

BEFORE THE COLORADO WATER CONSERVATION BOARD

COLORADO SPRINGS UTILITIES' REBUTTAL PREHEARING STATEMENT

**IN THE MATTER OF THE PROPOSED ACQUISITION OF AN INTEREST IN THE
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO
RIVER**

Pursuant to Rule 6(m)(5)(f) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 (ISF Rules) and paragraph II of the July 18, 2025 Order Re: Procedures and Deadlines for Prehearing Submissions, the City of Colorado Springs, acting by and through its enterprise, Colorado Springs Utilities (Springs Utilities) hereby submits this Rebuttal Prehearing Statement.

A. Summary of Springs Utilities' Position

As reflected in its' August 4, 2025 Prehearing Statement (Springs Utilities' PHS), Springs Utilities supports the Colorado River Water Conservancy District's (River District) and Colorado Water Conservation Board's (CWCB) acquisition of an interest in, and the judicial change of, the historic use of the senior Shoshone Water Right for instream flow (ISF) purposes to provide for permanency of the historical Shoshone call and maintenance of the historical Colorado River flow regime. Springs Utilities has concerns with adding ISF use to the junior Shoshone Water Right, given that the River District's preliminary historical use analysis overstates actual historical use of the Shoshone Water Rights. In addition, the River District's modeling underestimates the resulting impacts to upstream water users as a direct consequence of expanding the use of the junior Shoshone Water Right. An expansion of use, relative to historical operations of the Shoshone Water Rights, would cause injury to Springs Utilities' Continental Hoosier System (CHS) and Homestake Project water rights.

Springs Utilities is also concerned that the Draft Shoshone Water Rights Dedication and ISF Agreement between the River District, CWCB and Public Service Company of Colorado (PSCo) (Proposed Acquisition

Agreement) as currently drafted requires that the CWCB request administration of Shoshone ISF Water Rights at any time the natural flow of the Colorado River at the Dotsero Gage is less than 1,408 unless the River District and CWCB jointly agree to a lower flow rate for administration. This arguably usurps the CWCB's discretion to operate the Shoshone Water Rights for ISF uses in accordance with the statutory authority granted to it under C.R.S. § 37-92-102 and is inconsistent with the CWCB's duty to "promote the conservation of the waters of the state of Colorado in order to secure the greatest utilization of such waters under C.R.S. § 37-60-106(1)". Even if ISF Rule 10, 2-CCR 408-2 provides the CWCB with the authority to delegate its responsibilities to third parties, it should not do so in circumstances like these that involve one of the most consequential water rights on the Colorado River. As such, the Proposed Acquisition Agreement should be modified to maintain the CWCB's lawful discretion consistent with the proposed language suggested in section A.4 of Springs Utilities' PHS.

Springs Utilities also requests that the Proposed Acquisition Agreement be revised to include the provisions related to call relaxation described in paragraph 10.6.3 of the Memorandum of Agreement between Springs Utilities, the River District and many other west slope entities (2024 Blue River MOA) attached as Exhibit 5 to Springs Utilities' PHS. Finally, Springs Utilities requests that, consistent with the 2024 Blue River MOA, the Proposed Acquisition Agreement be revised to include the term and condition referenced in section A.5 of Springs Utilities' PHS related to consistency between the CWCB's exercise of the Shoshone Water Rights and rules adopted for the purposes of fulfillment of Colorado's commitments under either or both the Colorado River Compact and the Upper Colorado River Basin Compact.

Given the concerns raised in its PHS and this Rebuttal Prehearing Statement, Springs Utilities requests that the Proposed Acquisition Agreement be revised to include language similar to that provided in Springs Utilities' Exhibit 7 attached hereto. The language reflects that there are legitimate concerns with the River District's historical use analysis and that as a result the CWCB will not take a position on the historical

use of the Shoshone Water Rights, and defer quantification of the historical use of the junior and senior Shoshone Water Rights to the Water Court process with the CRD and PSCo having the burden of proving the historical use.

