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DEPARTMENT OF  
WATER RESOURCES

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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

Subcase Nos.: 78-4084A, 78-4084B,  
78-4084C

MEMORANDUM IN SUPPORT OF RULE 60(b)  
MOTION FOR RELIEF FROM JUDGMENT

**I.**  
**BACKGROUND**

**A. Introduction**

On May 28, 2008, Brent Rocky, LLC ("Brent Rocky") acquired what is known as the Boar's Nest ranch property. On May 19, 2008, immediately preceding this acquisition, and unbeknownst to Brent Rocky, notice was sent to the original claimants that the water rights appurtenant to the Boar's Nest ranch were decreed as disallowed in the Snake River Basin

Adjudication. Subsequent to the filing of three notices of claim for water rights on the Boar's Nest ranch property in 1988 by prior owners, there is no evidence of any meaningful communication between the original claimants, the several subsequent owners of the now-disallowed water rights, and the Idaho Department of Water Resources ("IDWR"). Furthermore, despite the beneficial use basis of the claims in question, IDWR never conducted a field examination of the Boar's Nest property. The purpose of this Rule 60(b) Motion for Relief From Judgment is to rectify mistakes made by both IDWR and the previous owners of the Boar's Nest ranch property which have unjustly resulted in the *de facto* forfeiture of beneficial use water rights appurtenant to that property.

**B. Description And History Of The Property**

The Boar's Nest ranch property is approximately 850 acres located south of Riggins, Idaho. It consists of a ranch house, two barns, two cabins, and a number of sheds. In December, 1947, John Carrey purchased the property from John Bratland. In August, 1978, Mr. Carrey sold a large portion of the property to Russell Morrell, retaining the house and approximately 63 acres. In June, 1987, Mr. Morrell sold his parcel to A.C. Ranches. In 1988, Mr. Carrey and A.C. Ranches filed notices of claims to water rights for spring-based beneficial use water rights utilized on the property. On March 10, 1993, SS Ranch purchased the entire property (thereby re-unifying the A.C. Ranches and Carrey parcels). It does not appear that SS Ranch provided IDWR with written notice of the change in ownership or change in mailing address. On March 19, 2002, Boar's Nest Ranch, LLC purchased the property. Similarly, it does not appear the Boar's Nest Ranch, LLC provided IDWR with written notice of the change in ownership or change in mailing address. Finally, on May 28, 2008, Brent Rocky purchased the property. See Exhibit A to the Affidavit of Matthew J. McGee ("McGee Aff."). In

conducting due diligence for Brent Rocky in preparation for a proposed real estate auction of the property, auctioneer John Knipe discovered the recent disallowance of water rights appurtenant to the subject property.

**C. History Of The Water Rights**

The water rights at issue—78-4084A, 78-4084B, and 78-4084C (“Boar’s Nest Water Rights”)—are split water rights of the parent water right number 78-4084. Water right number 78-4084 was a beneficial use water right claim made on May 3, 1977 by Mr. Carrey. *See* McGee Aff., Ex. B. Mr. Carrey made a claim for 0.14 cfs from unnamed springs tributary to the Salmon River. *Id.* The claimed purpose of use was for domestic (0.08 cfs) and stockwater (0.06 cfs) purposes. *Id.* The period of use was January 1 through December 31. *Id.* The claimed priority date of the water right was June 1, 1900. *Id.* The evidence supporting this claimed priority date was a letter signed by Mr. Carrey stating that the water on the property has been used continuously for domestic and livestock purposes since 1900. *See* McGee Aff., Ex. C.

On June 2, 1988, Mr. Carrey claimed water right number 78-4084A in the Snake River Basin Adjudication (“SRBA”). *See* Exhibit B to the Affidavit of Scott King (“King Aff.”). He claimed a quantity of 0.14 cfs for domestic and stockwater purposes. *Id.* On July 26, 1988, A.C. Ranches similarly claimed water right numbers 78-4084B and 78-4084C in the SRBA. *See* King Aff., Exs. C & D. It claimed a quantity of 0.12 cfs under water right number 78-4084B for stockwater purposes and a quantity of .04 cfs under water right number 78-4084C for domestic purposes. *Id.*

Notably, one of the springs on the property provides domestic water to the ranch house on the Boar’s Nest property and also provides domestic water to an adjacent property. *See* Exhibit A to the Affidavit of Scott King (“Report”), p. 2. This adjacent property is currently

owned by Jim Yates. *See id.* The water right appurtenant to the Yates property—water right number 78-10348 (“Gill Water Right”)—is in the name of the previous property owner, Dolina Gill. *See McGee Aff., Ex. D.* The Gill Water Right has been partially decreed in an amount not to exceed 0.08 cfs for domestic and stockwater purposes, with a priority date of 1902. *Id.* Importantly, the Gill Water Right has been identified as having the same point of diversion on the Boar’s Nest ranch property as one of the points of diversion claimed by Mr. Carrey for domestic use, which claim was disallowed because no beneficial use was found.<sup>1</sup> *See McGee Aff., Ex. D; King Aff. Ex. B.*

