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8 IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

9 UNITED STATES OF AMERICA AND
10 THE WALKER RIVER PAIUTE TRIBE,

11 Plaintiff(s),

12 vs.

13 THE WALKER RIVER IRRIGATION
DISTRICT, et al,

14 Defendant(s).
15

IN EQUITY NO. C-125-B-ECR
3:73-cv-00127-ECR-(RAM)

OPENING BRIEF IDENTIFYING
THRESHOLD ISSUES

16 I. INTRODUCTION

17 Pursuant to this Court’s order of July 25, 2008, (Doc. No.478), Circle Bar N Ranch,
18 L.L.C, et al., (“Circle Bar N”) by and through their attorney Laura A. Schroeder and Schroeder
19 Law Offices, P.C., submit this Opening Brief that identifies threshold issues that Circle Bar N
20 proposes must be resolved at the outset of this matter.

21 The Court has requested the parties to provide an explanation of what characteristic they
22 perceived as establishing a threshold issue. In the Case Management Order entered on April 19,
23 2000, the court identified a number of issues as “threshold issues,” that is, those that should be
24 addressed at the outset of the litigation. Consistent with that definition, we would propose to
25 define a threshold issue as one that should be decided in the early stages of litigation as it will
26 limit the scope of litigation, eliminating issues or counterclaims that are not sustainable under the

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1 Winters Doctrine. Included in this definition of threshold issues are jurisdictional matters, claim
2 and issue preclusion, and equitable and other defenses referenced by Court in its *Case*
3 *Management Order* filed April 19, 2000 (Doc. 108 at 9).

4 We do not, however, propose that all of the threshold issues should be addressed
5 concurrently. Certain of the issues identified in the *Proposed Threshold Issues* (Doc. 1361)
6 submitted by the counterdefendant parties are second and third tier issues for analysis. For
7 example, the primary issues of whether a federally reserved right for groundwater may be
8 claimed for the lands within the Reservation as of June 14, 1936 (“Decree Lands”) and for the
9 lands added to the Reservation in 1936 (“1936 Lands”) should be resolved before the Court
10 considers the issue of whether it is required to accept the distinction drawn between surface
11 water rights and groundwater rights provide by Nevada and California law.

12 Early in the proceedings, the United States and Tribe, in their *Response to Joint Motion*
13 *by Walker River Irrigation District and State of Nevada Concerning Case Management* (Doc.
14 101 at 2), proposed that the initial phase of litigation focus on certain legal issues related to the
15 Court’s jurisdiction, groundwater, and affirmative defenses that the other parties might assert. It
16 appears that the United States and Tribes are back peddling with regard to their position on
17 affirmative defenses, as they appear to be objecting to the inclusion of affirmative defenses as
18 threshold issues. This concern purportedly arises from the belief that if such items are included,
19 it will provide the counterdefendants with a means of short-cutting litigation, thereby allowing
20 them to “avoid the requirements of the Federal Rules of Civil Procedure.” See *United States of*
21 *America’s and Walker River Paiute Tribe’s Proposed List of Preliminary Threshold Issues*
22 (Doc.1360 at 3). The Plaintiffs’ apparent lack of confidence in the Court’s ability to discern
23 which issues are purely legal questions as opposed to those that involve factual determinations is
24 misplaced. The Court, as was stated in the *Case Management Order* (Doc. 108 at 13-114), has
25 already acknowledged that certain of the threshold issues may require discovery and even an
26 evidentiary hearing before any final determination is made.

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1 Three of the United States' eleven claims for relief and the Tribe's claims for relief are
2 currently before the Court as a result of the bifurcation of the Tribal Claim from others filed by
3 the United States. (See Doc. 108). The claims relate to 1) a surface water claim for the lands
4 added to the Reservation in 1936 ("1936 Lands"), 2) a storage claim for Walker River surface
5 waters in Weber Reservoir for use on the lands of the Reservation as it existed as of June 14,
6 1936 ("Decree Lands"), as well as on the 1936 Lands, and 3) groundwater underlying and
7 adjacent to Decree Lands and 1936 Lands. When discussing threshold issues, jurisdictional
8 issues impacting both reservations will be addressed first, followed by separate discussions of
9 specific issues relating to claims for the lands existing in the Decree Lands and those added as a
10 result of the 1936 legislation. Finally, second and third tier issues will be presented.