B. Springs Utilities' Rebuttals

1. Rebuttal to positions taken by other parties regarding the determinations the CWCB must make prior to acquiring an interest in the Shoshone Water Rights.¹

As reflected in the CWCB's Staff's Prehearing Statement, the CWCB must determine that the acquisition of the Shoshone Water Rights is appropriate to preserve and protect the natural environment to a reasonable degree through an evaluation of at least 11 factors, including the following factors specifically addressed in section A.2, 3, and 5 the Springs Utilities' PHS: 1) any material injury to decreed water rights; 2) the historical consumptive use and return flows of the Shoshone Water Rights that may be available for ISF use; and 3) the effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in delivery of more water than required under compact obligations. CWCB Staff's PHS, Pgs. 3-4. Utilities disagrees with the River District's and its co-parties² that joined in its prehearing statement (River District et al), and other parties' assertions related to those factors and provides its rebuttal to those assertions in the following subsections.

a. Rebuttal to the River District et al's and other parties' positions on the potential injury to other water rights, including Springs Utilities' water rights, that could result from the proposed ISF use of the Shoshone Water Rights and the adequacy of the River District's Preliminary Historic Use analysis.

¹ As a member of Homestake Partnership, Springs Utilities agrees with and adopts the policy/legal positions included in Homestake's Rebuttal Prehearing Statement.

² Mesa County Board of County Commissioners, the Clinton Ditch & Reservoir Company, and the Basalt Conservancy District.

The River District et al claim that Springs Utilities and the other FRWC members have not identified any water rights that would be materially injured by the CWCB's acquisition of the Shoshone Water Rights. River District et al PHS, Pgs. 7-8. The River District et al also assert that Springs Utilities' CHS and Homestake water rights that are located upstream of the Shoshone Power Plant will not be injured because they are junior to the Shoshone Water Rights and that the Shoshone Water Rights were in place at the time those rights were appropriated. *Id.* In addition, Clifton Water District, Grand Valley Water Users Association, Mesa County Irrigation District, Orchard Mesa Irrigation District, Palisade Irrigation District, and the Ute Water Conservancy District (Grand Valley Entities); and Kobe Water Authority (Kobe) claim that their water rights located downstream of the Shoshone Power Plant will be injured if the return flows from the historical operations of the Shoshone Water Rights are reduced from what they claim was historically available for diversion under their rights. Grand Valey Entities PHS, Pgs. 6-7, Kobe PHS, Pgs. 3-4.

These arguments fail to recognize that Colorado law requires that a water right not be expanded beyond its historical use, and that no injury to other water rights will occur. *See, e.g. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Res.*, 91 P.3d 1058, 1063 (Colo. 2004). They are also inaccurate because as reflected in Springs Utilities' PHS and Denver Water's Exhibits 5 and 6, Springs Utilities' Homestake Project and CHS water rights will be injured if the historical use of the Shoshone Water Rights is expanded, which would result if the CWCB and/or the Water Court accepted the preliminary historic use analysis submitted by the River District. In addition, if the CWCB/Water Court were to accept the River District's preliminary historic use analysis more water would be available for diversion by water rights located below the Shoshone Reach compared to the water physically and legally available for those rights historically.

. b. Rebuttal to the River District's and CWCB's positions on the impacts the proposed acquisition will have on interstate compact issues

The River District et al contend that the operation of the Shoshone Water Rights for instream flow purposes will not impair the ability of Colorado to develop its apportionment of water under the Colorado River Compact. River District et al PHS, Pgs.12-13. The CWCB Staff take the position that the change of the Shoshone water rights will not reduce the historic return flows of the Shoshone Water Rights and will therefore not reduce the supplies available to Colorado water users under the Colorado River Compact. CWCB PHS, Pg. 8. However, by injuring vested water rights located upstream from Shoshone, an expanded ISF call does reduce the available water supply to water users in the state and has the effect of pushing more water to the state line. This is one of the reasons Springs Utilities conditioned its non-opposition to the change of the historic use of the senior Shoshone Water Right on inclusion of the language referenced in footnote 5 of the Technical Memorandum submitted by the River District and PSCo that confirms the senior (and junior if changed) Shoshone Water Rights will be exercised in compliance with any rules on compact administration by the State Engineer. Such language is not included in the Proposed Acquisition Agreement and should be incorporated to address Springs Utilities' compact related concerns.

