filed the *Upper Snake Water Users' Response To State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*, which set forth a concern with certain language in the first remark in the "Other Provisions" section of the proposed partial decrees, and proposed changes to that language.

Also on July 21, the City of Pocatello filed the *City Of Pocatello's Statement For July 21, 2009 Status Conference Regarding The June 25, 2009 State Of Idaho And Idaho Power Joint Motions To Modify Partial Decrees, Consolidate, And Enter Partial Decrees* ("*Pocatello's Statement*"). The City of Pocatello stated that it intended to obtain expert review of certain historic data relevant to the administration of the Swan Falls Agreement and requested a schedule to accommodate the experts' work. *Id.* at 1-2.

At the July 21 status conference, counsel for the City of Pocatello discussed the City's concerns with the proposed partial decrees and its view that it needed additional time to obtain expert analysis of historic flow data. Counsel for the Upper Snake Water Users also discussed their objection. In addition, counsel for Jeff C. and Jackie Harper, Basin and Range Resource Company LLC, and Interested Water Users (collectively, "Interested Water Users") expressed concerns with the proposed partial decrees. Pursuant to the status conference, this Court issued an order setting the following schedule:

1. August 5, 2009: filing of Interested Water Users statement of issues;
2. September 4, 2009: filing of the State's and Idaho Power's joint opening brief in support of the Joint Motions;
3. October 5, 2009: filing of response briefs;
4. October 19, 2009: filing of joint reply brief; and
5. November 6, 2009 (10:00 a.m.): oral argument.

Scheduling Order (Jul. 23, 2009).

On July 23, the Upper Snake Water Users filed an amended version of their July 21 filing. The amendment was minor and did not alter or add to the concerns expressed, or the changes requested, in their July 21 filing. (Hereinafter, the July 21 and July 23 filings are collectively referred to as the "*Upper Snake Water Users' Response*.") On August 5, 2009, the Interested Water Users filed a "*Statement of Issues*" that set forth concerns with, and proposed changes to, certain language in the remarks in the proposed partial decrees.

ARGUMENT

I. The Proposed Partial Decrees Use The Language Of The Agreement.

The question presented by the *Joint Motions* is whether the partial decrees proposed by the State and Idaho Power are consistent with and give effect to the terms of the Swan Falls Agreement. As this Court has previously observed in this consolidated subcase: “The very purpose of the Swan Falls Agreement is to define Idaho Power’s water rights.” *Memorandum Decision And Order On Cross-Motions For Summary Judgment* at 45 (Apr. 18, 2008) (“*Memorandum Decision*”). “Clearly, decreeing the rights consistent with the intent of the parties requires an examination of the underlying Agreement.” *Id.* at 23.

An examination of the language of the Swan Falls Agreement and the pertinent remarks in the partial decrees proposed under the *Joint Motions* demonstrates that the language of the proposed remarks is taken directly from the Agreement, including the Exhibits thereto and the implementing legislation (collectively, the “Agreement”). The Agreement’s language has been modified in the proposed remarks only to the extent necessary: (1) to reaffirm the intent and effect of the Agreement with respect to the resolution of the summary judgment issues raised in this consolidated subcase; and (2) to translate contractual language (which defines agreements and obligations) into partial decree language (which defines a water right).

The Upper Snake Water Users, the City of Pocatello and the Interested Water Users (“Objectors”) would go further, and propose to substantially alter the plain language of the Agreement. While the Objectors’ proposals purport to simply clarify the Agreement or resolve ambiguities, they would have the opposite effect, and in several

instances would result in partial decrees that significantly depart from the language and intent of the Swan Falls Agreement.

II. The Upper Snake Water Users' Objection.

The Upper Snake Water Users' objection is based on the incorrect premise that Paragraph 7 of the Swan Falls Agreement is ambiguous with respect to whether the seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. at the Murphy Gaging Station are to be administered on the basis of "actual flows" or "calculated flows." This objection sets up a false dichotomy.