11 While this approach may entail some redundancy, the rationale for this organization
12 derives from *Winters* and its progeny, which hold that if the United States impliedly reserves
13 waters for a federal reservation, the court must examine the purpose for the creation of the
14 reservation when determining the scope of that right.

15 In determining whether there is a federally reserved water right implicit in a
16 federal reservation of public land, the issue is whether the Government intended
17 to reserve unappropriated and thus available water. Intent is inferred if the
18 previously unappropriated waters are necessary to accomplish the purposes for
19 which the reservation was created. See, E. g., *Arizona v. California*, supra, 373
20 U.S., at 599-601, 83 S.Ct., at 1497-1498, 10 L.Ed.2d, at 577-578; *Winters v.*
21 *United States*, supra, 207 U.S., at 576, 28 S.Ct., at 211, 52 L.Ed., at 346.

22 *Cappaert v. United States*, 426 U.S. 128, 140, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976).

23 The purpose of the reservation with regard to the Decree Lands was to allow the Tribe to
24 develop an agrarian lifestyle. *United States v. Walker River Irr. Dist.*, 104 F.2d 334, 339-340
25 (1939). Therefore water was reserved for irrigation purposes, whereas the reservation for the
26 1936 Lands was to provide the Tribe with additional lands for dry land stock grazing. S. R.
1750, 74th Cong., 2d Sess. 6-39 (1936). Given this purpose, the claims for federally reserved
rights for these lands are of questionable merit. Only if the purpose of the reservation will fail

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1 without water, then, and only then, may this Court recognize impliedly reserved rights for the
2 1936 Lands. *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

3 II. JURISDICTIONAL THRESHOLD ISSUE

4 A. Whether this Court has jurisdiction to adjudicate new claims for additional surface and/or
5 underground water in Case C-125, a case in which a final judgment has been entered, or must a
6 new and separate action form the basis for these claims?

7 This issue is a first tier threshold issue that must be addressed at the outset of the
8 proceedings. Case C-125-ECR adjudicated the implied federally reserved rights for the Walker
9 River Paiute Reservation as it existed as of June 14, 1936. *Decree, United States of America v.*
10 *Walker River Irrigation District, et al.*, as amended Order for entry of Amended Final Decree to
11 *Conform to Wirt of Mandate* (D Nev. Apr. 24, 1940). This Court retained jurisdiction of this
12 case solely for “the purpose of changing the duty of water or for correcting or modifying this
13 decree; also for regulatory purposes, including a change of the place of use of any water user, but
14 no water shall be sold or delivered outside the basin of the Walker River” While it is
15 possible for this Court to modify or change the existing decree, no authority exists for reopening
16 the decree to enlarge the United States’ decreed rights or providing additional rights to the Tribe
17 in light of the fact that a final judgment was entered. A prohibition specifically precluding
18 enlargement of a party’s rights is found in the provisions of the Decree. “Each and every party
19 to this suit . . .and all persons claiming by, through or under them, and their successors and
20 assigns in and to the water are forever enjoined and restrained from claiming any rights in or to
21 the waters of Walker River and/or its branches and/or its tributaries, except the rights set up and
22 specified in this decree. . . .”

23 Unlike the court in *Arizona v. California*, this Court did not retain jurisdiction of the
24 action for the purpose of any supplementary decree. *See Arizona v. California*, 460 U.S. 605,
25 618 (1983). The United States and Tribe improperly filed their claims in Case No. C-125.

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1 III. INITIAL NONJURISDICTIONAL THRESHOLD ISSUES

2 A. Whether the express provisions of the Decree prevent the Tribe and the United States from
3 asserting any claim in and to the waters of the Walker River and its tributaries that could have
4 been asserted as of April 14, 1936, including a claim to a right for conservation storage?