c. Rebuttal to the River District's assertions regarding Springs Utilities' position on the Colorado River Cooperative Agreement and Shoshone Outage Protocol

The River District makes the assertion that the FRWC members who are parties to this proceeding, including Springs Utilities, are claiming that the Colorado River Cooperative Agreement (CRCA) and the Shoshone Outage Protocol Agreement (ShOP Agreement) between the U.S. Bureau of Reclamation, Denver Water, Northern Water, the Colorado Division of Water Resources, the River District and various other west slope parties requires the CWCB to place limitations on the CWCB's acquisition of the Shoshone Water rights, including provisions related to drought restrictions on operation of the senior Shoshone Water Right for ISF purposes. River District et al PHS, Pg. 15. Springs Utilities is not advocating for the inclusion of

any provisions of either the CRCA or ShOP Agreement in the Proposed Acquisition Agreement other than Article VI.E.2.a of the CRCA.

Springs Utilities is requesting that the Proposed Acquisition Agreement acknowledge that any change of the junior Shoshone Water Rights could negatively impact Springs Utilities' ability to serve its customers during extreme drought conditions and that it is appropriate for the Proposed Acquisition Agreement and the decree entered by the Water Court adding ISF uses to both the junior and senior Shoshone Water Rights to include the relaxation provisions included in the 2007 Agreement Concerning the Shoshone Call between the River District and PSCo and Article VI.E.2.a of the CRCA as referenced in paragraph 10.6.5 of the 2024 Blue River MOA. Springs Utilities also asserts that it is appropriate for the Acquisition Agreement and change decree to include drought exceptions like those described in paragraph 10.5.6 of the 2024 Blue River MOA when the junior Shoshone Water Rights are being operated for ISF uses. This will ensure that Springs Utilities will be able to meet its customers' demands during extreme drought conditions.

2. Rebuttal to the River District's and CWCB Staff's positions related to the CWCB's discretion to determine when and how to operate an instream flow right.

The CWCB Staff and the River District et al claim that the CWCB has the broad discretion under CRS 37-92-102 and ISF Rule 10 to enter into agreements that allow the owner of the water right to retain control and discretion over when to release and allow the water right to be used for instream purposes similar to what is included paragraph 7 of the Proposed Acquisition Agreement. CWCB Staff PHS, Pg. 11, River District et al PHS, Pgs. 16-17. As reflected in Section A.5 of its PHS, Springs Utilities disagrees that CRS 37-92-102 allows the CWCB to cede all its discretion to determine when and how to operate an instream flow right. Springs Utilities also disagrees that ISF Rule 10 allows the CWC to cede all discretion regarding when to place a call under the Shoshone water rights as allowed by paragraph 7 of the Proposed Acquisition Agreement because it only allows the CWCB to delegate limited authority to the River District. It is also

unclear whether the Proposed Acquisition Agreement constitutes and “Enforcement Agreement” as referenced in ISF Rule 10.

Even if the CWCB is allowed to delegate all of its authority over placing a call under the Shoshone Water Rights to the River District under ISF Rule 10, Springs Utilities argues this is a policy issue of state wide concern and it should not do so in this case because it represents the collective interest of the people of the state of Colorado, and should maintain control of the operation of the Shoshone Water Rights for ISF purposes to ensure one of the most senior water rights on the Colorado River is administered in a way the reflects its historical operations and prevents injury to water rights located both upstream and downstream of the Shoshone Reach while promoting the maximum utilization of the public’s limited resource. Such an important fiduciary duty should not be delegated to an entity that does not represent the state as a whole.³

3. Rebuttal to the Grand Valley Entities Assertion that Springs Utilities and the other FRWC members are seeking a windfall to the detriment of other water users.

The Grand Valley Entities assert that Springs Utilities and the other FRWC members are seeking a windfall because their rights have always been subject to the Shoshone Water Rights call. Springs Utilities is not seeking a windfall, rather it is seeking to protect its water rights from a reduction in yield caused by an enlargement of the use of the Shoshone Water Rights that would result if the CWCB/River District were able to change the use to ISF and call for the full 1,408 cfs at all times.

