

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
OCT 21 2004

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WYOMING WOOL GROWERS ASSOCIATION;)	
WYOMING STOCK GROWERS ASSOCIATION;)	
WYOMING FARM BUREAU FEDERATION;)	
WYOMING ASSOCIATION OF CONSERVATION)	
DISTRICTS; ROCKY MOUNTAIN FARMERS	)	Civil Action No.:
UNION; the WYOMING COUNTY	)	04-CV-0253J
COMMISSIONERS ASSOCIATION; BOARD OF)	
COUNTY COMMISSIONERS OF THE COUNTY)	
OF CAMPBELL; BOARD OF COUNTY	)	BRIEF IN SUPPORT OF
COMMISSIONERS OF THE COUNTY OF	)	MOTION TO CONSOLIDATE
LINCOLN; BOARD OF COUNTY	)	THIS CASE WITH <i>STATE OF</i>
COMMISSIONERS OF THE COUNTY OF	)	<i>WYOMING AND PARK</i>
SUBLETTE; BOARD OF COUNTY COMMISSIONERS	)	<i>COUNTY v. UNITED STATES</i>
OF THE COUNTY OF WASHAKIE; WYOMING	)	<i>DEPARTMENT OF INTERIOR;</i>
ASSOCIATION OF COUNTY PREDATORY ANIMAL	)	<i>GALE NORTON; AND STEVEN</i>
BOARDS; FREMONT COUNTY PREDATORY	)	<i>WILLIAMS AND GREATER</i>
ANIMAL BOARD; TETON COUNTY PREDATORY	)	<i>YELLOWSTONE COALITION,</i>
ANIMAL BOARD; CONVERSE COUNTY	)	<i>ET AL.</i>
PREDATORY ANIMAL BOARD; WYOMING	)	CIVIL ACTION NO.
OUTFITTERS & GUIDES ASSOCIATION; GREEN	)	04-CV-123J
RIVER VALLEY CATTLEMEN'S ASSOCIATION;	)	AND
UPPER GREEN RIVER CATTLE ASSOCIATION;	)	MOTION FOR SCHEDULING
WYOMING BUSINESS ALLIANCE; CODY	)	CONFERENCE

COUNTRY OUTFITTERS AND GUIDES)
ASSOCIATION; FOUNDATION FOR NORTH)
AMERICAN WILD SHEEP; JACKSON HOLE)
OUTFITTERS AND GUIDES; ROCK SPRINGS)
DISTRICT 4 GRAZING BOARD; SPORTSMEN FOR)
FISH & WILDLIFE, WYOMING; SPORTSMEN FOR)
FISH & WILDLIFE, PARK COUNTY; SPORTSMEN)
FOR FISH & WILDLIFE, TETON COUNTY;)
SPORTSMEN FOR FISH & WILDLIFE, LINCOLN)
COUNTY and SPORTSMEN FOR FISH & WILDLIFE,)
UTAH)

Plaintiffs;)

vs.)

UNITED STATES DEPARTMENT OF THE INTERIOR;)
UNITED STATES FISH & WILDLIFE SERVICE;)
GALE NORTON, in her official capacity as the Secretary)
of the United States Department of the Interior; STEVEN)
WILLIAMS, in his official capacity as the Director of the)
United States Fish & Wildlife Service; RALPH)
MORGENWECK, in his official capacity as the Regional)
Director of Region Six for the United States Fish &)
Wildlife Service)

Defendants.)

BRIEF IN SUPPORT OF MOTION TO CONSOLIDATE THIS CASE WITH
*STATE OF WYOMING AND PARK COUNTY v. UNITED STATES DEPARTMENT OF THE
INTERIOR; GALE NORTON; and STEVEN WILLIAMS AND GREATER YELLOWSTONE
COALITION ET AL.*, CIVIL ACTION NO. 04-0123-J

AND

MOTION FOR SCHEDULING CONFERENCE

Plaintiffs, Wyoming Wool Growers Association, *et al.*, collectively referred to as the “Wolf Coalition,” have filed pursuant to Fed.R.Civ.P. 42(a) and U.S.D.C.L.R. 42.1, a Motion to Consolidate this Case with *State of Wyoming and Park County v. United States Department of the Interior; Gale Norton; and Steven Williams and Greater Yellowstone Coalition, et al.*, Civil Action No. 04-0123-J (Motion to Consolidate), and pursuant to Fed.R.Civ.P. 16 and U.S.D.C.L.R. 16.1 a Motion for Scheduling Conference. This brief is offered in support of those two related motions.