5 This primary threshold issue poses a legal question that may be resolved by relying on
6 the language of the decree and the doctrine of res judicata.

7 B. Whether the doctrines of claim (res judicata) and/or issue preclusion (collateral estoppel)
8 bar any claim for storage rights, other than those for regulatory purposes, for those lands that
9 were within the Reservation at the time the Decree was entered?

10 The issue of storage for the Decree Lands is a first tier threshold issue that must be
11 addressed at the outset of the litigation phase. Presently, the only legal theory identified by the
12 United States and Tribe for their claim for storage rights is the Winters Doctrine. While storage
13 rights have been recognized as a result of federal legislation and in some cases consent decrees
14 entered into between parties to litigation, no cases have been identified wherein an implied
15 reserved right for storage has been identified. The United States and Tribe must establish their
16 entitlement for such a storage claim under the Winters Doctrine, or any other federal common
17 law theory.

18 Specifically, the viability of the United States’ and Tribe’s claims for storage water rights
19 present a legal question that may be resolved by application of the doctrines of claim and issue
20 preclusion. The 1936 Decree, as amended, awarded the full amount of “implied-reservation-of-
21 water” rights that were required to support the Walker River Indian Reservation. See *United*
22 *States v. Walker River Irr. Dist.*, 104 F.2d 334 (1939). The Tribe and United States are
23 precluded from relitigating the issue of the quantity of the reserved water rights needed for the
24 Walker River Indian Reservation. See *Nevada v. United States*, 463 U.S. 110, 133, 135 (1983).

25 Further, the court in *United States v. Walker River Irrigation District*, 11 F. Supp 158,
26 164 (1935), *rev’ on other grounds*, *United States v. Walker River Irrigation District*, 104 F.2d

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1 334 (9th Cir. 1939) addressed the issue of storage in its decision, referencing legislation passed
2 by the Sixty-Ninth Congress, First Session, December 7, 1925 to July 3, 1926, for
3 reconnaissance work in Schurz Canyon, on the Walker River, State of Nevada. The Court and
4 the parties to the adjudication were aware of the need for conservation storage at the time the
5 hearings were proceeding, and yet no claim was made. Therefore, claim and issue preclusion
6 should operate to bar these claims.

7 C. Whether the doctrines of claim (res judicata) and/or issue preclusion (collateral estoppel)
8 bar any claim for additional water from an underground source for lands that were within the
9 Reservation at the time the Walker River Decree was entered?

10 The issue of whether the United States and Tribe may claim additional waters from an
11 underground source for the Decree Lands is a first tier threshold issue that should be addressed at
12 the outset of the litigation phase. While some federal courts have recognized that groundwater
13 may be a component of the water impliedly reserved for an Indian reservation, the Supreme
14 Court has not reached the issue of whether groundwater may be impliedly reserved. See
15 *Cappaert v. United States*, 426 U.S.128, 142 (1976). Should this Court determines that water
16 from underground sources may be claimed under the Winters Doctrine, resolution of the validity
17 and/or scope of such claims must be addressed as a first tier threshold issue.

18 The attempt by the United States and Tribe to treat a claim for groundwater as a distinct
19 entity from a claim for water from surface sources is improper. The criterion for awarding
20 implied reserved rights is based on a court's determination as to the amount of water needed for
21 the purpose of the Reservation, regardless of the source. In the case of the Decree Lands, this
22 Court, following adoption of the findings of the special master, awarded the United States the
23 amount of water that was determined to be needed to support the Reservation. There is no basis
24 for claiming additional waters, whether surface or ground, for the Walker River Indian
25 Reservation as it existed as of June 14, 1936.