**D. The Department’s Investigation Of The Claims And Subsequent Recommendations**

Ken Knoblock, with IDWR’s Northern Region, was responsible for preparing the recommendations for the Boar’s Nest Water Rights claims. *See King Aff., ¶ 5.* To investigate the claims, Mr. Knoblock indicated that he searched IDWR records of property ownership in Idaho County and was unable to identify parcels owned by the named claimants, John Carrey and A.C. Ranches. *Id.* Mr. Knoblock stated that in November, 2005, he sent correspondence to both claimants. *See id.* Pearl Carrey, John Carrey’s elderly widow, responded, indicating that Mr. Carrey had passed away. *See id. & Ex. B.* She also indicated that she no longer owned the subject property. *Id.* A.C. Ranches did not respond to Mr. Knoblock’s letter. *Id.*

On November 24, 2006, IDWR received a Notice of Error Reply from Mrs. Carrey, again indicating that Mr. Carrey had passed away. *See McGee Aff., Ex. E.* Presumably because Mrs. Carrey no longer owned the subject property, she neither agreed with IDWR’s

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<sup>1</sup> As will be discussed below, IDWR found no beneficial use despite failing to conduct any beneficial use field exam. As this motion illustrates, the Boar’s Nest spring-based water rights have, in fact, been used for domestic and stockwater purposes for over 100 years.

recommendation nor proposed changes to IDWR's recommendation for water right number 78-4084A. *See id.*

Mr. Knoblock did not, at any point, perform a field examination of the claims to the Boar's Nest Water Rights. *See King Aff.*, ¶ 5. Further, Mr. Knoblock and IDWR appear to have ignored the evidence of continuous use in IDWR's file—Mr. Carrey's letter describing the beneficial uses on the Boar's Nest ranch property. *See McGee Aff.*, Ex. C. On January 3, 2007, IDWR recommended disallowance of the Boar's Nest Water Rights. *See McGee Aff.*, Ex. F. The basis of this recommendation is that no beneficial use was found. *See id.*

**E. SPF Water Engineering's Investigation Of The Boar's Nest Property**

Upon acquiring the property and discovering the partial decree disallowing the water rights, Brent Rocky commissioned SPF Water Engineering to investigate the water rights, water supply and hydrology on the property, and evaluate potential sites for drilling a domestic water supply well for the ranch house. *See King. Aff.*, ¶¶ 1-2. *See also Report.*

There appear to be seven (7) springs on the property. *See Report*, p. 2. Spring 1, which is located approximately 300 feet northeast of the Boars Nest ranch house, has been developed for use on the Boars Nest property, as well as on adjacent property owned by Mr. Yates. *Id.* The Boars Nest water is piped to a buried tank and subsequently pumped to the ranch house. *Id.* The Yates water is piped to two concrete tanks below the springs and delivered by gravity flow to the Yates property. *Id.*

Spring 2 is also located near the ranch house and is used for stockwater purposes. *Id.* There is a concrete trough at the spring and water is piped from the spring to stock tanks at the barn and corral. *Id.* Springs 3 and 4 are also used for stockwater purposes. *Id.* at pp. 2-3. Spring 3 is developed with a wooden enclosure, and water is piped to two stock tanks. *Id.* at

p. 2. Spring 4 was not precisely located because it was located far up the hill from the tank, but it feeds a stockwater tank about 800 feet northwest of the ranch house. *Id.* at p. 3. Spring 5 is located along the road between the ranch house and the Boar's Nest cabin. *Id.* Piping from the spring supplies a covered storage tank, which formerly supplied domestic water to the ranch house. *Id.* Domestic use from this storage tank has been discontinued and Spring 5 is currently only used for stockwater purposes. *Id.*

Spring 6 is located above the Boar's Nest cabin and supplies domestic water for the cabin and stockwater for use at two stock tanks located northwest of the cabin. *Id.* Finally, another stockwater tank located east of the Boar's Nest cabin is either supplied from Spring 6 or from a potential spring south of the tank. *Id.* It was not clear upon examination whether the spring area is a developed spring, but it is shown as a spring on the USGS topographic map. *Id.*