C. Conclusion

As a matter of law and policy, the CWCB should only acquire the Shoshone Water Rights in an amount and with terms and conditions that have been agreed upon by the parties, to preserve the utilization of Colorado River water to the greatest degree while preventing injury to other water rights. To accomplish

³ This situation also differs dramatically from other prior CWCB acquisitions of small amounts of water rights to which CWCB may have delegated its operational authority to another party. See River District Exhibits 19-24.

this the CWCB should only accept an acquisition agreement that requires the it to not take a position on the historical use of the Shoshone Water Rights in the water court process and includes language related to drought protection and Colorado River Compact issues the River District previously agreed to with Utilities.

D. Updated Exhibit List

Springs Utilities' updated exhibit list is provided below and a copy of new Exhibit 7 is provided herewith.

1. Springs Utilities 1 - Map of Springs Utilities' West Slope Collection System
2. Springs Utilities 2 - Map of Springs Utilities' Water Service Area
3. Spring Utilities 3 – Description of Springs Utilities' CHS Water Rights
4. Spring Utilities 4 – Description of Springs Utilities' Homestake Water Rights
5. Springs Utilities 5 – 2024 Blue River MOA
6. Springs Utilities 6 – Resume of Tyler Benton
7. Springs Utilities 7 – Proposed Language Related to CWCB's "Neutrality" on Historical Use
8. Denver 1 – Draft Shoshone Water Rights Dedication and ISF Agreement with Redlines and Comments

Dated this 29th day of August 2025.

By: /s/ Michael J. Gustafson

Michael J. Gustafson, Reg No. 37364
Attorney for Colorado Springs Utilities

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2025, a true and correct copy of **Colorado Springs Utilities' Rebuttal Prehearing Statement** was electronically submitted to the Colorado Water Conservation Board via email to the following parties:

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By: /s/ Michael J. Gustafson

Michael J. Gustafson, Reg No. 37364

Colorado Springs Utilities' Exhibit 7

The parties acknowledge that the historical use of the Shoshone Water Rights and the appropriate methodology or methodologies used to determine the historical use are disputed by various entities. In consideration of the dispute regarding historical use, and with due regard to the Division 5 Water Court's exclusive jurisdiction over the quantification of the historical use of the Shoshone Water Rights (including, but not limited to, the appropriate methodology), and the necessary terms and conditions to prevent injury to other water rights, the CWCB does not take a position regarding the quantification of the historical use of the Shoshone Water Rights (including, without limitation, the appropriate methodology or methodologies to determine such historical use) as part of this acquisition agreement. Further, the parties hereby agree that the River District and PSCo shall bear the sole burden of proving the historical use of the Shoshone Water Rights before the Division 5 Water Court and the terms and conditions necessary to prevent injury to other water rights. The parties further agree that the CWCB will not take a position before the Water Court on all matters related to the quantification of the historical use of the Shoshone Water Rights and the terms and conditions to prevent injury to other water rights, will not assist the River District, PSCo, or other opposers supporting co-applicants in quantifying the historical use of the Shoshone Water Rights or in supporting or challenging any opposer's position or analysis regarding the quantification of such historical use or the terms and conditions necessary to prevent injury to other water rights. For the purposes of this agreement, such prohibited assistance by CWCB includes but is not limited to, providing, supporting, or endorsing any evidence, including expert opinions/testimony or lay testimony, related to quantification of the Shoshone Water Rights; providing, supporting, or endorsing any evidence, including expert opinions/testimony or lay testimony supporting River District and PSCo's proposed terms and conditions to prevent injury, and/or providing, supporting, or endorsing any evidence, including expert

opinions/testimony or lay testimony opposing any opposers' proposed terms and conditions to prevent injury to other water rights. The parties further agree that the CWCB will not join in an appeal or otherwise challenge the Division 5 Water Court's final determination regarding the quantification of the historical use of the Shoshone Water Rights or terms and conditions necessary to prevent injury to other water rights. Notwithstanding the foregoing, the CWCB may participate fully as a co-applicant in all other matters pertinent to the proposed change of water rights to add instream flow use as a decreed use of the Shoshone Water Rights.

