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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.: Attachment A**
)
) **MEMORANDUM IN SUPPORT OF**
) **SURFACE WATER COALITION'S**
) **JOINT MOTION TO DECREE**
) **GENERAL PROVISION**
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COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley
Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
Company and Twin Falls Canal Company (collectively "Surface Water Coalition" or
"Coalition"), by and through their undersigned attorneys of record, and submit this *Memorandum
in Support of Surface Water Coalition's Joint Motion to Decree General Provision*. The

Coalition seeks to have the Court decree a general provision applicable to the Basin 01 storage water right decrees over which the Court has retained jurisdiction. *See Order Regarding Subcases Pending Upon Entry of Final Unified Decree* (Subcase Nos. 01-00219 et al., August 26, 2014). For the reasons set forth below, the Coalition respectfully requests the Court to grant the motion and decree the proposed general provision.

INTRODUCTION

The Upper Snake River Basin reservoir system above Milner Dam is a dynamic, coordinated operation between various federal and state agencies. The United States Bureau of Reclamation ("Reclamation") works closely with Water District 01 ("WD1" or "District"), the United States Army Corps of Engineers ("COE"), and the individual spaceholders through the Committee of Nine ("Co9"), to operate the various dams and reservoirs, primarily for irrigation and power storage and flood control purposes. Reclamation operates the dams and reservoirs pursuant to authorizing legislation, formal flood control rule curves, contracts with spaceholders, and its state law based water rights. WD1 is responsible for administering the water rights and working with Reclamation to account for spaceholder storage in the individual reservoirs and diversions from the river. The construction, maintenance and operation of the reservoir storage system, paid by numerous spaceholders, including canal companies and irrigation districts, is truly the lifeblood of southern Idaho's agricultural economy.

Pursuant to the Palisades Contracts, confirmed originally by the *Eagle Decree*, and later incorporated by special remarks through stipulation in the various Basin 01 partial decrees in the SRBA, Reclamation and the spaceholders agreed to certain administrative provisions to govern

operation of the reservoirs and administration of the storage water rights.¹ The changes to pre-Palisades operations made the construction of Palisades Dam possible and allowed Reclamation to efficiently operate the reservoirs in a manner to maximize storage in the Upper Snake reservoir system without impacting existing water rights. As part of these operations and administration, WD1 is required to account for storage, exchanges, and other operations agreed to by all spaceholders and Reclamation.

Further, the administration of the storage water rights, most of which were appropriated before the advent of the Water District 01 computerized accounting program, is critical for understanding how physical water storage is maximized for the benefit of all spaceholders without injuring natural flow irrigation deliveries at the close of the irrigation season. The Coalition's motion sets forth the bases for decreeing a general provision that would apply to the Basin 01 storage water rights consistent with prior administration and the adjudication statutes for the benefit of all spaceholders, while protecting the priority of natural flow rights for those entities finishing the irrigation season.

PROCEDURAL BACKGROUND

The Basin 01 storage rights have a lengthy procedural history before the SRBA Court. The Coalition offers the following abbreviated synopsis for context and convenience.² First, in the late 1980s, Reclamation and various individual spaceholders filed notices of claim to the storage water rights. In June of 2006 Reclamation filed amended notices of claim. In September

¹ The Coalition refers the Court to the attached *Factual Background Addendum* and exhibits for a more thorough description of the reservoirs and their history.

² The Coalition has not attempted to set out each and every issue litigated or pursued through objections to the individual Basin 01 storage water right claims in the SRBA. The individual docket sheet for each water right, available on the SRBA's website (www.srba.state.id.us), identifies all of the filings and decisions in the various individual subcases.

2006 IDWR filed its Director's Report for Irrigation and Other Water Rights in Basin 01, Part 2. Various parties filed objections in the spring of 2007. Certain issues, like "ownership" and the hydropower and municipal "purpose of use" proceeded down separate litigation or settlement tracks over several years until final resolution. Eventually, several parties, including Reclamation, the State of Idaho, and the Coalition filed a stipulation in January 2012 addressing ownership, quantity, and the priority elements. The State of Idaho also filed a motion for summary judgment in early 2012 concerning the "refill" issue.