The Agreement confirms that the Murphy flows are "calculated" flows. Paragraphs 7(A) and 7(B) state that the Murphy flows are an "average daily flow." Swan Falls Agreement ¶¶ 7(A), 7(B). An "average" daily flow is by definition a "calculated" flow: an "average" daily flow is determined by summing the flow measurements for a twenty-four (24) hour period and dividing by the number of measurements.¹ Further,

¹ "Average daily flow" was a common flow measurement methodology that had been used for some time prior to the Agreement by both the U.S.G.S and the Idaho Water Resource Board. The original purpose of averaging the flow measurements for a twenty-four hour period was to compensate for the effects of various influences that could result in abnormally high or low instantaneous flow measurements at any given time during the day. This was explained by Idaho Power attorney Tom Nelson and Idaho Water Resource Board representative Frank Sherman during the Idaho Water Resource Board's hearings on the State Water Plan amendments that had been proposed for purposes of implementing the Swan Falls settlement:

MR. NELSON: Mr. Chairman, my understanding -- and we have some technical people here -- but as explained to me by the G.S., the way they use average daily flow is, take for example, you had a gage where you read it every hour; all right? So you would go down and you would have a reading every hour and you would average those 24 flows, and that would be the average --

MR. WILLIAMS: For that.

MR. NELSON: -- daily flow.

MR. WILLIAMS: Okay. So it is --

paragraph 7(B) expressly refers to "the calculation" of the average daily flows. Swan Falls Agreement ¶ 7(B).

Moreover, Paragraph 7 does not use the term "actual flows." Rather, Paragraph 7 provides that the calculation of the average daily flows shall be based upon "actual flow conditions." Swan Falls Agreement ¶ 7(B) (underlining added). This term simply means that all flows actually present at the Murphy Gaging Station are to be included in "the calculation" of the "average daily flows," with the sole exclusion of "fluctuations

MR. NELSON: And -- but it's within that day. Now, the average -- or the lowest instantaneous flow at -- at the Murphy gage, by way of example, I think is in the area of 3,600, whereas the lowest average daily flow is 4,500.

MR. WILLIAMS: I see.

MR. NELSON: See --

MR. WILLIAMS: By average all the measurements for that particular day?

MR. NELSON: Yeah. That's my understanding of the way the G.S. uses average daily flow, as the Board has used it in the Water Plan.

MR. WILLIAMS: Some of those fluctuations may be because of discharges from dams and hydro --

MR. NELSON: Whether or not certain irrigation pumps are on or off and that sort of thing, whether you had rain on a particular tributary that day and that sort of thing.

MR. WILLIAMS: Okay. That answered it. Thank you.

MR. NELSON: I assume we'll hear from the technical people if that's not an accurate explanation.

Third Affidavit of Michael C. Orr, Exhibit 27 at 21-22 (transcript of Idaho Water Resource Board hearing, Feb. 5, 1985 (7 p.m.), Boise, Idaho) (transcript pages 75-77). Idaho Water Resource Board representative Frank Sherman gave a similar explanation during the next day's hearing:

[MR. SHERMAN:] . . . Typically, for management purposes, we use the average daily flow: Four readings, ten readings, 24 readings in one day averaged together because of the influences of minor thunderstorms, pumps on and off, Idaho Power's (unintelligible) operations. So we talk in terms of the daily average.

Id., Exhibit 28 at 5 (transcript of Idaho Water Resource Board hearing, Feb. 6, 1985 (2 p.m.), Lewiston, Idaho) (transcript page 9).

resulting from the operation of Company facilities,” which the Agreement defines to include flows purchased, leased, owned or otherwise acquired by Idaho Power from sources upstream and conveyed to and past its power plants below Milner Dam for power production. Swan Falls Agreement ¶¶ 7(B), 7(E).

Thus, the Upper Snake Water Users’ objection mis-reads the plain language of the Agreement. Further, the changes the Upper Snake Water Users propose would create the very ambiguity they seek to avoid. Retaining the original term “average daily flow” while deleting the reference to “the calculation” of such flows and adding the new term “actual flows” would raise questions as to whether the partial decrees call for administration on the basis of “actual flows” or “calculated flows.” The potential ambiguity would be heightened by comparing the proposed changes to the original language of the Agreement. The Agreement would not be integrated into the partial decrees but rather would remain in effect independent of them,² and the significant changes proposed by the Upper Snake Water Users could raise questions in the future as to whether the partial decrees were intended to be consistent with the Agreement.