I. STATEMENT OF FACTS

In 1987, the United States Fish and Wildlife Service (FWS) published the Northern Rocky Mountain Wolf Recovery Plan (Recovery Plan). The Recovery Plan was designed to “outline[] steps for the recovery of the gray wolf (*Canis lupus*) . . . in the Northern Rocky Mountains of the United States.” Recovery Plan, Executive Summary at iv. The goal of the plan was to remove the gray wolf from the endangered and threatened species list by establishing a minimum of ten (10) breeding pairs of wolves for at least three (3) consecutive years, in three (3) recovery areas. The three (3) recovery areas include northwest Montana, central Idaho, and the Greater Yellowstone Area.

In November 1994, the FWS published a Final Rule for “reintroducing” the gray wolf into Yellowstone National Park as a non-essential experimental population. The potential effects of this Final Rule were evaluated in a Final Environmental Impact Statement (FEIS) issued in May 1994. The Recovery Plan was incorporated into the FEIS and the Final Rule. The primary analysis area studied in the FEIS consisted of the geographic area in and around Yellowstone National Park, including all or portions of six (6) counties: Fremont, Hot Springs, Lincoln, Park, Sublette, and Teton. The FEIS did not envision or address the impact of a wolf population that extended beyond this geographic area. Defendants have not prepared a Supplemental Environmental Impact Statement (SEIS) to address the effects of gray wolf populations outside of the Recovery Area.

In 2003, Wyoming created a wolf recovery plan (Wyoming Plan) to manage the gray wolf population, pursuant to legislation that was adopted that same legislative term. After completion, Wyoming submitted the Wyoming Plan for FWS review. The FWS convened an independent panel of twelve (12) wolf management experts to peer review of the Wyoming Plan. Those peer reviews

constitute the best scientific and commercial data available for evaluating the Wyoming Plan. Out of eleven (11) written reviews provided, ten (10) concluded that the Wyoming Plan (with the Idaho and Montana plans) would maintain the gray wolf recovery goal population numbers in the northern Rocky Mountain Recovery Area. Despite the fact that the best scientific and commercial data available supported the Wyoming Plan, in January 2004 the FWS rejected the Wyoming Plan.

On April 22, 2004, the State of Wyoming filed a civil action in the United States District Court for the District of Wyoming against the United States Department of the Interior (Department of Interior), Gale Norton (Secretary of the Interior), and Steven Williams (Director of the FWS). On June 22, 2004, the State of Wyoming filed its First Amended Complaint, asserting six (6) separate causes of action and seeking declaratory and injunctive relief. To summarize, the State claims as follows: (1) that the Defendants have violated the ESA and the Administrative Procedures Act (APA) in their rejection of the Wyoming Plan by ignoring the best scientific and commercial data available, and by relying instead upon "litigation risk management" and political concerns; (2) that the Defendants violated the FWS's own mandates (the "10(j) Rules") by failing to properly manage and control depredate wolves in Wyoming; and (3) that Defendants have violated the Commerce Clause, the State's sovereignty under the Tenth Amendment to the United States Constitution, and the Guarantee Clause of Article IV of the United States Constitution.

The State of Wyoming's First Amended Complaint seeks equitable remedies in the form of a declaration that the Defendants' mandate to the Wyoming Legislature is unconstitutional, that the Defendants unreasonably denied or unlawfully withheld agency action, and acted arbitrarily and capriciously, in not properly managing and controlling wolves and by rejecting the Wyoming Plan. The State prays for injunctions ordering Defendants to approve the Wyoming Plan, to propose a rule to delist the gray wolf, and to control wolf depredation in Wyoming.