BEFORE THE COLORADO WATER CONSERVATION BOARD

**IN THE MATTER OF THE PROPOSED ACQUISITION OF AN INTEREST IN THE
SHOSHONE WATER RIGHTS FOR INSTREAM FLOW USE ON THE COLORADO
RIVER**

**WRITTEN TESTIMONY OF TYLER BENTON ON BEHALF OF COLORADO
SPRINGS UTILITIES AND THE HOMESTAKE PARTNERS**

As provided for in the July 18, 2025 order of the hearing officer, I, Tyler Benton, have prepared my pre-filed written testimony on behalf of Colorado Springs Utilities (“Springs Utilities”) and the Homestake Partners, as set forth in this document, for the Shoshone Water Rights Acquisition Hearing currently scheduled for September 16-18, 2025 before the Colorado Water Conservation Board (“CWCB”).

I. Qualifications

I have a Bachelor of Science degree in Geological Engineering from the Colorado School of Mines and am a registered Professional Engineer in Colorado. I am a Senior Project Engineer in the Infrastructure and Resource Planning Group of Colorado Springs Utilities with 15 years of experience specializing in water supply planning within Colorado. See Colorado Springs Ex. 6.

Among other job duties, my work has a focus on the Colorado River Basin. My job duties are to provide technical support for the Continental Hoosier System Project, Homestake Project, and Colorado Springs Utilities’ other Colorado River sourced water supplies. I manage consultants to perform hydrological modeling using WEAP, ModSim, and StateMod platforms, respectively. The modeling simulates potential project operations considering Cameo Call, Shoshone Call, and

Blue River Decree to develop associated yield estimates and better understand changes in streamflow.

II. Potential Impacts of Shoshone Acquisition on Colorado Springs' Utilities

Continental Hoosier System

Springs Utilities owns and operates the Continental Hoosier System ("CHS") which is made up of a number of direct flow and storage water rights in the Blue River Basin with 1929 and 1948 priorities that were decreed in Civil Action No. 1710, Summit County District Court, Civil Action Nos. 1805 and 1806, Summit County District Court, and Consolidated Case Nos. 2782, 5016, and 5017, United States District Court, Colorado ("CHS Water Rights")¹. This system diverts water from the headwaters of the Blue River that is then conveyed through the Hoosier Tunnel to Montgomery Reservoir located in the headwaters of the South Platte River Basin. The water is then delivered by gravity to the Colorado Springs Metropolitan Area via the 70-mile Blue River Pipeline to meet its customers' water demands.

The water derived from the CHS Water Rights is an indispensable part of Springs Utilities' water supply that is used to meet about 12% of its treated water demand, considering first use and reuse. These water rights divert in-priority, or by substitution under the Green Mountain Reservoir plan of substitution decreed in Case No. 2003CW320. Under administration of the prior appropriation system, Springs Utilities is required to curtail diversions under the CHS Water Rights whenever a senior downstream water right is not satisfied and places a valid call. The 1948 priority

¹ For the purposes of this testimony, I am referring to CHS Water Rights to only include those water rights diverting from the Blue River. Springs Utilities owns and operates Montgomery Reservoir storage right on the Middle Fork of the South Platte River decreed in CA3286. This storage right is not subject to being called out of priority by the Shoshone Water Rights.

CHS Water Rights are subject to curtailment from a call by both the senior 1,250 cfs and junior 158 cfs Shoshone Water Rights. The 1929 priority CHS Water Rights are subject to curtailment when the senior 1,250 cfs Shoshone Water Right is placing a valid call. The River District's preliminary historical use analysis would result in an increase in the frequency of curtailments by the Shoshone Water Rights as compared to what has historically occurred.

Environmental Resource Consultants' (ERC) Technical Memorandum RE: Evaluation of BBA Water Consultants' Preliminary Shoshone Historical Use Assessment (Denver Water Exhibit 5) demonstrates that the River District's preliminary historical use analysis overstates the historical use of the Shoshone Water Rights by up to 36%, which results in an unlawful expansion of these rights. Additionally, as demonstrated in ERC's Tech Memorandum: Evaluation of Hydros Consulting's Shoshone Power Plant Water Rights Yield Assessment (Denver Water Exhibit 6), such an expansion of use would have a substantial impact on Springs Utilities' water supplies as it would reduce the yield from the CHS Water Rights by a maximum annual volume of 867-acre feet. Any reduction in yield from the CHS negatively impacts the ability for Springs Utilities to meet its customers' water demands.