In September 2012 the parties then entered into a more comprehensive stipulation addressing several elements and remarks necessary for administration. The parties agreed to the standard period of use element, a year round storage component (1/1 to 12/31), and an irrigation from storage component of 3/15 to 11/15 (inclusive of the irrigation season decreed for various natural flow rights).³ However, the parties reserved "any other storage water right basin-wide issue." *See Stipulation* at 7 (Subcase Nos. 01-00219 et al, Sept. 25, 2012).

The Basin 01 "refill" litigation then continued before the Court in the context of Basin-Wide Issue No. 17. Following motions and a decision from this Court, the matter was appealed and decided by the Idaho Supreme Court in *A&B Irr. Dist. et al. v. State of Idaho*, 157 Idaho 385 (2014). At about the same time the Basin-Wide Issue 17 decision was issued, this Court entered the *Final Unified Decree* in August 2014. This Court also entered its *Order Regarding Subcases Pending Upon Entry of Final Unified Decree* which explained that it was retaining jurisdiction over the Basin 01 storage water right claims subject to this motion.

³ Despite IDWR's recommended "season of use," and as agreed to in the *Stipulation* in 2012, Water District 01 has not administered the storage water rights according to a 1/1 to 12/31 season of use element. In other words, the District's administration and computerized accounting program has not "reset" the storage rights on January 1st. This fact provides further support for the Court to address the issue in the SRBA and provide certainty and finality for the water users and spaceholders.

After the parties stipulated to resolve Reclamation's late Basin 01 storage claims addressing "refill" (i.e. 01-10620 et al.), the State file a motion for order decreeing water rights in January 2015. During this time several parties were negotiating a resolution of the "storage reset" issue concerning administration of the storage water rights in the fall of a calendar year. These negotiations continued for several months. Finally, the Court entered partial decrees for the storage water rights in August 2016. The parties continued informal negotiations through the fall of 2016, culminating with a formal mediation session before Judge Melanson on April 5, 2017.

Since the parties were unable to reach a settlement through mediation the Coalition filed its *Joint Motion to Decree General Provision* and supporting documents pursuant to the Court's *Order on Mediation Order Setting Status Conference* (Feb. 22, 2017).

STATEMENT OF FACTS

The Coalition offers the following facts in support of its *Joint Motion*. See also, *Factual Background Addendum* and attached Exhibits. As described below, the history and the development of the Upper Snake River storage system, including the operation and administration of the Basin 01 storage rights, is complex and unique. The brief history provides context for the Coalition's joint motion and describes why a general provision is necessary to provide certainty and finality to the proper administration of storage water rights. The Coalition's proposed general provision will help maximize storage for the benefit of all spaceholders as well as protect the priority of natural flow rights for those entities finishing the irrigation season consistent with prior administration.

I. Administration of Storage Water Rights Pre-1978.

The history of the administration of storage water rights in the Upper Snake River Basin is dependent upon which reservoirs were completed at the time. For purposes of the present motion, the Coalition focuses on American Falls and Lake Walcott, both pre and post 1978 (when the computerized water rights accounting program was first implemented).

Prior to 1978, the Water District 01 Watermaster typically did not regulate or administer water rights after the “end of regulation,” which typically occurred sometime during the fall. *See Declaration of David B. Shaw (“Shaw Dec.”)* at 5. As irrigation demand decreased, the reservoirs could store available natural flow in anticipation of the following irrigation season. The accounting for the following year’s storage water rights began with the calculation of holdover (carryover) storage after all canal diversions ended for the year.

For several decades Lake Walcott was typically drawn down in the fall and early winter to protect the dam from ice damage. *See Shaw Dec.* at 4. Lake Walcott is the furthest downstream reservoir and it always fills due to its location. *See id.* Prior to 1978, the Lake Walcott water right (1-219) was never exercised toward the end of the irrigation season since this was the time of year storage was being released and the lake level was lowered to prepare for winter operations. The reservoir typically filled in March, but the fill time varied from February to April. Importantly, the Lake Walcott 1909 priority storage right always filled before the irrigation season and did not begin storing water in the fall to the detriment of canals still diverting. *See Shaw Dec.* at 4. Stated another way, the Watermaster never “reset” the Lake Walcott 1909 priority water right (1-219) in the fall. *See Shaw Dec.* at 7.

