



201112190077  
Skagit County Auditor

12/19/2011 Page 1 of 10 2:21PM

WHEN RECORDED RETURN TO:  
Skagit County  
Public Works Department  
ATTN: Jan Flagan  
1800 Continental Place  
Mount Vernon, WA 98273

DOCUMENT TITLE(S):  
TEMPORARY CONSTRUCTION EASEMENT

GUARDIAN NORTHWEST TITLE CO.

101458-6

REFERENCE NUMBER(S) OF DOCUMENTS ASSIGNED OR RELEASED:

**GRANTEE:**

Swinomish Indian Tribe Community, a federal recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934(25 U.S. C. § 476)

**GRANTEE:**

Skagit County, a political subdivision of the State of Washington

**ABBREVIATED LEGAL DESCRIPTION:**

Portion of Section 17, Township 35 North, Range 5 East, W.M., lying Southerly of the former Burlington Northern Railway right-of-way

**TAX PARCEL NUMBER(S):**

P39244, 350517-0-002-0003

Recording Requested By And  
When Recorded Mail To:

Skagit County  
Public Works Department  
Attn: Jan Flagan  
1800 Continental Place  
Mount Vernon, Washington 98273

**TEMPORARY CONSTRUCTION EASEMENT**

SKAGIT COUNTY  
Contract # C20110517  
Page 1 of 8

Grantor: Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. § 476)

Grantee: Skagit County, a political subdivision of the State of Washington.

Abbreviated  
Legal

Description: Portion of Section 17, Township 35 North, Range 5 East, W.M., lying Southerly of the former Burlington Northern Railway right-of-way

Assessor's Tax/  
Parcel Number: P39244 (XrefID: 350517-0-002-0003)

The undersigned, the **Swinomish Indian Tribal Community**, a federally recognized Indian Tribe organized pursuant to section sixteen of the Indian Reorganization Act of 1934 ("Grantor" or "Tribe"), for good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, hereby grants to **Skagit County**, a political subdivision of the State of Washington ("Grantee"), a temporary, non-exclusive construction easement and appurtenances thereto ("Temporary Easement"), as provided herein. Grantor and Grantee may be individually referred to herein as a "party", and may be collectively referred to herein as the "parties." The terms of this Temporary Easement are further provided as follows:

**1. Nature and Location of Easement.** The temporary construction easement hereby granted by Grantor shall allow Grantee's agents, employees, and contractors to access a portion of Grantor's Property as described in Exhibit "A" and depicted in Exhibit "B" (all of which is referred to herein as the "Project Property") for the purpose of constructing a habitat restoration and flood mitigation project (herein the "Project") on portions of Hansen and Red Creeks contained within the boundaries of the Project Property. Specific Project construction activities shall occur according to specifications on a set of engineering plans provided by Grantee and as approved in writing by the Grantor and the Washington State Recreation and Conservation ("RCO") Office prior to the commencement of any Project construction activities. The Project Property was (or shall be) purchased with grant funds provided by the Salmon



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SKAGIT COUNTY WASHINGTON  
REAL ESTATE EXCISE TAX

DEC 19 2011

Amount Paid \$  
Skagit Co. Treasurer *man*

Recovery Funding Board through the RCO Office (grant # 10-1856) and all construction activities must comply with the terms of the grant agreement, the associated Deed of Right for salmon recovery purposes on file with the State and recorded with the Skagit County Auditor's Office (Skagit County Auditor's File No.: \_\_\_\_\_), and the specifications on engineering plans as approved by Grantor and the RCO Office. This Temporary Easement is subordinate to the Deed of Right and nothing in this Temporary Easement shall be construed to displace the rights and obligations identified in the Deed of Right.

**2. Use of Easement.** After engineering plans for the Project are agreed to in writing by the Grantor and the RCO, the Grantee, Grantee's employees, agents, and contractors, shall have the right, without notice, and at all times, to enter upon the Project Property within the Temporary Easement area (as described and depicted in *Exhibit "A" and "B"*) for purposes of using the Temporary Easement for the Project. Grantor shall have the right to exclude Grantee, Grantee's employees, agents, contractors, or other third parties from the Temporary Easement, if it is determined by the Grantor and the RCO that the engineering plans for the Project have not been complied with by Grantee; provided that Grantor and RCO have first provided the Grantee with reasonable advance notice of any alleged noncompliance with the engineering plans by Grantee, and have also provided Grantee with a reasonable opportunity to cure any alleged noncompliance with the engineering plans. Grantor shall not place, construct, or cause to be placed or constructed or maintained any building, structure, obstruction, and/or improvements within or upon the Temporary Easement (including, without limitation, fences, gates, foundations, rockeries, trees, bushes or other shrubbery) while the Temporary Easement is in effect, without written approval of the Grantee. Grantee shall access the Project Property and construct the Project according to the engineering plans approved in writing by the Grantor and the RCO.

