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ATTORNEYS FOR THE CITY OF POCATELLO

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO VARIOUS WATER RIGHTS HELD BY OR FOR )  
THE BENEFIT OF 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 )

**POCATELLO'S  
REBUTTAL BRIEF**

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The City of Pocatello ("Pocatello") hereby submits its brief in rebuttal to the Surface Water Coalition ("SWC") and Bureau of Reclamation's ("BOR") closing briefs in the above captioned matter.

**PROCEDURE**

The issues raised by the BOR and the SWC in their initial closing papers were, to some extent, already addressed in *Pocatello's Post-Trial Brief* and *Pocatello's Proposed*

*Findings of Fact, Conclusions of Law and Ruling (“Pocatello’s Proposed Findings”).*

However, SWC did not file a post-trial brief, and none of its pleadings filed to date have addressed Pocatello’s evidence or legal arguments taken in this matter. As such, Pocatello reserves the right to provide a sur-rebuttal brief, in response to as-yet unknown arguments SWC might raise in their Rebuttal Brief.

Based on the materials filed to date by BOR and the SWC, the primary (though not sole) focus of this brief will be on an issue that must be resolved in this dispute, and an issue wholly disregarded by the SWC in all of their closing papers: how much water is *necessarily needed* to provide a supply to crops?

### **INTRODUCTION**

The SWC’s January 14, 2005 delivery call letter demands curtailment of junior ground water rights in order to satisfy the decreed quantities on the face of the SWC’s water rights.<sup>1</sup> The letter goes on to say:

The extent of injury equals the amount of water diminished from the cumulative shortages in natural flow and storage water which is the result of groundwater depletions....[a]ny and all water that is pumped under junior groundwater rights that would otherwise accrue to the Snake River to satisfy a senior water right, as demonstrated by the [ESPAM] model, results in a ‘material injury’ to the SWC’s senior surface water rights.

Testimony in this matter showed that if the Idaho Department of Water Resources (“Department”) satisfies the SWC’s demands to curtail the vast majority of junior groundwater rights, it will create a windfall of natural flow water supplies for SWC in quantities of water rarely ever historically available in the Snake River at the SWC’s

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<sup>1</sup> *Letter to Karl Dreher Re: Request for Water Right Administration in Water District 120 (portion of the Eastern Snake Plain Aquifer) /Request for Delivery of Water to Senior Surface Rights, January 14, 2005.* The letter goes on to say that curtailment must occur “unless substantial aquifer recovery occurs as a result of artificial or natural recharge in excess of the present rate of ground water depletions.” *Id.* at 2.

headgates. Even those entities with the least reliable natural flow rights (based on pre-well deliveries records associated with those rights) could divert the natural flow for irrigation, and keep their BOR storage accounts full.

The requested outcome would satisfy a number of interests: the BOR's desire for sufficient water for flow augmentation<sup>2</sup> and the SWC's desire to have water available for rental or as an "insurance" policy<sup>3</sup>. It does not, however, satisfy the requirement under Idaho law that the Department should curtail junior ground water rights *only* to avoid material injury to senior water rights.

The Parties have filed literally thousands of pages of paper—reports, pre-filed testimony, briefs, proposed findings. Sifting through all of that, it seems the task of the Hearing Officer is to resolve the following issues, to wit:

- As far as determining shortages, may the SWC withhold certain water supplies from scrutiny, such as their storage water, and seek delivery only of natural flow supplies?
- Can the SWC's delivery call be answered in the way they suggest, by finding all depletions that reduce water available for diversion to be injurious?
- If not—and the decision in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 154 P.3d 433 (2007) ("AFRD#2") and the Department's own exercise of its discretion suggests not—should the Department curtail junior ground water users to obtain the amount

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<sup>2</sup> See, Hearing Testimony of Jerrold Gregg generally, Transcript of Hearing, January 24, 2008.