However, as for American Falls Reservoir, various district annual reports from 1965 to 1973 demonstrate that the storage water right priority of March 30, 1921 for 01-2064 was restored in September. Since American Falls has a senior storage water right located in the lower basin, filling the right as early as possible allows upstream junior storage rights to begin storing water earlier. *See Shaw Dec.* at 5. When the natural flow exceeded 1,700 cfs, half of the available natural flow (or 850 cfs) was delivered to AFRD#2 under water right 1-6, and the balance was delivered to storage in American Falls Reservoir. *See Shaw Dec.* at 4. In other words the American Falls Reservoir storage water right was not considered “full” in the fall months as it began accruing water for the following year’s irrigation season. *See id.* Water that passes American Falls and is not diverted before Milner Dam is “lost” to Water District 01. *See Shaw Dec.* at 5. Other than the 1921 American Falls water right (1-2064), storage water right priorities were not administered to curtail the natural flow rights of irrigation entities that were still delivering water for irrigation purposes that season.⁴

With the advent of new reservoirs in the system it was clear that Reclamation, the Watermaster, and the spaceholders had to carefully account for available storage as water under one storage right could be held upstream at a different reservoir. At the same time, water was distributed to protect senior rights and not interfere with any water a prior reservoir right would otherwise receive.

⁴ All canal companies and irrigation districts above Blackfoot hold natural flow rights pre-1900 that are not affected by any of the reservoir storage water rights. Most entities below Blackfoot hold natural flow rights pre-1909 that are similarly not affected by any of the reservoir storage rights. Milner Irrigation District’s senior natural flow water right 1-17 has a 1916 priority date, and AFRD#2’s natural flow water right 1-6 shares the same priority as American Falls Reservoir storage water right 1-2064 (March 30, 1921). Recent changes in the computerized accounting program have resulted in distributing water to Lake Walcott’s storage water right 1-219 with a priority date of 1909 that has taken natural flow away from these two districts in the fall.

II. Administration / Storage Water Right Accounting Post-1978.

In 1978, Water District 1 began using a new computerized accounting program as part of administration of all water rights within the district. *See Shaw Dec.* at 4. That year the Water District passed two resolutions, one requiring the Watermaster to administer “year round,” and the second requiring the Watermaster to account for all diversions that could injure prior natural flow or storage diversions. In 1979, the unfilled storage water rights accrued additional water in the fall as the reservoirs stored available water. The ability to store such water was aided by the fact that Jackson Lake was restricted to a “safety of dams” condition between 1978 and 1987. Since Jackson could not store as much water, the entire reservoir system needed about 500,000 acre-feet less to fill.

In 1988 the Watermaster programmed a storage “reset” date of August 1st into the computerized accounting program. The date was chosen to assist the Watermaster in allocating storage, maximizing storage for the following year, and to minimize unallocated storage in the system. In 1989 the storage “reset” date was changed to October 1st and in 1990 it was changed again to August 15th. Finally, in 1997, as a result of extremely high flows, the “reset” date was changed to September 15th, the date that is still used by the District today. *See Shaw Dec.* at 7. This final change was hydrologically based to capture unappropriated natural flow appearing in the river before it passed Milner Dam.

Adding the “reset” date in 1988 created a conflict with certain natural flow irrigation water rights, namely the 1916 water right (1-17) held by Milner Irrigation District and the 1921 water right (1-6) held for AFRD#2. For the first time in Water District 01 history, the storage “reset” date dictated that the 1909 Lake Walcott storage right come back into priority before the

end of the irrigation season. Between 1988 and 2011 the Lake Walcott storage right was limited by its 2,500 cfs diversion rate limit, as previously decreed in the *Foster Decree*. However, when water right 1-219 was reported and decreed in the SRBA, the diversion rate limitation was removed. Accordingly, from 2011 to the present, the Walcott storage right was allowed to take all available natural flow to the detriment of the natural flow rights held by Milner and AFRD#2 that were finishing the irrigation season.