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1 The United States and the Tribe, as beneficiary of the United States, should be barred by
2 the doctrines of claim and issue preclusion from claiming additional water from an underground
3 source. *See Nevada v. United States*, 463 U.S. 110, 133, 135 (1983). The Decree reflects the
4 court's determination that the water awarded to the Tribe was sufficient to constitute the full
5 "implied-reservation-of-water" rights reserved for Walker River Indian Reservation. *United*
6 *States v. Walker River Irr. Dist.*, 104 F.2d 334 (1939).

7 D. Whether any water, surface or underground, was impliedly reserved when lands were added
8 to the Reservation in 1936 in light of the following: (1) the language and history of the Act of
9 Congress that authorized the addition of those lands; (2) the fact that the lands were added for
10 grazing purposes; and (3) the fact that prior to their addition to the Reservation, those lands
11 were designated as public domain and opened to entry under the Desert Lands Act?

12 The following initial threshold issues create legal questions that should be resolved by
13 this Court at the outset of the litigation phase:

14 (1) What was the intended purpose for the reservation of 1936 Lands, as determinable
15 from the legislation creating the Reservation, the circumstances surrounding the Reservation's
16 creation, and the history of the Indians for whom it was reserved? *Coleville Confederated Tribes*
17 *v. Walton*, 647 F.2d 42, 47 (1981); *see also Parravano v. Babbitt*, 70 F.3d 539, 543 (1995)).

18 (2) What is the scope of federally reserved rights that may be claimed for the 1936 Lands
19 given the purpose of the reservation? *See United States v. New Mexico*, 438 U.S. 696, 701
20 (1978).

21 (3) Whether the Desert Lands Act effected a severance of waters from public domain
22 lands so as to preclude claims for federally reserved rights for lands previously opened to entry?
23 *California Oregon Power Co. v. Beaver Portland Cement Co.*, 129 U.S. 142 (1935), interpreted
24 the Desert Lands Act as effecting a severance of all waters upon the public domain not
25 theretofore appropriated. A patent issued thereafter for lands in a desert land state or territory,
26 under any of the land laws of the United States, carried with it no common-law right to the water

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1 flowing through or bordering upon the lands conveyed. If any of the lands left the public
2 domain, upon reacquisition of the land, the United States would obtain no greater water rights
3 than those possessed by its predecessor in title when it purchases or condemns the land.

4 These issues are legal questions that may be readily addressed as initial threshold issues.

5 E. Whether the United States may reserve water, under the federally implied reservation of
6 water doctrine, from a water source that is not within the lands being reserved?

7 This issue arises with regard to the various sections of public domain lands that Congress
8 authorized the Secretary of the Interior to set aside pursuant to the Congressional Act of June 22,
9 1936 for addition to the Walker River Indian Reservation. Because the Walker River does not
10 appear to run through or border most of the 1936 Lands parcels, a question arises as to whether
11 the United States and Tribe may legitimately claim surface water rights for those parcels. Water
12 claimed under the federally reserved rights doctrine is limited to waters within or bordering the
13 exterior boundaries of reserved lands.

14 IV. SECOND TIER THRESHOLD ISSUES

15 A. Whether the doctrine of laches may be asserted against the counterclaims filed by the United
16 States and Tribe?

17 While the applicability of the doctrine of laches to each of the United States' and Tribe's
18 claims for relief may not be readily construed as initial threshold issues because of the factual
19 foundation required to establish these equitable defenses, the issue of whether the doctrine of
20 laches may be applied in the case of Indian claims is a legal question that may be addressed early
21 in the proceedings. While a number of earlier federal decisions suggest that the doctrine of
22 laches may not be used to bar a claim for Indian rights, a recent decision out of the 2nd Circuit,
23 *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273 (CA2, 2005), *cert. denied*, *sub*
24 *nom. U.S. v. Pataki*, 547 U.S. 1128 (2006), and *cert denied Cayuga Indian Nation of New York v.*
25 *Pataki*, 547 U.S. 1128 (2006), relying on the United States Supreme Court *City of Sherrill v.*
26 *Oneida Indian Nation*, 544 U.S. 197 (2005), establishes that tribal land claims may be barred by

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1 the doctrine of laches. This legal question should be addressed prior to preceding to the
2 following second tier threshold issues:

3 1. Whether the doctrine of laches bars the conservation storage claims of the United
4 States and the Tribe for the lands within the Reservation as it existed at the time of entry of the
5 Walker River Decree?