<sup>3</sup> See, e.g., Written Direct Testimony of Billy Ray Thompson, at 15, 18; Written Direct Testimony of Albert Lockwood at 9.

*necessarily needed* for the SWC to grow a crop?<sup>4</sup> Or should the Department curtail junior ground water users to obtain, as Dr. Brockway testified, the face amount of the decree to minimize the risk to the seniors during the season?<sup>5</sup>

- Finally, what methodology is most appropriate for the Department to use in determining the amount of water *necessarily needed* for beneficial uses in the context of conjunctive administration?

## I. IN RESPONDING TO A DELIVERY CALL, IDAHO LAW REQUIRES EXAMINATION OF ALL SOURCES OF SUPPLY

### A. Idaho law requires consideration of all sources of supply during conjunctive administration.

The SWC suggests that, in the context of a delivery call, the Department is without authority to scrutinize the sources of supply available to the senior. *See, Surface Water Coalition's Proposed Findings of Fact & Conclusions of Law* at 23-24, ¶ 111-114 (“*SWC Findings*”). As a threshold matter, the Rules of Conjunctive Management of Surface & Ground Water Resources (“CMR”) require the Department to consider all of the SWC’s water supplies in answering a delivery call. CMR 42(a) and (g).

The SWC would like to see a regime whereby depletions to the stream that impact natural flow are cause for curtailment, even if the senior has a full reservoir or—as in the case of SWC entities<sup>6</sup>—the senior relies primarily on its storage supplies. This type of

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<sup>4</sup> This is the phrase used by Mr. Dreher to describe the amount of water associated with his “minimum full supply” determinations. *See infra* at note 8 and discussion thereon.

<sup>5</sup> “So it seemed prudent to me to start out with something that reduces the risk, and maybe start out with a water right.” Transcript, January 31, 2008, page 2370. [Discussing with Mr. Simpson on re-direct his rationale for his analysis and suggestions for administration].

<sup>6</sup> *See Surface Water Coalition's Pre-Hearing Memorandum* at 22. Storage water represents the primary supply for all SWC entities with the exception of Twin Falls Canal Company (“TFCC”) who relies primarily on a senior natural flow right. (“The Director’s characterization of storage rights as

administration would represent the sacrifice of junior ground water rights in order to “firm up” the previously unreliable natural flow rights of the non-TFCC members of the SWC. By its own admission, all SWC members except TFCC *rely* on their storage supplies.<sup>7</sup> Furthermore, the SWC has not described—nor can it—how such administration could be consistent with the legal requirements that the Department consider optimum use, maximum beneficial use, and reasonable use of conjunctive water resources in the course of administration. *AFRD#2*, 154 P.3d at 447-48. The SWC’s objections to the Department’s consideration of “total water supply” in the course of administration fail as a matter of law.

**B. Idaho law controls this delivery call.**

The BOR suggests that the administration of water rights in Idaho may be controlled by federal law. *Reclamation’s Post-Hearing Brief at 29-30* (“*BOR Post-Trial Brief*”). To the extent the private lease of water from a BOR storage account provides the source of replacement water to avoid injury to seniors, the Department has found *state law* to be an adequate means to administer water. *See Amended Order of May 2*. There is no factual support for the argument that the lease is ineffective because the Director does not immediately transfer it to another account. In the closing days of this trial, the IGWA’s leased amount of water that the Director had waited to assign to the TFCC was, in fact, placed in the TFCC account. This is an accounting matter, and accounting for water in the Upper Snake River Basin is a function of the government of the *State of*

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‘supplemental’ water rights for all Coalition members fails to recognize that for some entities storage water provides a ‘primary’ source of water supply, particularly in dry years. For SWC members with more junior priority natural flow rights, such as AFRD #2, A&B, BID, MID, Milner, and NSCC, storage water represents a primary supply of water for their projects, particularly in dry water years, and can even consist of 100% of the water supply in certain years”).

<sup>7</sup> *See, supra*, note 5.