2.1 Upon completion of the Project, the Grantor agrees to provide any required future maintenance of the Project and the Project Property. To the greatest extent allowed by law the Grantor hereby forever releases and holds the Grantee harmless from any drainage impacts and/or damages to the Project Property arising from and/or related to the Project, specifically including as may arise from: (a) the Grantor's use and/or maintenance of the Project and the Project Property upon completion of the Project; and (b) any drainage impact to the Project Property resulting from the Project. The terms of this Section 2.1 shall survive the termination and/or expiration of this Temporary Easement.

**3. Termination of Temporary Easement.** This Temporary Easement shall expire and terminate at such time as the Grantee has completed the Project or activity necessitating the use of the Temporary Easement as described hereinabove. Completion of such Project or activity shall be made at the sole discretion of Grantee; provided, that in any event this Temporary Easement shall expire by its own terms and terminate in five (5) years from the date of mutual execution, whichever is sooner.

**4. Venue.** Subject to Section 9. (below), in the event that any litigation should arise concerning the construction or interpretation of any of the terms of this Temporary Easement, it is agreed by the parties that the venue for any such legal action shall be in Skagit County, State of Washington.

**5. Entire Agreement.** This Temporary Easement contains the entire agreement between the parties hereto and incorporates and supersedes all prior negotiations or agreements. It may not be modified or supplemented in any manner or form whatsoever, either



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by course of dealing or by parol or written evidence of prior agreements and negotiations, except upon the subsequent written agreement of the parties. Waiver or breach of any term or condition of this Temporary Easement shall not be considered a waiver of any prior or subsequent breach. This Temporary Easement shall only become effective upon recording with the Skagit County Auditor, and shall not be recorded by either party until (and unless) Grantor is (becomes) the legal owner of the Grantor's Property (as described herein). This Temporary Easement is subordinate to the Deed of Right associated with the real property and on file with the State and recorded with the Skagit County Auditor's Office (Skagit County Auditor's File No.: \_\_\_\_\_). Nothing in this Temporary Easement shall be construed to displace the rights identified in the Deed of Right.

**6. Compliance With Laws And Terms Of Permits:** Grantee shall comply with all applicable federal, state, and local laws, rules, permits, and regulations in carrying out any activities pursuant to this Temporary Easement.

**7. Assignment:** Unless otherwise expressly provided herein, no portion of or rights under this Temporary Easement may be assigned to any other individual, firm, company, and/or other entity without the express and prior written approval of the Grantor.

**8. No Third Party Beneficiaries:** Except as expressly provided in this Temporary Easement, this Temporary Easement is not intended to nor does it create any third party beneficiary or other rights in any third person or party, including, but not limited to, the general public, property owners and residents in the vicinity of the property, or any other organization or entity, or any agent, contractor, subcontractor, consultant, employee, volunteer, or other representative of any party.

**9. Dispute Resolution And Limited Waiver Of Sovereign Immunity**

**A. Applicable Law.** This Temporary Easement including all matters of interpretation, validity and performance shall be governed and enforced in accordance with the laws of Washington State.

**B. Mediation.** Any controversy, claim or dispute, including claims and counterclaims by the parties concerning the making, formulation, validity, obligations and duties under and/or breach of this Temporary Easement and issues related to the existence, interpretation and enforceability of the mediation and arbitration provisions of this Temporary Easement, shall be subject to mandatory mediation. A competent mediator shall be chosen by agreement of the parties. If the parties are unable to agree on a mediator, either party may request that a judge, pursuant to Section D appoint a mediator. The Tribe reserves the right to revoke its limited waiver of sovereign immunity if Grantee fails to appear for mediation pursuant to this Section B.