AFRD#2's water right 1-6 also experienced various changes in administration after 1978. Prior to the accounting program, available natural flow in the fall (Sept/Oct) was split between water rights 1-6 and 1-2064. Accordingly, AFRD#2 received up to 850 cfs of natural flow for irrigation purposes in the fall. *See Shaw Dec.* at 4. From 1978 to 1987, water right 1-6 received all of the natural flow available to the March 30, 1921 priority because water right 1-2064 was deemed "full" or "satisfied" until the end of the irrigation season. When the August 1st reset date was added in 1988, AFRD#2 did not receive natural flow under 1-6 between 1988 and 2007 because the "winter water savings" space in American Falls Reservoir was assigned an "effective priority date" of one (1) day senior (March 29, 1921) in the accounting program. Since this storage space never completely filled in the fall before AFRD#2 ceased irrigation diversions, water right 1-6 did not receive any natural flow during this period.

In 2008 the Water District determined that water right 1-6 was being treated as junior to the "winter water savings" space. Based upon a review of the water right licenses and decrees, the District determined that water right 1-6 should be treated as senior to that space since the "winter water savings" space was encompassed under water right 1-2064. Once water right 1-2064 was deemed full or satisfied for the year, 1-6 was allowed to receive the full 1,700 cfs until

the end of the irrigation season. At that time the District assigned water right 1-6 an “effective priority date” of March 28, 1921, or one (1) day senior to the “winter water savings” space, for the period from the September 15th “reset” date until the end of the irrigation season. This determination was later affirmed by the Director in the *Final Order Regarding Instructions to Water District 01 Watermaster* (In the Matter of Water Right No. 1-6, Feb. 11, 2013). However, despite the administration pre-1978 and the Director’s 2013 order, the use of the Lake Walcott 1909 priority, and the removal of its diversion rate limitation, precluded 1-6 from receiving all of the water it was entitled to after 2008.

The multiple changes in this storage water right accounting since 1978 are the primary reason for this Court to decree a general provision and provide certainty to the Water District 01 water users. Whereas the Coalition’s proposed general provision is consistent with the history and development of the storage water rights prior to 1978, it will also help maximize actual storage of water to the benefit of all spaceholders while protecting natural flow rights for those entities finishing the irrigation season.

ARGUMENT

I. The Court Should Decree the Coalition’s Proposed “Reset” General Provision Necessary for Storage Water Right Administration.

The Coalition submits this is the final remaining issue for the Court to resolve regarding the Basin 01 storage water rights. The Court retained jurisdiction over the Basin 01 storage water rights. *See Order Regarding Subcases Pending Upon Entry of Final Unified Decree* (Subcase Nos. 01-00219 et al., August 26, 2014); *see also, Final Unified Decree* at 13, Section IV, Paragraph 17 (subparagraph (a) and/or (c)). The “storage reset” issue represents an “other final determination” for the Basin 01 storage water rights listed in the *Order Regarding Subcases*

Pending Upon Entry of Final Unified Decree. Further, the storage “reset” issue is one that is not reviewable under the Idaho Administrative Procedures Act and IDWR’s rules procedure. *See Final Unified Decree* at 13, Section IV, Paragraph 17. Indeed, IDWR and the Water District cannot add “general provisions” regarding the storage water rights’ season of use through an administrative process. Accordingly, the Court should address this final remaining issue necessary for administration of the Basin 01 storage water rights under the grounds set forth above.

Idaho’s adjudication statutes allow the Director to include “such general provisions” as he or she “deems appropriate and proper, to define and to administer all water rights.” *See* I.C. § 42-1411(3). Partial decrees entered in the SRBA are “subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights.” *See* I.C. § 42-1412(6). The Idaho Supreme Court has described a general provision as follows:

A general provision is a provision that is included in a water right decree regarding the administration of water rights that applies generally to water rights, is not an element of the water right, or is necessary for the efficient administration of the water rights decreed. Administering a water right is not a static business. While some administrative provisions would clearly apply to a certain type of water right in certain circumstances other administrative provisions clearly would not apply to a certain type of water right and every circumstance.