Notably, the springs' infrastructure generally appears to have been in use for many years. *Id.* With the exception of the buried tank associated with Spring 1, for which age could not be assessed, the springs and associated facilities appear to have been developed for domestic and stockwater uses well before the commencement of the Snake River Basin Adjudication. *See id.*; King Aff., ¶ 3. Accordingly, SPF Water Engineering questioned the propriety of the disallowance of the water rights and began to investigate the history of that decision. Scott King, of SPF, contacted Mr. Knoblock to find out the reason for IDWR's recommended disallowance of the Boars Nest Water Rights. *See* King Aff., ¶ 5. Mr. Knoblock indicated that he had recommended disallowance for the following reasons:

- Mrs. Carrey responded to his correspondence by indicating that she no longer held any ownership interest in the property;
- A.C. Ranches did not respond to correspondence;

- If the property had been conveyed to another owner, the new owners did not timely submit notice of ownership change; and
- Mr. Knoblock could not match IDWR's current tax lot parcel numbers to either of the named claimants.

*See King Aff.*, ¶ 7.

After speaking with Mr. Knoblock, Mr. King contacted Carter Fritchle with IDWR's state office regarding the Boar's Nest Water Rights. *See King Aff.*, ¶ 8. Mr. Fritchle stated that he was familiar with the Boar's Nest Water Right claims and that he had personally assisted at least one of the prior claimants with the initial claims filing. *Id.* Upon Mr. King's explanation of the investigation (or lack thereof) conducted by Mr. Knoblock, Mr. Fritchle indicated that it was not standard practice for IDWR to disallow a claim due to a failure of a claimant to reply to correspondence, or due to IDWR's inability to identify the current owner, without first conducting an actual on-site beneficial use investigation. *Id.* Furthermore, Mr. Fritchle told Mr. King that IDWR generally verifies that the claim should be disallowed for reasonable cause, which could include the *actual verification* of no beneficial use found. *Id.* Mr. Fritchle advised that Brent Rocky should consider filing a motion with the SRBA court to set aside the partial decree disallowing the claims in light of the apparent procedural irregularities associated with IDWR's investigation of the claims. *See id.*

## II. LEGAL STANDARDS

Rule 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied,, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) ***any other reason justifying relief from the operation of the judgment.*** The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken.

IDAHO RULE CIV. P. 60(b) (emphasis added).

“Rule 60 provides the only avenue of relief from final civil judgments other than by appeal or independent action.” *Lubben v Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 648 (1972). The Rule “requires a showing of good cause and specifies particular grounds upon which relief may be afforded.” *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). Whether to grant relief under Rule 60(b) rests in the sound discretion of the trial court. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979). “[A] Rule 60(b) motion to vacate is not a substitute for an appeal.” *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982); *De Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977) (citing *Ackermann v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 211 (1950)).

“I.R.C.P. 60(b)(6), which is the catchall for the rule, was not intended to allow a court to reconsider the legal basis for its original decision.” *First Bank & Trust of Idaho v. Parker Bros., Inc.*, 112 Idaho 30, 32 (1986). A party making a Rule 60(b)(6) motion must demonstrate unique and compelling circumstances justifying relief. *Matter of Estate of Bagley*, 117 Idaho 1091, 1094 (Ct. App. 1990) (citing *Puphal v. Puphal*, 105 Idaho 302 (1983)). This case presents such “unique and compelling circumstances” that would justify relief from the partial decree of the Boar’s Nest Water Rights as disallowed.

### III. ARGUMENT

#### A. The Department Failed To Appropriately Investigate The Boar's Nest Water Right Claims

Idaho Code Section 42-1409 requires that "[a]ll claimants of water rights that are included in a general adjudication shall file with the director a notice of claim for all water rights" and that a claimant "shall sign and verify under oath that the statements contained in a notice of claim or amended notice of claim are true and correct." IDAHO CODE § 42-1409(3), (4). On June 2, 1988, the original claimant of water right number 78-4084A, Mr. Carrey, complied with these requirements. Similarly, on July 26, 1988, the original claimant of water right numbers 78-4084B and 78-4084C, A.C. Ranches, complied with these requirements.