III. The City Of Pocatello’s Objection.

The City of Pocatello states that the *Joint Motions* “include proposed language and a formula for administration of flows under the Swan Falls Agreement.” *Pocatello’s Statement* at 2. This assertion incorrectly implies that the partial decrees “propose” new Murphy flow language or a new administration methodology. As previously discussed and as a comparison of the proposed partial decrees to Paragraph 7 of the Agreement

² See Exhibit A to *State Of Idaho’s And Idaho Power Company’s Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37* (remark no. 6); see also *id.* at Exhibit B and Exhibit A to *State Of Idaho’s And Idaho Power Company’s Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026* (remark no.7).

demonstrates, the relevant language is taken directly from Paragraph 7 of the Agreement. There is nothing new in the relevant provisions of the proposed remark – the City’s objection simply takes issue with the original language of the Agreement.

The City of Pocatello also asserts that a provision of the Nez Perce settlement calls for IDWR to “regulate [the Murphy flows] in accordance with the Swan Falls Agreement.” *Pocatello’s Statement* at 2. This assertion is no basis for opposing the *Joint Motions*, because it explicitly recognizes that regulation of Murphy flows must be in accordance with the Swan Falls Agreement, not the Nez Perce settlement. The Nez Perce settlement is not relevant in this consolidated subcase and need not be consulted for purposes of decreeing the water rights in accordance with the Swan Falls Agreement.

Finally, the City of Pocatello is incorrect in suggesting that expert analysis of “historic data relevant to administration of the Swan Falls Agreement” is necessary or relevant for purposes of resolving the *Joint Motions*. *Pocatello’s Statement* at 2. The Agreement, not historic flow data, is relevant and controlling for purposes of defining the water rights. *See Memorandum Decision* at 23 (“Clearly, decreeing the rights consistent with the intent of the parties requires an examination of the underlying Agreement.”). Moreover, because the partial decrees use the language of the Agreement, the only purpose for which expert analysis of historic flow data might be offered is to support a proposal to alter the plain terms of the Agreement.

IV. The Interested Water Users’ Objections.

A. The Interested Water Users’ First Objection.

The Interested Water Users raise four objections to the proposed partial decrees. *See Statement of Issues* at 2-5. The first objection is that the first remark in the “Other

Provisions” section of the proposed partial decrees “suggests that any water rights owned by Idaho Power would be ‘considered fluctuations resulting from the operation of Idaho Power Company facilities’” because the relevant language of the remark is slightly different than the language of Paragraph 7(E) of the Agreement. *Id.* at 3. In other words, the assertion is that unless Paragraph 7(E) is recited verbatim in the remark, flows associated with Idaho Power’s water rights would not count towards the seasonal flows of 3,900 c.f.s and 5,600 c.f.s. as measured at the Murphy Gaging Station. This objection has two problems.

First, while it is true that the proposed partial decrees do not recite Paragraph 7(E) verbatim, this fact is unremarkable and unobjectionable. Contractual language defines the parties’ agreements and obligations, while partial decree language has a different purpose: it must give effect to the Agreement and define the water rights. In order to accomplish these purposes it was necessary in some instances to translate the contractual language of the Agreement into partial decree language, as the Interested Water Users apparently recognize. *See Statement of Issues* at 2 (“In the process of converting the original language of the Swan Falls Agreement to the SRBA Partial Decrees language, certain tailoring apparently was undertaken to fit the new context.”). Paragraph 7(E) is an example of such a provision. Further, the Interested Water Users are simply incorrect in arguing that the proposed remark is broader than Paragraph 7(E). Both provide that flows of water that Idaho Power purchases, leases, owns or otherwise acquires from sources upstream of its power plants and conveys to and past its power plants below Milner are to be considered “fluctuations” resulting from the operation of Idaho Power facilities.