The State case, Civil Action No. 04-0123-J, was assigned to the Honorable Alan B. Johnson.

The Wolf Coalition filed its Complaint in United States District Court for the District of Wyoming on September 21, 2004, against the Department of Interior, United States Fish & Wildlife Service, Gale Norton, Steven Williams, and Ralph Morgenweck (Regional Director for the FWS).

The Wolf Coalition has asserted four separate causes of action and seeks injunctive and declaratory relief. To summarize, the Wolf Coalition contends as follows: (1) that Defendants have violated the ESA and APA in their rejection of the Wyoming Plan by failing to consider the best scientific and commercial data available; (2) that Defendants violated the ESA, APA and the National Environmental Policy Act (NEPA) by failing to manage and control the gray wolf population in Wyoming; and (3) that Defendants have violated NEPA by failing to prepare an SEIS to address the impact of wolf populations outside of the Greater Yellowstone Area, and by requiring the State of Wyoming to adopt a wolf management plan that would require, encourage, support, or manage gray wolves in areas located outside of the recovery area defined and studied in the Recovery Plan, the FEIS, and the Final Rule. The Wolf Coalition Complaint seeks a declaration that Defendants unlawfully rejected the Wyoming Plan, as well as injunctions ordering the Defendants to approve the Wyoming Plan, to properly manage and control the gray wolf population in Wyoming, and to enjoin Defendants from further violating the ESA, APA, and NEPA.

The Wolf Coalition case, Civil Action No. 04-CV-0253J, has also been assigned to the Honorable Alan B. Johnson.

II. DISCUSSION

According to Fed.R.Civ.P. 42(a), “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” The purpose behind Rule 42(a) is to afford “the broadest possible scope of action consistent with fairness to the parties . . . [this] is strongly encouraged.” *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). “The decision whether to consolidate . . . actions [involving a common question of law or fact] is left to the sound discretion of the trial court.” *Shump v. Balka*, 574 F.2d 1341, 1344 (10th Cir. 1978). Further, the district court’s discretionary power to consolidate should not be disturbed absent an abuse of such power. *Id.* “[T]he decision to consolidate is discretionary with the court and turns essentially on balancing time that might be saved against possible delay or prejudice involved in

consolidation.” *Transeastern Shipping Corp. v. India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971). In making its determination,

the court should weigh the risk of prejudice and possible confusion versus the possibility of inconsistent adjudication of common factual and legal issues, the burden on the parties, witnesses, and judicial resources by multiple lawsuits, the length of time required to try multiple suits versus a single suit, and the relative expense required for multiple suits versus a single suit.

In re Cree, Inc., Securities Litigation, 219 F.R.D. 369 (M.D. N.C. 2003) (citing *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)). The balancing test set out in *In re Cree, Inc.* helps the court avoid the unnecessary costs or delay created from separately adjudicating trials with common questions of law or fact.

As is apparent from the Complaints filed by the State of Wyoming and the Wolf Coalition, the questions of law and fact common to both cases are almost identical. In summary, both the State of Wyoming and the Wolf Coalition are seeking declaratory and injunctive relief to require the Defendants to adopt the Wyoming Plan. Both the State of Wyoming and the Wolf Coalition also seek to force the Defendants to properly control and manage the gray wolf population. These common questions of law and fact support consolidation of these actions into one proceeding for purposes of document production, administrative record review, discovery, briefing, and trial.

A. Common Questions of Law

There are numerous legal similarities between the Wolf Coalition case and the State of Wyoming case. Both allege that the Defendants violated the ESA when they rejected the Wyoming Plan by failing to use the best scientific and commercial data available. Both lawsuits also assert that Defendants’ rejection of the Wyoming Plan violates the APA. In addition, the two cases allege that defendants are improperly managing and controlling the gray wolf population in Wyoming.

Both Complaints seek the same relief. The Wolf Coalition and the State are each seeking a declaratory judgment establishing that Defendants unlawfully rejected the Wyoming Plan. The Wolf Coalition and the State are also requesting an injunction ordering Defendants to approve the

Wyoming plan, and to properly manage gray wolf populations in Wyoming.