Idaho Code § 42-1412(6) provides that “[t]he decree shall also contain an express statement that the partial decree is subject to such subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights.” I.C. § 42-1412 (1996). We conclude that a general provision is an administrative that generally applies to water rights but it need not apply to every water right.

Idaho Code § 42-1412(6) instructs that a general provision should be included in a water right decree if such general provision is “necessary” to define or efficiently administer water rights. Whether a general provision is “necessary” depends upon the specific general provision at issue and involves a question of fact, (defining the proposed general provision and the circumstances of its

application), and a question of law (determining whether the general provision facilitates the definition or efficient administration of water rights in a decree). A general provision is “necessary” if it is required to define the water right being decreed or to efficiently administer water rights in a water right decree.

A&B Irr. Dist. v. Idaho Cons. League, 131 Idaho 411, 414 (1997).

This Court has further described how a general provision can be decreed for purposes of the efficient administration of water rights within a certain hydrologic basin, even though the provision does not establish a water right:

As explained below, when *A&B* and *ICL* are read in conjunction with each other, the respective holdings provide that a general provision recognizing the use of high flow water does not establish a water right. However, based on historical practices a general provision authorizing the “use” of high flow water not amounting to a water right can still be necessary for the efficient administration of the water rights in the body of the decree.

Memorandum Decision and Order on Challenge at 18 (Subcase Nos. 74-15051, et al., 294 “High Flow” Claims, Jan. 3, 2012).

Accordingly, this Court must determine whether a proposed general provision is “necessary” to “define” or “efficiently administer” the storage water rights in Basin 01. The Coalition submits that the following general provision should be decreed to “define” and “efficiently administer” the storage water rights in Basin 01:

All storage water rights in the Reservoir system shall be entitled to accrue available natural flow beginning on November 16th for the following calendar year in priority; provided, however, water accruing to the storage rights of the Reservoir system may be temporarily held in unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Watermaster (as supervised by the Director of the Department of Water Resources), the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner. Storage water rights nos. 1-4055, 1-10044, 1-10045, 1-2064, 1-2068, 1-10401, 21-12946, 21-2161, 21-2156, 21-4155, and 21-10560 may accrue natural flow for the following calendar year according to priority between October 1st and November 15th; provided, however, each of the enumerated rights shall only be entitled to accrue natural flow

available above the point of diversion of each right during this time period. Natural flow available between October 1st and November 15th to the March 30, 1921 priority of water right no. 01-2064 shall only be available after water right no. 01-06 receives up to 850 cfs of the available natural flow.

“Reservoir system” shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott, which store water for distribution pursuant to water right nos. 1-219, 1-2064, 1-2068, 1-4055, 1-10042, 1-10043, 1-10044, 1-10045, 1-10620, 1-10621A, 1-10621B, 1-10622, 1-10623A, 1-10623B, 21-2156, 21-4155, 21-10560, 21-13161, 25-7004, 25-14413A and 25-14413B.

See SWC Joint Motion at 2.

When decreed, the above general provision will accomplish two objectives to ensure the efficient administration of storage water rights in Basin 01.⁵ First, the provision will allow Water District 01 to continue to “maximize” the actual storage of water in the Upper Snake River Basin for irrigation and other purposes. Again, ever since the construction of the reservoirs and appropriation of the storage rights, the District has allowed Reclamation to store available water beginning in the fall, rather than waiting until January 1st. Although the administration has changed over time, the District has never implemented a season of use that limits actual storage of water and accounting to the water right from January 1st to December 31st. Decreeing a general provision will preclude future uncertainty or confusion between the season of use element and actual water right administration.