*Idaho*, not the federal government. Importantly, the BOR cites no legal basis for their argument—the testimony of a BOR administrator cited by BOR does not substitute for legal argument. Federal law is simply not applicable in this dispute, and the BOR fails to cite any law on point to show otherwise.

**II. THE SWC FAILED TO MAKE A SHOWING THAT IT IS ENTITLED TO DELIVERY OF THE QUANTITIES OF WATER ON THE FACE OF ITS DECREES**

**A. How much water is *necessarily needed* for SWC to grow a crop?**

The Idaho Supreme Court has stepped carefully in defining the path to determine material injury to water rights in the context of conjunctive management. In *AFRD#2*, the Court articulated a threshold legal presumption that a senior placing a delivery call is entitled to quantity on the face of his decree, but that the CMR (through evidence of juniors or through the efforts of IDWR) should be used to determine whether the full decreed amount is actually required for beneficial uses. 154 P.3d at 449. Curtailment is limited to the amount required for beneficial uses. The Director anticipated the *AFRD#2* Court’s articulation of this standard, and in the May 2, 2005 Order characterized the amount necessary for beneficial uses as the “minimum full supply”.

The SWC’s primary complaint about the Department’s administration of its delivery call is summarized in its Finding 117<sup>8</sup>:

Finally, the Director erroneously used the “total water supply” and “full headgate delivery” criteria to arrive at the least amount of water each Coalition member is entitled to divert for purposes of conjunctive administration, or what is coined the “minimum full supply”.

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<sup>8</sup> *SWC Findings* at 25.

By contrast, Mr. Dreher drew a distinction during his testimony between amounts of water that might be diverted if they are available, and the amounts needed for beneficial uses:

We're not saying that—at least I'm not proposing that a surface water right holder can't divert that water if it's there. The point is I don't think they can seek curtailment of junior-priority rights to provide that amount of water that's not *necessarily needed*. That's the distinction.<sup>9</sup> (Emphasis supplied).

Mr. Dreher testified that he arrived at that conclusion based on his understanding of the doctrines of optimum use, maximum utilization, and reasonable use<sup>10</sup>—doctrines which the *AFRD#2* Court expressly found were required to be incorporated into conjunctive administration. Mr. Dreher's testimony on this point, and the Department's continued reliance on this interpretation as a basis for administration, provides strong support for the position that the Department has properly interpreted the qualitative amount of water *necessarily needed*. In other words, the *necessarily needed* amount *is* a minimum.

The SWC's position that they are entitled to more than the "minimum full supply" fails as a matter of law. It also fails as a matter of fact. A review of their bases demonstrates that their evidence was insufficient to support the factual finding they seek, and as such, that is likely enough.

- The SWC have provided qualitative and unsubstantiated testimony that summarily asserts the full decreed amount has been diverted and "beneficially used" (*see, e.g., SWC Findings* at 19, ¶ 91-93; *generally, SWC Lay Witness Written Direct Testimony*).

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<sup>9</sup> Transcript of Hearing at 437, lines 14-20, January 17, 2008.

<sup>10</sup> Transcript of Hearing at 489, line 22, January 17, 2008.

- By the same token, SWC (and Pocatello) have provided technical testimony that demonstrates the amounts of water *necessarily needed* by the SWC's crops through the experts' reliance on the crop irrigation requirement ("CIR")<sup>11</sup>. See Exhibit 3061.

Given that the CIR value establishes how much water was needed by the crops during the historic period, the lay witness testimony is insufficiently precise—both in terms of quantity and time frame—to be useful to resolving this dispute.

The differentiation between the lay testimony and the technical expert testimony above is not meant to blur the distinctions made by Pocatello in its *Post-Trial Brief and Proposed Findings*. The unreliability of the SWC's irrigation diversion requirements analyses was discussed at length in Pocatello's prior filings, and will not be rehashed here.<sup>12</sup> Dr. Brockway's testimony at trial made it clear that the SWC's irrigation diversion requirements analysis was not designed to demonstrate the amount of water *necessarily needed* by the SWC's crops<sup>13</sup>. He also testified that, rather than rely on the irrigation diversion requirements, that the SWC would prefer to receive delivery of the amount of water on the face of the decree, as this would be most likely to avoid risk to the SWC<sup>14</sup>.