In addition, Springs Utilities has agreed to participate in the Shoshone Outage Protocol (ShOP) through the 2024 MOA between Springs Utilities, the Colorado River District and five other west slope entities. In that agreement, Springs Utilities committed not to oppose the Colorado River District's and CWCB's change of historical use of the 1,250 cfs senior Shoshone Water Right for ISF use, subject to the inclusion of terms and conditions related to drought exceptions and Colorado River Compact compliance in an acquisition agreement and water court decree. Springs Utilities executed this agreement during pre-permitting for the planned expansion of Montgomery Reservoir from about 5,700 acre feet capacity to about 13,800 acre feet capacity, an enlargement

of about 8,100 ac-ft. The 2024 MOA also instituted volumetric limits on diversions conveyed through the Hoosier Tunnel limited to no more than 195,000 acre feet of water in any continuous running fifteen-year period (an average of 13,000 acre feet per calendar year) with a max calendar year conveyance of 21,000 acre feet. This project is critical to Springs Utilities in order to increase system resiliency in the near term, and in the long term will allow for an additional average annual yield to be diverted from the CHS compared to current operations. This additional average annual yield is identified as a supply component in Springs Utilities 2017 Integrated Water Resource Plan and would be diverted under the absolute CHS's Water Rights that are currently bypassed due to lack of storage capacity. An expansion of use and the resulting increase in the frequency of calls under the proposed Shoshone ISF Water Rights, compared to the historical record, will further impact Springs Utilities' ability to utilize CHS Water Rights as intended to meet its customers' growing water demands under the planned expansion of Montgomery Reservoir.

III. Potential Impacts of Shoshone Acquisition on Colorado Springs Utilities' Interest in the Homestake Project

Springs Utilities and the City of Aurora, acting by and through its Utility Enterprise ("Aurora"), both acting by and through the Homestake Steering Committee (collectively, "Homestake Partners") each own 50 percent of and operate a number of direct flow and storage water rights in the Eagle River basin that make up the Homestake Project, originally decreed in Civil Action No. 1193, Eagle County District Court on June 8, 1962, with an appropriation date of September 22, 1952 (Homestake Project Water Rights). Water from the Homestake Project is diverted from the headwaters of the Eagle River and then conveyed through the Homestake Tunnel to Turquoise Reservoir in the headwaters of the Arkansas River. Water is then delivered from

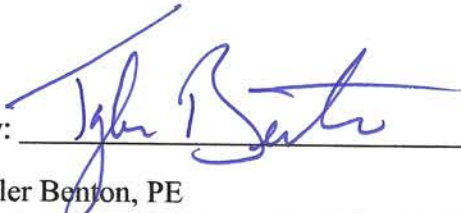
Turquoise Reservoir to the Colorado Springs Metropolitan Area via the Otero Pump Station and Homestake Pipeline.

The Homestake Project is extremely important to Springs Utilities because it provides approximately 21 percent of its potable water supplies considering first use and reuse of this supply. The Homestake Project Water Rights are diverted under a 1952 appropriation date and are subject to valid calls from senior downstream water rights, including the senior 1,250 cfs and junior 158 cfs Shoshone Water Rights. As demonstrated in Denver Water Exhibit 5, an expansion of use of the Shoshone Water Rights would increase the frequency of such a call over this historical record and reduce existing water supplies available to meet water demands of Springs Utilities' customers.

For example, an expansion of the Shoshone Water Rights based on the analysis conducted by the River District's consultants could lead to a significant reduction in Homestake Reservoir storage of up to a maximum annual decrease of 6,869 acre-feet. Decreases in storage at Homestake Reservoir contribute to a maximum annual decrease in 6,047 acre feet of deliveries through Homestake Tunnel.

Dated this 29th Day of August 2025.

By: _____


Tyler Benton, PE
Senior Project Engineer for Colorado Springs
Utilities

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August 2025, a true and correct copy of **Written Testimony of Tyler Benton** was electronically submitted by email to the following Parties:

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/s/ Michael J. Gustafson
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