Thereafter, IDWR was responsible for the investigation of the claimed water rights. Idaho Code Section 42-1410 provides the rules and procedures for investigation of water systems and claims in the SRBA:

(1) Upon entry of the court's order commencing a general adjudication, or as provided in section 42-1404 or 42-1424, Idaho Code, the director *shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system for water rights acquired under state law. The examination shall continue in a manner and for such a period of time as the director determines is necessary to evaluate the extent and nature of each water right for which a notice of claim under state law has been filed. The director may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.*

(2) *The director and other employees of the department shall have authority to go upon all lands, both public and private, for the purpose of investigating the uses of water from any water source and may require the cooperation of the claimant in investigating the claimant's water use. The employee investigating the claimant's use shall make a reasonable effort to contact the claimant to schedule a date and approximate time for the examination. If the well or diversion works are located in a*

building other than an unlocked structure used solely for housing the well or other diversion works in which there is no reasonable expectation of privacy, the employee shall only enter the building in the absence of a court order after requesting and receiving the permission of the claimant or other occupant. The director may request the district court to issue an order compelling inspection and subpoenas requiring the attendance of any witness of the production of documents in accordance with the rules of civil procedure.

IDAHO CODE § 42-1410 (emphasis added). As Section 42-1410 makes clear, IDWR must investigate claims to water rights, and IDWR has broad authority to satisfy this statutory obligation, including the authority to go upon public and private land to investigate water systems. Therefore, and with respect to this case, it comes as no surprise that Mr. Fritchle, a Technical Section Manager with the Adjudication Bureau at IDWR, stated that *it is not standard practice* to disallow a claimed water right simply due to the inability to identify the named claimant through tax lot ownership records. *See King Aff.*, ¶ 8.

The agent responsible for investigation in this case appears to have limited his investigation to: (1) an unsuccessful attempt to correspond with the named claimants; and (2) an unsuccessful search of tax lot records in the claimants' names. *See King Aff.*, ¶ 5. The agent did not search any other property or tax records to determine the owner of the land to which the Boar's Nest Water Rights are appurtenant. *See King Aff.*, ¶ 7. In investigating other claims in the area, there is no indication that the agent made any inquiry of nearby property owners about the status of the Boar's Nest property. Most importantly, the agent did not conduct any actual beneficial use field examination. *See King Aff.* ¶ 5.

According to the IDWR Claim Investigation Handbook, an agent is to conduct both an initial in-office investigation *and a field investigation*. *See McGee Aff.*, Ex. G (hereinafter "Handbook"). Ideally, the field investigation involves both claimant contact and a

field examination. While “[t]he agent should try in as many cases as possible to do the field exam with the claimant present to the full extent the claimant wants to participate” (Handbook, Ch. 1, *Introduction*, p. 7), such claimant participation is not necessarily required. See IDAHO CODE § 42-1410(b). See also Handbook, Ch. 1, *Introduction*, p. 9 (referring to the propriety of “drive by” field examinations).

For example, an agent’s evaluation of the claimed “source” element of a beneficial use water right *requires* a field exam. See Handbook, Ch. 4, *Source*, p. 1. “The agent’s investigation of the source claimed should consist of an evaluation of whether the source claimed under a beneficial use claim is that source of water being used on the commencement date [of the adjudication]. *A field exam will be necessary to fully evaluate this element.*” *Id.* (emphasis added).

Likewise, an agent’s evaluation of the claimed “point of diversion” element of a beneficial use water right *requires* a field exam. See Handbook, Ch. 5, *Point of Diversion*, p.1. “The agent’s investigation of the point of diversion claimed should consist of an evaluation of whether the point of diversion claimed under a beneficial use claim is that point of diversion of water being used on the commencement date [of the adjudication]. *A field exam will be necessary to fully evaluate this element.*” *Id.* (emphasis added).

In this case, the Boar’s Nest Water Rights are beneficial use-based water rights for which claims were properly filed in the SRBA. See King Aff., Exs. B, C, & D. Thus, at a minimum, a field examination was necessary to appropriately evaluate the claimed source of the water—springs tributary to the Salmon River—and the claimed points of diversion. It matters not that the IDWR agent encountered difficulties in his attempts to contact the named claimants. These difficulties did not excuse his complete failure to conduct the required on-site beneficial

use field exams. In sum, the agent's inability to make contact with the claimant and failure to conduct a field examination does not mean that no beneficial use was found. This inability to make contact with the claimant and failure to conduct a field examination only means that no beneficial use was investigated.<sup>2</sup> One cannot find what one does not actually look for. Consequently, it would represent a manifest injustice to deprive the current property owner, Brent Rocky, of the domestic and stockwater rights appurtenant to its recently acquired ranch property—spring-based water rights with corresponding and plainly visible infrastructure which clearly establish beneficial use of the claimed water had IDWR simply visited the property.