**C. Arbitration.** If not resolved within fifteen (15) days after selection or appointment of a mediator (or such longer period as may be mutually agreed upon by the parties), any controversy, claim or dispute, including claims and counterclaims by the parties, concerning the making, formation, validity, obligations and duties under and/or breach of this Temporary Easement and issues related to the existence, interpretation and enforceability of the mediation and arbitration provisions of this Temporary Easement, but excluding issues regarding or related to the sovereign immunity of the Tribe, shall be adjudicated exclusively by binding arbitration conducted by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules of the AAA then in effect. The arbitration shall take place in the



administrative offices of Skagit County, or such other place as the parties may agree. One arbitrator and the expedited procedures of such rules shall be used and shall be neutral. The arbitrator shall have the power and authority to grant legal and equitable remedies in accordance with the provisions of this Temporary Easement. Under no circumstances shall the arbitrator make any determinations regarding the Tribe's sovereign immunity from uncontested suit. The arbitrator shall have the authority to authorize or require discovery of the kinds provided for by the Washington Rules of Civil Procedure. The decision of the arbitrator shall be final and binding. The costs of arbitration shall be borne equally by the parties unless the arbitrator rules otherwise.

**D. Compelling and Enforcing Arbitration.** Mediation and arbitration pursuant to Sections B, C, E, and F may be compelled and a decision of the arbitrator pursuant to Sections C or F may be enforced through appropriate judicial proceedings initiated in the United States District Court for the Western District of Washington ("Federal Court"). In the event that Federal Court lacks jurisdiction over that proceeding, a proceeding to judicially compel mediation or arbitration or seek judicial enforcement of the arbitration decision may be brought in state courts of competent jurisdiction with the State of Washington, or, at the election of Grantee, in the Tribal Court of the Swinomish Indian Tribal Community. In the event that such judicial proceedings are initiated, the prevailing party (as defined by the laws of Washington) shall be entitled to an award by the court of reasonable attorneys' fees and costs.

**E. Disputes Regarding or Related to Sovereign Immunity.** Any dispute regarding or related in any way to the sovereign immunity of the Tribe shall be resolved in Federal Court (Western District of Washington). In the event that the Federal Court determines that it lacks jurisdiction over the proceeding, the dispute regarding the sovereign immunity of the Tribe may be resolved, at the sole election of Grantee, in the Tribal Court of the Swinomish Indian Tribal Community, or by binding arbitration before a retired Federal judge chosen by agreement of the parties. If the parties are unable to agree as to the appointment of a retired Federal judge to serve as arbitrator, either party may request the appointment of an arbitrator pursuant to Section C. If Grantee elects to have the dispute regarding or related to the Tribe's sovereign immunity resolved before a retired Federal judge, the judge shall have the authority to award costs and reasonable attorney's fees if s/he finds that either of the parties' arguments, if made in U.S. District Court would violate Federal Rule of Civil Procedure 11 (as in effect as of the date of execution of this Agreement).

**F. Limited Waiver of Sovereign Immunity.** Except as otherwise expressly provided in this Section F, nothing in this Temporary Easement is intended to be or shall constitute or be construed as a waiver, limitation or modification of the Tribe's sovereign immunity from unconsented suit. The Tribe hereby consents to submission, pursuant to Sections B, C, E, and F, of disputes arising under this Temporary Easement and hereby waives its sovereign immunity with regard to mediation pursuant to Section B, to arbitration pursuant to Section C, to lawsuits pursuant to Sections D solely seeking to compel such mediation or arbitration or seeking enforcement of an arbitration decision, and lawsuits pursuant to Section E solely seeking to resolve claims arising under this Temporary Easement regarding or related to the sovereign immunity of the Tribe. This limited waiver relates only to legal actions by Grantee seeking any relief or enforcement of rights authorized by this Temporary Easement and not to legal actions by any other person, corporation, partnership, or entity whatsoever. This limited waiver authorizes relief compelling the Tribe to take action expressly required by this Temporary Easement and/or awarding monetary damages against the Tribe for breach of this Temporary Easement. The Tribe does not waive, limit, or modify its sovereign immunity from uncontested



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suit except as expressly provided in this Section F. This limited waiver does not extend to proceedings in any other forum, regarding any other matter, or create any rights in any person who is not a party to the Temporary Easement. This limited waiver does not authorize punitive damages against either party. Upon execution of this Temporary Easement, and if requested, the Tribe will provide to Grantee a resolution from the governing body of the Tribe ratifying this Temporary Easement and this Limited Waiver of Sovereign Immunity.

GRANTOR:

DATED this 24<sup>th</sup> day of October, 2011.