This issue—the difference between what is *necessarily needed* (i.e., "minimum full supply" as that term has been employed by the Department) and what might be needed to provide the SWC a cushion of comfort during a short water year- is the pivot on which the Hearing Officer must resolve this case. Will juniors be required to curtail to

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<sup>11</sup> CIR=crop ET – effective precipitation

<sup>12</sup> See, e.g., *Pocatello's Post-Trial Brief*, section I.C., *Pocatello's Proposed Findings*, section V.I. and V.K.

<sup>13</sup> See, e.g., Transcript of Hearing, at 2376-2377, January 31, 2008.

<sup>14</sup> *Id.* at 2370 and 2374.

provide a “just-in-case-of-a-shortage” supply for the SWC? Or will they be required to curtail for purposes of beneficial use—i.e., the amount *necessarily needed*.

The better course is for the Hearing Officer to adopt the approach detailed by Pocatello in its *Proposed Findings* at 28, ¶¶ V.K. and 41-43, ¶¶ VII.B-E.

**B. The AFRD#2 Court did not create a burden of proof that can never be overcome by the juniors.**

Based on the evidence it presented in the case, the SWC relies heavily on the legal presumption articulated in *AFRD#2* that the senior is entitled to delivery of the face amount of his decree. In addition, argues the SWC, because juniors (and the Department’s forecasting methodologies) are insufficiently prescient to have “perfect foresight” regarding the amounts of supply and demand required in a given season, such defenses are inadequate as a matter of fact. *SWC Findings* at 32, ¶ 142. This is a convenient argument because by it, the SWC rests on their legal presumption and obtains curtailment that will ensure delivery of their full decreed quantities without any showing of need at all. This cannot have been the result intended by the *AFRD #2* Court.

Particularly because it articulated the presumption and defense after a thorough discussion of the applicability of the various public interest doctrines arising under the Idaho Constitution and statutes, and reiterating that such doctrines are alive and well and required for consideration by the Department during administration. 154 P.3d at 447-48.

**C. The SWC’s evidence is insufficient as a matter of fact to overcome the defenses established by the juniors in this case.**

The *AFRD #2* decision does not prohibit the senior from also making a showing of what amounts of water he needs to make a crop; however, it is worthy of note that none of the SWC experts gave an opinion on material injury. For material injury

testimony, SWC chose to rely on assertions from lay witnesses that all of the water diverted during the historic period was needed for beneficial use.

This testimony is problematic because, even if a fish farmer can grow more fish by simply adding more water, a corn farmer cannot necessarily grow more corn by adding more water. In fact, testimony in this case established the opposite. Delivery of more water than is required by the crop simply results in added return flows to the system. Transcript of Hearing at 1761, line 15 to page 1762 line 3, January 28, 2008 (Testimony of Vince Alberdi). Further, the concept that crops require a fixed amount of water (based on temperature and solar radiation, as well as crop type) was fundamental to the irrigation diversion requirements analyses presented by both SWC and Pocatello. In these two competing analyses presented to the Hearing Officer, SWC and Pocatello agreed on only one piece of input data: how much water was required by the crops. *Pocatello's Proposed Findings* at 29, ¶ V.K.1 and 3.<sup>15</sup> In resolving the question of whether there was material injury, the Hearing Officer should rely on the technical evidence provided by Pocatello, and reject the SWC's technical evidence as unreliable as a basis for administration, as described previously in this brief and in *Pocatello's Post-Trial Brief* and *Pocatello's Proposed Findings*.<sup>16</sup>

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<sup>15</sup> See also, Exhibit 3061, described at length in Pocatello's Post-Trial Brief.