**B. There Exists Abundant Evidence Of The Beneficial Use Of Water From The Springs On The Property**

Had Mr. Knoblock conducted an appropriate field examination, it would have been clear that water systems were developed and that water was being beneficially used on the property in question. *See Report*. As explained in Section I.E. *supra*, at least six springs, and possibly seven, have been developed for domestic and/or stockwater uses on the property. Both domestic and stockwater uses are beneficial uses of water in Idaho. *See* IDAPA 37.03.08.010.06 (domestic and stockwatering recognized as beneficial use of water in Idaho). *See also Short v. Praisewater*, 35 Idaho 691, 701 (1922) (domestic use of water is “highest beneficial use known to the law”); *Livestock v. U.S.*, 144 Idaho 1, 8 (2007) (watering stock is a beneficial use).

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<sup>2</sup> It is important to note that “[f]or beneficial use rights IDWR will not investigate or recommend forfeiture.” Handbook, Ch. 11, *Forfeiture*, p. 4. “Beneficial use rights will be recommended as either: (1) a right described by recent beneficial use or (2) disallowed based upon no recent beneficial use.” *Id.* Thus, in light of IDWR’s failure to actually make a field examination, the statement made on each of the agent’s recommendations, “[n]o beneficial use found,” appears implicitly to have been an investigation and improper recommendation of forfeiture. *See McGee Aff., Ex. F.*

Importantly, an examination of the water infrastructure on the Boar's Nest ranch property shows that the springs which are the source of the Boars Nest Water Rights were developed for beneficial use well before the commencement of the SRBA. *See* Report, pp. 3-12. An examination of a title insurance policy for the property issued in 2002 provides additional support for the proposition that water rights were developed on the property prior to commencement of the SRBA. *See* McGee Aff., Ex. H. For example, in 1978, a 10-foot wide water line easement was recorded by and between Mr. Carrey and Russell Morrell, who purchased a portion of the Boar's Nest ranch from Mr. Carrey.<sup>3</sup>

Furthermore, there is documentary evidence in IDWR's file that at least a portion of the claimed water rights have been beneficially used on the Boar's Nest ranch property since 1900. *See* McGee Aff., Ex C. The letter, dated March 7, 1977, from Mr. Carrey to IDWR reads as follows: "To Whom It May Concern – The water on this property has been used continuously on this property since 1900 for domestic and livestock uses. I have been a resident of this area since 1898." *See id.* The letter is signed by Mr. and Mrs. Carrey. *Id.* It also appears to be signed by Loy Hollenbeak, who held two land patents, dated 1920 and 1932, in the same geographic area as the Boar's Nest ranch and would most likely be familiar with historic water use in the area. *See* McGee Aff., Ex. I.

Finally, the development of Spring 1, which is on Boar's Nest property, raises additional questions about the propriety of entirely disallowing the Boar's Nest Water Rights. Spring 1 appears to be one of the points of diversion for water right number 78-10348, the Gill Water Right serving what is now the Yates property. *See* McGee Aff. Ex. F. The Gill Water Right, which shares a point of diversion (a spring on Boar's Nest property in the SW quarter of

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<sup>3</sup> Note that these separate parcels of property have since been reunited.

the NE quarter of Section 8, Township 23N, Range 01E) with the Boar's Nest Water Rights, *was recommended and decreed in the SRBA*. Therefore, it is difficult to imagine circumstances supporting the wholesale disallowance of the Boar's Nest Water Rights when a shared point of diversion for a portion of those water rights was decreed with a 1902 priority date. *See* Partial Decree for Water Right Number 78-10348.

SPF's Report, coupled with the 1977 letter from Mr. Carrey and the decree of the Gill Water Right, demonstrate that water from springs on the Boar's Nest ranch property was beneficially used well before the commencement of the SRBA. This historic beneficial use of water from the springs continues to date. *See* Report. Without conducting a field examination, it was inappropriate for IDWR to find no beneficial use in light of this evidence. The partial decree of the Boar's Nest Water Rights as disallowed should be set aside, and the water rights should be properly investigated and recommended accordingly.

#### **IV. CONCLUSION**

Due to the fact that the decree was only recently issued, the extreme result of *de facto* forfeiture resulting from IDWR's investigative failures, and the apparent lack of injury to adjacent water users (given that these are spring-based water rights emanating from springs wholly located on the Boar's Nest ranch property), it is appropriate in the interests of justice for the Court to set aside the partial decree disallowing the Boar's Nest Water Rights (water right numbers 78-4084A, 78-4084B, and 78-4084C). Brent Rocky respectfully requests such relief from the partial decree and further requests that the Court require the Department to submit an amended or supplemental recommendation of the Boar's Nest Water Rights after an appropriate investigation, including a field examination as necessary, is conducted.

DATED this 5 day of October, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &  
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By   
Matthew J. McGee – Of the Firm  
Attorneys for Brent Rocky LLC

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of October, 2009, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT** to be served by the method indicated below, and addressed to the following:

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