Second, the plain language of the proposed remark demonstrates that the water rights will not be considered “fluctuations” resulting from flows of water purchased, leased, owned or otherwise acquired by Idaho Power. The proposed remark expressly provides that such flows must come “from sources upstream” of the Idaho Power facilities covered by the Agreement,³ as does the Swan Falls Agreement. Swan Falls Agreement ¶ 7(E). In contrast, the water rights defined by the Agreement authorize diversions from the Snake River at Idaho Power’s power plants, not “from sources upstream.” Further, the proposed partial decrees explicitly define the water rights held by Idaho Power as coextensive with the Murphy flows:

Water rights nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A collectively entitle Idaho Power Company to an unsubordinated water right, except as provided in paragraph nos. 3 and 4 below, to average daily flows of 3900 CFS from April 1 to October 31 and 5600 CFS from November 1 to March 31 as measured at the “Murphy Gaging Station”...

Exhibit A to *State Of Idaho’s And Idaho Power Company’s Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37* (remark no. 1). Thus, both the Agreement and the proposed partial decrees unambiguously provide that flows associated with these water rights must be considered in determining whether the Murphy flows are being met.

B. The Interested Water Users’ Second Objection.

The Interested Water Users’ next objection is that the term “future” beneficial uses in the proposed partial decrees for water rights held in trust by the State⁴ is

³ See Exhibits A & B to *State Of Idaho’s And Idaho Power Company’s Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37* (remark no. 1); see also Exhibit A to *State Of Idaho’s And Idaho Power Company’s Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026* (remark no.1).

⁴ The term “future” is in remark no. 1 in the “Other Provisions” section of the proposed partial decrees for the water rights held in trust by the State. See Exhibit B to *State Of Idaho’s And Idaho Power Company’s Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*; see

ambiguous because it does not specify “the operative date” to which the term “future” refers. *Statement of Issues* at 3. Thus, the objection proposes to replace the term “future” with the term “subsequent.” *Id.* at 4.

This objection is contrary to the plain language of the Swan Falls Agreement. The term “future” comes from Exhibit 7B to the Agreement, while the term “subsequent” comes from Paragraph 7(B). Swan Falls Agreement ¶ 7(B). This Court has determined that Paragraph 7B “do[es] not refer to a trust or a division of ownership.” *Memorandum Decision* at 29. In contrast, this Court has held that Exhibit 7B “provides that any portion of Idaho Power’s water rights in excess of the minimum flows are held in trust by the State, by and through the Governor.” *Id.* at 31. Accordingly, under the plain terms of the Agreement, and pursuant to Idaho Code § 42-203B(2), “future” is the appropriate term for purposes of defining subordination of the “subordinatable” water rights held in trust by the State.

Further, simply replacing the term “future” with the term “subsequent” would not resolve the alleged ambiguity, which the Interested Water Users ascribe to the failure to identify “the operative date.” *Statement of Issues* at 3. Neither “future” nor “subsequent,” standing alone, identifies “the operative date” for purposes of subordination of the subordinatable water rights held in trust by the State. Thus, the alleged ambiguity would remain even if the term “subsequent” was used in the remark. Moreover, “the operative date” is set forth in the proposed partial decrees. It is the date of the Swan Falls Agreement—October 25, 1984—and is recited in remark no. 7 of the

also Exhibit A to *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026.*

proposed partial decrees for the water rights to be held in trust by the State (and in remark no. 6 of the proposed partial decrees for the water rights to be held by Idaho Power).⁵

C. The Interested Water Users' Third Objection.

The proposed partial decrees include a remark providing that the water rights are subordinate to the lawful exercise of water rights of persons dismissed from Ada County Case No. 81375 ("the 7500 Case").⁶ This remark gives effect to Paragraph 7(C) of the Agreement. The Interested Water Users suggest that a list of these water rights, or the dismissal notices from the 7500 Case, be submitted into the record in this consolidated subcase "to ensure that there is no confusion over the water rights covered" by the subordination provisions. *Statement of Issues* at 4-5.

The State and Idaho Power agree that it is important there be no confusion over which water rights benefit from subordination pursuant to Paragraph 7(C) of the Agreement. The problem with the Interested Water Users' suggestion on this point is that it would not resolve the potential confusion, and may even add to it. The reason for this is that unlike the original dismissal list, the list of water rights benefiting from subordination pursuant to Paragraph 7(C) is not static or unchanging. It likely has changed since the time of the dismissals and may well change again in the future through operation of law.