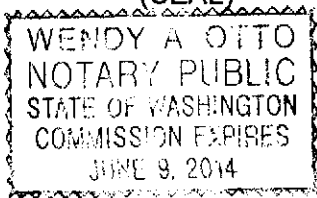
The Swinomish Indian Tribal Community, a federally recognized Indian Tribe organized pursuant to section sixteen of the Indian Reorganization Act of 1934

By: Brian Cladoosby  
Brian Cladoosby  
Title: Chairman, Swinomish Indian Senate

STATE OF WASHINGTON }  
COUNTY OF SKAGIT } ss.

I certify that I know or have satisfactory evidence that Brian Cladoosby, as the Chairman of the Swinomish Indian Senate of the Swinomish Indian Tribal Community, is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was duly authorized to execute this instrument and executed the forgoing instrument as his free and voluntary act for the uses and purposes herein mentioned.

DATED this 24<sup>th</sup> day of October, 2011



Wendy A Otto  
Notary Public  
Print name: Wendy A Otto  
Residing at: Stanwood, WA  
My appointment expires: 6/9/14



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**GRANTEE:**

DATED this 21 day of November, 2011.

**BOARD OF COUNTY COMMISSIONERS  
SKAGIT COUNTY, WASHINGTON**

Ron Wesen

Ron Wesen, Chairman

ABSENT

Kenneth A. Dahlstedt, Commissioner

Sharon D. Dillon

Sharon D. Dillon, Commissioner

Attest:

Linda Hammer

Clerk of the Board

Recommended:

Henry Hoff  
Department Head

Approved as to form:

[Signature] 11/19/11  
Civil Deputy Prosecuting Attorney

Approved as to indemnification:

Billie Gadrmas 11/16/2011  
Risk Manager

Approved as to budget:

Lisha Yagme  
Budget & Finance Director



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**EXHIBIT "A"**  
**LEGAL DESCRIPTION**

UNREGISTERED  
THAT PORTION OF THE NORTH ONE-HALF OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER, AND OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER, AND OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, AND OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER ALL IN SECTION 17, TOWNSHIP 35 NORTH, RANGE 5, EAST OF WM MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 17; THENCE NORTH 0°06'31" WEST ALONG THE WEST LINE OF SAID NORTHWEST QUARTER, 682.37 FEET TO THE SOUTHWEST CORNER OF THE NORTH ONE-HALF OF SAID NORTHWEST QUARTER; THENCE NORTH 89°44'12" EAST ALONG THE SOUTH LINE OF SAID NORTH ONE-HALF 760.18 FEET; THENCE N 2°15'21" E, 73.87 FEET; THENCE N 42°59'21" W, 56.87 FEET; THENCE N 46°29'19" W, 86.68 FEET; THENCE N 1°56'52" W, 128.52 FEET; THENCE N 2°33'56" W, 162.46 FEET; THENCE N 21°01'22" W, 64.18 FEET; THENCE N 70°06'02" W, 88.54 FEET; THENCE N 15°59'19" E, 64.14 FEET; THENCE N 21°04'22" E, 17.19 FEET; THENCE N 17°42'42" E, 31.94 FEET; THENCE N 89°55'52" E, 246.01 FEET; THENCE N 10°08'30" E, 217.55 FEET; THENCE N 0°01'23" W, 305.57 FEET MORE OR LESS TO THE SOUTH LINE OF THE ABANDONED BURLINGTON NORTHERN RAILROAD RIGHT OF WAY; THENCE WESTERLY FOLLOWING SAID SOUTH RIGHT OF WAY LINE 870 FEET MORE OR LESS TO A POINT ON THE NORTH-SOUTH CENTERLINE OF SAID SECTION 17; THENCE S 0°07'43" E ALONG SAID CENTER OF SECTION LINE 357.70 FEET MORE OR LESS TO A POINT WHICH IS 70 FEET NORTH OF THE CENTER OF SECTION 17; THENCE N 85°42'30" W, 602.03 FEET MORE OR LESS TO THE SOUTHEASTERLY LINE ON THE ABANDONED BURLINGTON NORTHERN RAILROAD RIGHT OF WAY; THENCE FOLLOWING SAID RIGHT OF WAY LINE SOUTHWESTERLY 643 FEET MORE OR LESS TO THE CENTERLINE OF HANSEN CREEK, THENCE SOUTHEASTERLY FOLLOWING SAID CREEK CENTERLINE TO A POINT ON THE SOUTH LINE OF THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 17; THENCE SOUTH 89°22'56" EAST ALONG SAID SOUTH LINE, 774.17 FEET TO THE TRUE POINT OF BEGINNING.