B. Common Questions of Fact

The common questions of fact in these two cases also promote consolidation. The Wolf Coalition and State of Wyoming cases are predicated on the same series of agency action taken by the Defendants. Namely, the two actions stem from the 1987 Northern Rocky Mountain Wolf Recovery Plan, the Final Environmental Impact Statement, and the Final Rule related to the Defendants' "reintroduction" of the gray wolf into the Central Idaho and Yellowstone Recovery areas. The Wolf Coalition and the State cases also challenge the Defendants' failure to properly consider the peer reviews in rejecting the Wyoming Plan.

Both the Wolf Coalition and the State of Wyoming have direct and substantial interests in the recovery and management of the gray wolf throughout Wyoming, including the Yellowstone Recovery Area. The Wolf Coalition and the State of Wyoming seek to remedy injury to Wyoming's wildlife resources and agricultural interests.

C. The Wolf Coalition's National Environmental Policy Act Claim

The Wolf Coalition has also asserted a specific claim related to Defendants' violation of the NEPA. The State of Wyoming also references and relies upon the FEIS and the Final Rule related to wolf "reintroduction", but has not asserted a specific claim regarding the Defendants' violation of that Act. Both the State of Wyoming and the Wolf Coalition rely heavily upon the Final Rule, the potential effects of which were evaluated in the May, 1994 FEIS. The FEIS, along with the 1987 Recovery Plan, forms the basis for the Defendants' "reintroduction" of gray wolves into the Yellowstone Recovery Area.

The Wolf Coalition's NEPA claim rounds out the legal and factual issues associated with resolution of the current action and the State of Wyoming's claims. Neither the Wolf Coalition's nor the State's claims can be addressed or resolved without reference to the FEIS and the NEPA process that Defendants were required to follow. To ensure a comprehensive review of the dispute at issue, and to ensure a complete resolution of all of the issues that have been raised before this Court, the Defendants' compliance with NEPA must be addressed. As such, the Wolf Coalition's

challenge to Defendants' NEPA compliance further supports consolidation of these matters into one proceeding.

D. Avoidance of Unnecessary Costs and Delay

Consolidation will mitigate the time and cost of litigating these two cases. “[The] power to order consolidation of actions [arising out of common question of fact] is purely discretionary . . . [and] is generally exercised when it is clear that consolidation will serve policies such as judicial economy and expedition of litigation.” *Turner v. Traspportacion Maritima Mexicana S.A.*, 44 F.R.D. 412, 415 (E.D. Pa. 1968), *see also A.H.L. Incorporated of Delaware v. Star Insurance Company*, 1997 WL 381755 (Kan. 1997). Consolidation of the Wolf Coalition and State cases will best minimize the demands on this Court’s time and resources and is appropriate based on the overwhelming factual and legal similarities between the two cases. Both the Wolf Coalition and the State seek the same relief, under essentially the same causes of action, for the same agency violations, based on the same evidence. Consolidation is particularly appropriate when two suits have the same operative facts and will rely on the same evidence in both cases. *De Figueiredo v. Trans World Airlines, Inc.*, 55 F.R.D. 44 (S.D. N.Y. 1971), *see also Fields v. Atchison, Topeka and Santa Fe Railway Co.*, 1996 WL 109536.

Even in complex environmental litigation, consolidation is appropriate where there are common issues of law and fact. In *Maestri v. Westlake Excavating Co., Inc.*, 894 F.Supp. 573 (N. D. N.Y. 1995), the United States District Court for the Northern District of New York consolidated two actions asserting violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) where there were common issues of law and fact in the two actions.

Consolidating the two actions will lessen the burden imposed on the Court, the parties, and the witnesses (many of whom reside outside of Cheyenne or even Wyoming), since they would then be affiliated with only one case in this venue rather than two. By consolidating these cases, the Court will be able to address the complexities of these two lawsuits in one proceeding, thereby freeing up time on its busy docket.