⁵ Should the Court determine that "the operative date" of October 25, 1984 should also be recited in remark no. 1 of the partial decrees for the water rights to be held in trust by the State, the State and Idaho Power would not object to the following modification to the remark: "... shall be subject to subordination to and depletion by future beneficial uses made after October 25, 1984 under water rights acquired pursuant to applicable state law ..."

⁶ This provision is remark no. 3 in the "Other Provisions" section of the proposed partial decrees for the water rights to be held by Idaho Power. See Exhibit A to *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*. The corresponding provision in the proposed partial decrees for water rights to be held in trust by the State is remark no. 4. See *id.* at Exhibit B; see also Exhibit A to *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026*.

This is because the subordination benefit also attaches to new water rights created by transfers, splits or re-numbering of the water rights on the original dismissal list. Thus, there either already are, or may be in the future (or both), new water rights that were not on the original list but that nonetheless benefit from subordination pursuant to Paragraph 7(C). Accordingly, the original dismissal list is no longer reliable for purposes of identifying all the water rights that benefit from subordination under Paragraph 7(C), and as time goes on it will become progressively less reliable. For these reasons, the State invited all parties, including the Interested Water Users, to a workshop at IDWR on May 6, to discuss developing a means of identifying and tracking current and future water rights benefiting from subordination under Paragraphs 7(C) and 7(D).⁷ At the conclusion of the workshop, IDWR offered to prepare a proposal for identifying and tracking such water rights, but has not yet completed this task. In any event, the issue need not be resolved for purposes of decreeing the water rights that are at issue in this consolidated subcase.

D. The Interested Water Users' Fourth Objection.

The Interested Water Users' last objection is that certain water rights first claimed in the SRBA would not benefit from subordination under Paragraph 7(D) of the Agreement. *Statement of Issues* at 5. This paragraph provides that the hydropower water rights identified in the Swan Falls Agreement are subordinate to water rights for which

⁷ The concern the Interested Water Users raise with respect to Paragraph 7(C) also arises under Paragraph 7(D), but the problem of identifying and tracking current and future water rights that benefit from subordination under Paragraph 7(D) is even more difficult. Paragraph 7(D) applies to water rights for which beneficial use was made prior to October 1, 1984 and for which an application or claim was filed by June 30, 1985. Simply compiling the original list of such water rights requires a laborious review of many water right files at IDWR.

beneficial use was made by October 1, 1984, and for which an application or claim was filed by June 30, 1985, and is given effect in the remarks in the proposed partial decrees.⁸

The Interested Water Users therefore propose “to add to the end of this provision the words, ‘or in the SRBA.’” In other words, the Interested Water Users’ last objection is simply a request to amend the Agreement so as to broaden the scope of subordination beyond that agreed upon by the parties, and should be rejected for the same reason. Paragraph 7(D) does not include the phrase “or in the SRBA,” even though the Agreement proposed the legislation that authorized the SRBA. The partial decrees should give effect to the Agreement, not modify it.

CONCLUSION

For the reasons set forth herein, the State and Idaho Power request that this Court grant the *Joint Motions* in their entirety.

Respectfully submitted this 27th day of August 2009.

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⁸ This provision is remark no. 4 in the proposed partial decrees for the water rights to be held by Idaho Power. See Exhibit A to *State Of Idaho's And Idaho Power Company's Joint Motion For Entry Of Partial Decrees Re: Water Rights In Basin 02 And Basin 37*. The corresponding provision in the proposed partial decrees for water rights to be held in trust by the State is remark no. 5. See *id.* at Exhibit B; see also Exhibit A to *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026*.

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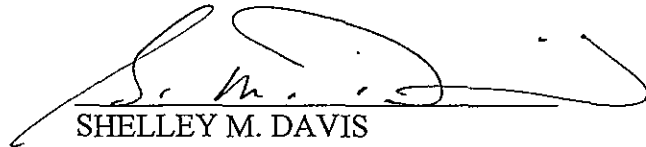
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August 2009, I caused a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S AND IDAHO POWER COMPANY'S JOINT MOTIONS TO ENTER AND MODIFY PARTIAL DECREES to be served on the following parties by the indicated methods:

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