6 As noted above, the court in *United States v. Walker River Irrigation District*, 11 F. Supp
7 158, 164 (1935) addressed the issue of storage in its decision, referencing legislation passed by
8 the Sixty-ninth Congress, First Session, December 7, 1925 to July 3, 1926, for reconnaissance
9 work in Schurz Canyon, on the Walker River, State of Nevada. The court and the parties were
10 aware of the need for conservation storage at the time the hearings were proceeding, and yet no
11 claim was made. *See United States v. Walker River Irr. Dist.*, 11 F. Supp. 158, 164 (1935) (The
12 court referenced the 1926 Blomgren report, which addressed water supply and storage needs for
13 the Walker River Indian Reservation.) If this Court does not bar a claim for conservation storage
14 as a result of a finding of claim and/or issue preclusion, the doctrine of laches may be applied to
15 bar the claim, as the United States and Tribe acknowledged practical completion of construction
16 of Weber Dam as of 1935 in their pleadings, yet delayed their claims for storage rights for 56
17 years.

18 2. Whether the doctrine of laches bars the United States' and the Tribe's claims for a
19 water right from underground sources for the Reservation as it existed at the time of the entry of
20 the Walker River Decree?

21 As the elements of laches include the need to establish a lack of diligence by the party
22 against whom the defense is asserted and the prejudice to the party asserting the defense, *Cayuga*
23 *Indian Nation of New York v. Pataki*, 413 F.3d 266 (CA 2 2005), some discovery may be
24 required prior to resolution of this issue.

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1 3. Whether the doctrine of laches bars the United States' and Tribe's claims for federally
2 reserved water rights including surface water, underground water, and/or conservation storage
3 claims for the 1936 Lands?

4 Resolution of issues regarding the ability to claim groundwater and storage water under
5 the Winters Doctrine and the primary purpose of the reservation of the 1936 Lands should be
6 addressed prior to addressing the issue as to whether the United States' and Tribe's claims for
7 federally reserved water rights for the 1936 Lands should be barred by laches. It is anticipated
8 that discovery will be required before this threshold issue may be addressed.

9 B. Whether the doctrine of estoppel may be may be applied against the counterclaimants?

10 The generally issue of whether the doctrine of estoppel may be applied against the claims
11 of the United States and the Tribe, as its beneficiary, is a legal question that must be addressed
12 before proceeding to the following threshold issues:

13 1. Whether the doctrine of estoppel bars any claim for conservation storage water rights
14 for use on Decree Lands?

15 2. Whether the doctrine of estoppel bars any claim for a water right from underground
16 sources within Decree Lands?

17 The doctrine of estoppel may be asserted against the United States and Tribe to bar them
18 from claiming rights to water for conservation storage, as well as rights for water from an
19 underground source, to the detriment of the counterdefendants. The current claims for storage
20 and groundwater are inconsistent with the actions of the United States on behalf of the Tribe in
21 the initial Decree case, as no claim was made for storage water or groundwater, but only to direct
22 flow surface waters of the Walker River and its tributaries to support the Reservation. This was
23 true despite the fact that a report was published in the Congressional Record in 1926 describing
24 the need for the construction of a dam for storage purposes. The new claims are inconsistent
25 with the United States' initial posture and may not be adopted to the detriment of the
26 counterdefendants. While there may be the need for some discovery, this is a threshold issue that

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1 should be resolved prior to moving forward with litigation of the case.

2 3. Whether the doctrine of estoppel bars any claim for conservation storage water rights
3 for use on the 1936 Lands?

4 4. Whether the doctrine of estoppel bars any claim for a water right from underground
5 sources within the 1936 Lands?