Consolidation of these matters will also expedite the overall proceedings associated with

addressing the parties' allegations, as all of the issues raised will be dealt with in one proceeding and pursuant to one schedule, rather than in two separate proceedings with two separate time-lines.

There is little, if any, risk that consolidation will result in prejudice or confusion. Consolidation of these two actions is appropriate and warranted.

E. The Need for a Scheduling Conference

An Order on Initial Pretrial Conference (Scheduling Order) was entered in the State of Wyoming case on September 28, 2004. According to that Scheduling Order, the Defendants were required to prepare and file the administrative record on or before October 15, 2004. The State of Wyoming provided the Wolf Coalition with a copy of that administrative record, which is comprised of one (1) compact disk. That disk contains two separate files. The first file contains the documents "released" for review. The second file is an index of the documents produced (eight pages long), and a summary listing of the "Withheld Documents" (four pages long). The reasons for withholding such documents are listed as "pre-decisional/deliberative" attorney client privilege, and "personal notes."

The Wolf Coalition is in the process of determining whether the administrative record produced by the Defendants is complete. The Wolf Coalition is also reviewing the Defendants' list of "Withheld Documents" to determine the viability and legality of the privileges claimed. At a minimum it will be necessary to obtain additional information related to the "Withheld Documents," as the "Subject" or description of each document is so wholly inadequate under Fed.R.Civ.P. 26(b)(5). Stated another way, Defendants have failed to "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Fed.R.Civ.P. 26(b)(5). As such, it is likely that it will be necessary to request the Court to order the Defendants to supplement the administrative record, and it may also be necessary to challenge the privilege claims asserted by the Defendants.

The Scheduling Order also set November 29, 2004 as the deadline by which the Appellant-Petitioner briefs are to be filed. The Appellee-Respondent deadline for filing a response brief is

January 10, 2005. The reply brief is due to be filed on or before January 24, 2005. Oral argument is scheduled to take place on February 4, 2005.

The Wolf Coalition believes that the current schedule does not allow the parties the necessary time to fully address the issues at hand or to ensure that a complete administrative record has been provided. The Wolf Coalition's and the State of Wyoming's claims related to the Defendants' unlawful rejection of the Wyoming Plan, their failure to properly control and manage the gray wolf population, and their violation of the ESA, NEPA, and the APA are too important to be rushed through to a hurried end. It is imperative that the parties are given sufficient time to review the documents provided, to seek Court assistance to supplement the administrative record as necessary, to challenge the Defendants' claims of privilege, and to present complete and fully documented arguments supporting their claims or defenses.

The Wolf Coalition does not seek to cause an unreasonable delay in the State of Wyoming case. Rather the Wolf Coalition is requesting that the Court consolidate the two actions, vacate the current Scheduling Order entered in the State of Wyoming case, and to set as quickly as possible a date and time for a scheduling conference in these consolidated matters. During that scheduling conference the parties should be prepared to address any deficiencies or problems with the administrative record and to describe any disputes related to claims of privilege. The parties would also be in a better position to determine how best to proceed if the actions are consolidated, and to address whether briefing on at least some of the claims could be completed on an expedited basis. By way of example only, it may be appropriate to proceed on an expedited basis with briefing on the Wolf Coalition's and the State of Wyoming's claims that the Defendants' unlawfully rejected the Wyoming Plan. The Wolf Coalition's and the State of Wyoming's claims directed to Defendants' failure to control and management of the gray wolf population could then be addressed separately. As noted in the Wolf Coalition's Motion to Consolidate, the State of Wyoming agrees that the failure to manage could be bifurcated from the claims related to the Defendants' rejection of the Wyoming Plan.

It is clear from the nature of the State of Wyoming's and the Wolf Coalition's failure to

manage claims that they are not subject to resolution pursuant to the appellate rules applicable to final agency action. The failure to manage claim goes to the heart of whether the Defendants have complied with the Recovery Plan, the Final Rule, and complied with NEPA. The resolution of such claim cannot be limited to reviewing the scant and inadequate administrative record provided by the Defendants. Rather, resolution of the Wolf Coalition's and the State of Wyoming's failure to manage claim must include an analysis of all of the factual evidence that establishes Defendants' failure to carry out their obligations under the ESA and NEPA, and the impacts that such failure has wrought upon the Wolf Coalition members.