<sup>16</sup> See, e.g., *Pocatello's Post-Trial Brief*, section I.C., *Pocatello's Proposed Findings*, section V.I. and V.K.

**D. The SWC's lay witness testimony is insufficient as a matter of law to find injury.**

Qualitative evidence from lay witnesses about the amounts of water a farmer is accustomed to receiving is of questionable value under Idaho law.<sup>17</sup> Idaho law, even as long ago as *Abbott*, refers litigants back to the standard of beneficial use as the measure of what a senior can demand. In that regard, the lay witness testimony adds nothing to the resolution of this matter.

Pocatello (and IGWA) previously briefed the question of the legal standard to show material injury under Idaho law in *Pocatello and IGWA's Brief in Support of Motion for Summary Judgment and Motion in Limine*, argued and decided by the Hearing Officer on January 4, 2008. The arguments made through the briefing and oral argument on the *Joint Motion to Strike Prefiled Lay Testimony of Surface Water Coalition and Memorandum in Support*, (January 11, 2008), which was argued on January 18, 2008, are also restated and incorporated here by reference.

**III. THE SWC CANNOT AVOID THE BENEFICIAL USE REQUIREMENT OF THE AFRD#2 DECISION BY REFERENCE TO ITS STATUS AS MERE PROVIDER OF IRRIGATION WATER.**

The SWC suggests that Pocatello's irrigation diversion requirements analysis, which reflects the amount of water required by the SWC for beneficial uses, should be rejected because the SWC entities are required to provide a particular amount of water to each shareholder or district member by contract and therefore have no control over individual irrigation management. *SWC Findings* at 34, ¶ 151. As such, says the SWC, the Department would be incorrect to assume the type of "careful water management"

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<sup>17</sup> See, e.g., *Abbott v. Reedy*, 9 Idaho 577, 75 P. 764 (1904) ("*Abbott*") ("the law allows the appropriator the amount actually necessary for the useful and beneficial purpose to which he applies it." Rather than the amount of water he is accustomed to receiving.).

endorsed by Mr. Dreher during his testimony.<sup>18</sup> Further, argues the SWC, to the extent particular lands are not in production because they've been paved over or are no longer being irrigated, it is not the business or concern of the canal companies because they merely deliver water to shares.

The SWC's objections arise not because the amounts of water Pocatello proposes in its irrigation requirements analysis are incorrect;<sup>19</sup> rather, this objection arises because the SWC objects to scrutiny of their after-the-headgate irrigation operations. By suggesting that an irrigation diversion requirements analysis that assumes SWC farmers irrigating with center pivot sprinklers are doing a careful job—based on the range of application efficiencies identified in the Department's technical reports<sup>20</sup>—Pocatello is necessarily suggesting that the question of *how* each SWC entity operates beyond its river headgate is important for purposes of determining beneficial use.

**A. The SWC's position would require determination of irrigation diversion requirements without regard to whether land is actually irrigated.**

As IGWA's evidence in this case showed, at least for Burley Irrigation District ("BID") and TFCC, numerous acres of land under those systems have been "hardened" and are no longer irrigated.<sup>21</sup> Dr. Brockway attempted to minimize the amounts in question during his testimony, but if TFCC's irrigated acres are actually 15,000 acres (or even the 6600 acres proposed by Dr. Brockway) less than claimed by the SWC, that translates conservatively to 30-45,000 acre-feet of water (or 13,000 acre-feet of water,

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<sup>18</sup> Transcript of Hearing at 503-04, January 17, 2008.

<sup>19</sup> See *Pocatello's Proposed Findings* at 22, explaining that, with the exception of North Side Canal Company ("NSCC") and TFCC, the differences between the SWC and Pocatello's total irrigation diversion requirements for the other five SWC entities are not that large.

<sup>20</sup> Such as Exhibit 3040 at page 37.