Second, the provision will provide certainty to the Water District 01 water users going forward and ensure that entities diverting natural flow for irrigation in the fall will be able to so

⁵ In this proposed general provision AFRD#2 is willing to limit the diversion rate under water right 1-6 to 850 cfs from October 1st through November 15th as an accommodation that is consistent with historic administration pre-1978 and similar to the spring administration of the water right. The limitation will further assist in maximizing storage and delivering available water to the American Falls storage water right (01-2064). However, if the general provision is not decreed, AFRD#2 reserves the right to divert up to the full 1,700 cfs as provided by water right 1-6 and the Director’s *Final Order Regarding Instructions to Water District 01 Watermaster* (In the Matter of Water Right No. 1-6, Feb. 11, 2013).

consistent with the administration that occurred after all reservoirs were constructed and operating and prior to the implementation of the computerized accounting program in 1978.

As to the first point, the general provision will formally authorize the Water District to continue to account for water stored by Reclamation in the fall. Although the accounting practice changed from 1978 until present with the advent of the computer program, i.e. the "reset" date used in the program, and which storage water right priority was used for the "reset," the Coalition's proposed general provision will ensure a method of administration that was implemented after the reservoirs were completed and the storage rights appropriated, without injuring existing irrigation natural flow rights at the time. Stated another way, whereas the District distributed natural flow to irrigation entities that were still diverting in the fall prior to 1978, the District only "reset" to the American Falls storage water right priority of March 30, 1921 to account for water that was actually stored above and beyond the natural flow demand. The above provision captures this practice by authorizing the Watermaster to distribute natural flow available above the demand of AFRD#2's 1-6 right (up to 850 cfs) to the American Falls general storage water right 01-2064 between October 1st and November 15th. All water users and spaceholders appropriated their water rights consistent with this system of administration, which allowed Reclamation to begin physically storing water and the Water District to account for such storage pursuant to an established water right. This system was implemented successfully for years without injuring existing natural flow water rights for irrigation purposes.

Next, between November 16th and the end of the calendar year the Coalition's general provision allows the Watermaster to continue to account for stored water in priority, including to the Lake Walcott 1909 storage right. This part of the general provision continues the

administration used in the computerized accounting program, but does so in a way that does not injure irrigation entities who may still be delivering water and can do so pursuant to natural flow water rights (i.e. like Milner's 1916 water right (1-17) or AFRD#2's 1921 water right (1-6)).

In sum, the Coalition submits the proposed general provision is necessary and will ensure the Basin 01 storage water rights are efficiently administered. The provision is supported by past administration before implementation of the computerized accounting program and will allow the Water District to maximize storage in the fall without injuring existing water rights diverting for irrigation purposes, most notably the water rights of Milner Irrigation District (1-17) and AFRD#2 (1-6). Further, the proposed general provision will provide certainty going forward to ensure the "reset" date is not changed and that the storage rights are administered consistently.

REQUEST FOR EVIDENTIARY HEARING

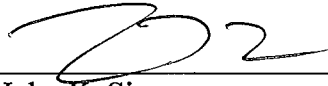
In the alternative, the Coalition would request an evidentiary hearing on the proposed general provision and any issues the Court wishes to address to resolve the Basin 01 "reset" date issue. If the Court determines that such a hearing is necessary the Coalition would request a status and scheduling conference.

CONCLUSION

A general provision is necessary for the administration of Basin 01 storage water rights. As detailed above, and in the accompanying supporting documents, decreeing the proposed general provision will provide certainty to all Basin 01 water users, consistent with historical administration that will benefit spaceholders and protect natural flow rights. The Coalition respectfully requests the Court to decree the proposed general provision.

DATED this 15th day of May, 2017.

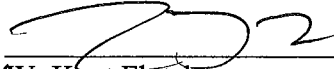
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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2017, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF SURFACE WATER COALITION'S JOINT MOTION TO DECREE GENERAL PROVISION** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

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ATTACHMENT A

01-219
01-2064
01-2068
01-4055
01-10042
01-10043
01-10044
01-10045
01-10620
01-10621A
01-10621B
01-10622
01-10623
21-02156
21-04155
21-10560
21-13161
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