Finally, the Wolf Coalition members will be deprived of substantive and procedural due process in relation to their right to have their claims heard at a meaningful time and in a meaningful manner if they are not allowed sufficient time to address the issues at hand. Conversely, consolidating these matters and allowing the parties sufficient time to properly obtain the necessary documents and present their respective positions will not prejudice any of the parties in the State of Wyoming case, but will further the ends of justice.

If a scheduling conference is held immediately after the Defendants' answer is due in the Wolf Coalition's lawsuit (currently scheduled to be filed on November 22, 2004), a new briefing schedule could be set with a minimal delay in the consolidated case. By expediting such a scheduling conference, the parties will be given an opportunity to establish the appropriate and fair deadlines for resolution of these all-important matters.

In the alternative, the Wolf Coalition respectfully requests that these matters be consolidated, and that the briefing deadlines set forth in the September 28, 2004 Scheduling Order be limited to addressing the Defendants' rejection of the Wyoming Plan. In such event, the Wolf Coalition respectfully requests that a scheduling conference be held to address discovery and deadlines for the failure to manage claims (including the Wolf Coalition's NEPA claims).

III. CONCLUSION

The Motion to Consolidate should be granted based on judicial economy and conservation of resources. Both the State of Wyoming and Wolf Coalition allege violations of the same laws

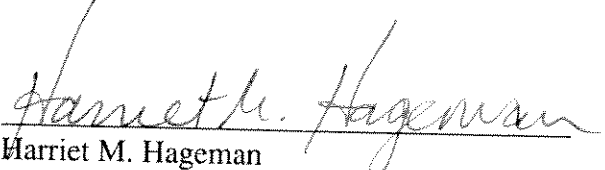
for illegally rejecting the Wyoming Plan, and seek common remedies and injunctions mandating approval of the Wyoming Plan and proper management of the gray wolf population in Wyoming. The Wolf Coalition and State claims stem out of the same series of agency actions that led to the “reintroduction” of the gray wolf in the Greater Yellowstone Area, management of the gray wolf, and rejection of the Wyoming Plan. The two Complaints reference the same 1987 wolf recovery plan, the same 1994 Final Rule, and the same FEIS addressing the potential impacts of wolf “reintroduction.” Both Complaints also rely upon the peer reviews that constitute the best scientific and commercial data available – data that Defendants rejected when they rejected the Wyoming Plan.

Consolidation of these two cases will lessen the burden on this court’s resources as well as the burden on the witnesses and parties affiliated with the cases. Due to the common questions of law and fact between the Wolf Coalition case and the State of Wyoming case described above, as well as the benefits that consolidation will afford, the Wolf Coalition respectfully requests that this Motion to Consolidate be granted.

Importantly, there is no benefit to adjudicating the Wolf Coalition and State cases separately.

The Wolf Coalition also requests that the Court set a date and time for holding a scheduling conference for the consolidated actions for the purpose of setting all relevant deadlines.

RESPECTFULLY SUBMITTED this 21st day of October, 2004


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 21, 2004, a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION TO CONSOLIDATE THIS CASE WITH *STATE OF WYOMING AND PARK COUNTY v. UNITED STATES DEPARTMENT OF THE INTERIOR; GALE NORTON; and STEVEN WILLIAMS AND GREATER YELLOWSTONE COALITION, ET AL*, CIVIL ACTION NO. 04-0123-J AND MOTION FOR SCHEDULING CONFERENCE, was served upon the following as indicated:

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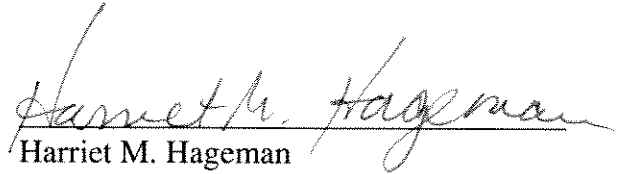
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