6 As was discussed with regard to the Decree Lands, the posture assumed by the United
7 States in the Decree case was inconsistent with that in the current case regarding the entitlement
8 to storage water and groundwater. The counterplaintiffs should be barred from adopting a
9 position that results in a loss or injury to those counterdefendants that detrimentally relied on this
10 posture. It is also inconsistent with the provisions of the legislation authorizing the Secretary of
11 the Interior to withdraw the 1936 Lands for the Reservation. The legislation specifically
12 provided that “said withdrawal shall not affect any valid rights initiated prior to the approval
13 hereof.” 74 Congress. Sess. II. Ch. 698, June 22, 1936.

14 C. Whether through its commencement and resolution of claims against the United States, the
15 Tribes’ claims (a) for water from underground sources and (b) for a conservation storage water
16 right for Weber Reservoir have been waived and are therefore extinguished?

17 These issues will require some legal research and discovery; however, when this
18 preparatory work is completed, these threshold issues should be readily resolved.

19 V. THIRD TIER ISSUES

20 A. Whether, regardless of the extent of hydrologic connection between surface and
21 groundwater, this court is required to accept the distinction drawn between surface water rights
22 and groundwater rights provided by California and Nevada law?

23 B. Whether the Court has jurisdiction over groundwater used pursuant to State law outside the
24 exterior boundaries of the Walker River Paiute Indian Reservation if such use interferes with the
25 Tribes’ rights under federal law to use water from the Walker River System? If so, should the
26 Court exercise that jurisdiction?

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1 C. Are the holders of surface water rights established under federal law entitled to protection
2 from the use of groundwater beyond the protection provided to holders of surface water rights
3 established under state laws?

4 D. If the Tribe has the right to pump groundwater under federal law, are such rights, as a
5 matter of federal law subject to different protections than those provided by State law?

6 E. If the only jurisdiction of this court with respect to groundwater issues is to protect surface
7 water rights established under federal law from interference by junior groundwater users, must
8 the issues of interference be decided as part of the adjudication of federal surface water claims?

9 F. If the Tribe has no claim to underground water on the Reservation based upon the implied
10 reservation of water doctrine, or based upon any other theory of federal common law, does the
11 State of Nevada have jurisdiction to regulate the use of underground water on the Reservation?

12 Resolution of the initial and second tier threshold issues may obviate the need for the
13 Court to reach the issues raised by the above questions for the following reasons: 1) the doctrine
14 of claim and/or issue preclusion may preclude a claim for groundwater for the Decree Lands; 2)
15 a determination as to the primary purpose of the reservation of the 1936 Lands and whether this
16 reservation will fail without the availability of water may preclude a claim for surface water,
17 groundwater, and conservation storage for those lands; and 3) claims for groundwater may be
18 effectively barred by other affirmative and equitable defenses.

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1 VI. CONCLUSION

2 As proposed by the Walker River Irrigation District in its Opening Brief on Threshold
3 Issues, bifurcation of potentially dispositive matters pursuant to F.R.C.P. 42(b), may obviate the
4 need for further litigation, expediting resolution of this matter and reducing expenditure of
5 judicial and party resources. Following resolution of the jurisdictional issue, should this Court
6 determine that it has retained jurisdiction to entertain the Tribal Claims in Case No. C-125,
7 Subfile B, Circle Bar N Ranch, et al. respectfully request that this Court order this matter be
8 bifurcated so that the initial and second tier threshold issues identified above may be addressed
9 prior to proceeding to further trial on the merits.

10 Submitted this 5th day of September, 2008.

SCHROEDER LAW OFFICES, P.C.

11 /s/ Laura A. Schroeder

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that I am an employee of Schroeder Law Offices, P.C., over the age of eighteen and not a party to the within action, and that on this date I electronically filed the foregoing document titled **Opening Brief Identifying Threshold Issues** with the Clerk of the Court using the CM/ECF system, and I served or caused it to be served by electronic mail CM/ECF (as indicated with an asterisk) or first-class mail, postage prepaid, addressed to the following persons:

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Dated this 5th day of September, 2008

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