<sup>21</sup> Transcript of Hearing at 2244, January 31, 2008.

using Dr. Brockway's number) that are not required by *anybody* under the TFCC system during times of shortage.<sup>22</sup>

The SWC is not in danger of forfeiture of such water—the decision in *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 83, 87, 982 P.2d 917, 922 (1998) and I.C. §42-223(7) demonstrates that. In *Peiper*, a shareholder under the Aberdeen-Springfield system attempted to avoid his assessments by claiming forfeiture of his shares due to non-use. The Court held that so long as the canal company cannot control the shareholder's non-use, it could continue to hold a valid irrigation water right associated with that use. *Id.* It is one thing to allow maintenance of an irrigation water right, despite non-use; however, it is something else entirely to countenance curtailment without examination of the actual uses to which the water is being put.

**B. The SWC also asks the Department to ignore the range of efficiencies associated with on-farm application of the water (i.e., an efficiency analysis) which is nonsensical as ignoring actual irrigated acres.**

By the same token, the SWC cannot obtain delivery of amounts of water that are inconsistent with the amounts required based on the on-farm efficiency analysis.

Pocatello has proposed—and Mr. Dreher has endorsed<sup>23</sup>—the assumption that SWC farmers are “careful water managers”. As a technical matter, this means that the analysis of the SWC's on-farm demand must consider the application type (i.e., furrow, center pivot, side roll sprinkler) and assume an efficiency from the higher end of the ranges reported by IDWR in the 1996 Dreher-Tuthill Report, Exhibit 3040. This is consistent

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<sup>22</sup> *Id.* at 2244-50. Note also, that 2 af/acre is the CIR; the actual amount of water calculated by an irrigation diversion requirements analysis would be twice or more times that amount. Using Pocatello's requirements analysis, Exhibit 3007(A) at Table 12, the inclusion of TFCC's non-irrigated acres in an irrigation diversion requirements analysis may overstate the amount of water required by as much as 81,000 af (5.4 af/acre X 15,000 hardened acres).

<sup>23</sup> Transcript of Hearing, January 17, 2008 at 503.

with the conjunctive management rules<sup>24</sup>: whether efficiency is characterized as “achievable” or “operational on-farm” efficiency, the rules require an efficiency analysis of the sort described by Pocatello.

**C. CMR 40.03 should be applied as written.**

The SWC offers, as its last in a suite of reasons why Pocatello’s irrigation diversion requirements analysis should be rejected, Finding 157, which suggests that CMR 40.03 should be wholly complied with, including a determination of reasonableness of application by the junior *and* the senior, and an efficiency analysis of the operations of the junior and the senior.<sup>25</sup> The SWC seems to suggest that it was up to the juniors to prepare and present such an efficiency analysis; however, nothing prevented the SWC from performing this analysis themselves during the course of this litigation. In any event, the junior ground water uses certainly do not object to an efficiency analysis of their operations of the same sort applied by Pocatello to the SWC—in fact they welcome it. Efficiencies of junior irrigators are undoubtedly higher than those of the SWC because junior irrigators pay a power cost for every drop they pump and apply. Further, if the SWC seriously thought that the junior irrigators were applying even up to the authorized amounts in their decrees or licenses, it seems likely that would have been presented during the trial.

In any event, Pocatello endorses the SWC’s request that the Department apply the CMR as written in the course of conjunctive administration.

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<sup>24</sup> See, CMR Rule 40.03 and Rule 42.01(d) and (g).

<sup>25</sup> SWC Findings at 36.

CONCLUSION

Pocatello respectfully requests the Hearing Officer enter Findings of Fact, Conclusions of Law and Ruling consistent with that proffered by Pocatello on February 26, 2008.

Respectfully submitted this 7<sup>th</sup> day of March, 2008.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> of March, 2008, I caused to be served a true and correct copy of the foregoing **Pocatello's Rebuttal Brief** by electronic mail and/or facsimile to:



Sarah Klahn, White & Jankowski, LLP

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