SITUATE WITHIN SKAGIT COUNTY, WA

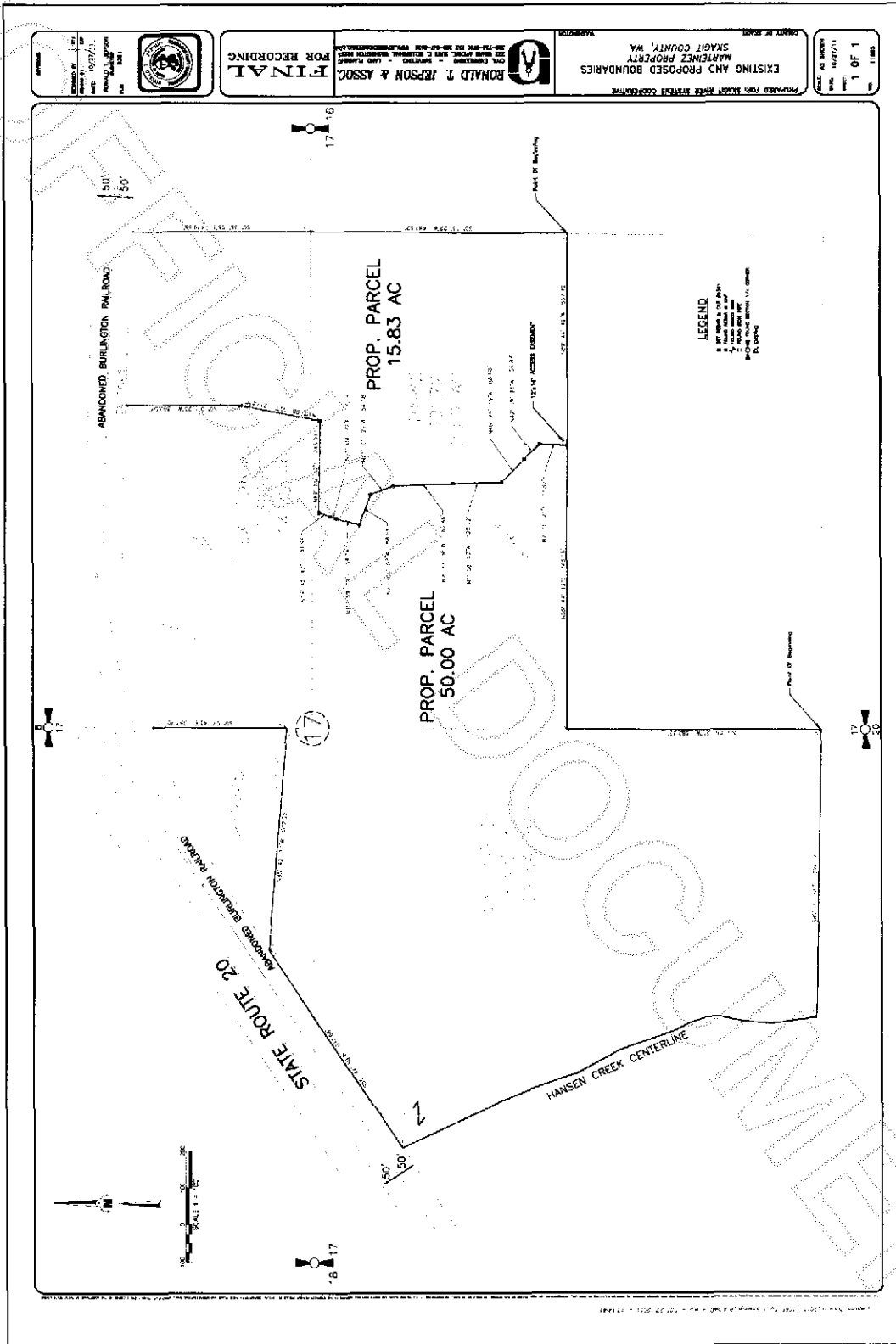
CONTAINING 50 ACRES



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# EXHIBIT "B" PROPERTY MAP



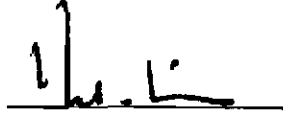
**Nielsen Brothers, Inc.**  
A Washington Corporation

For the below listed companies bank accounts, David R. Nielsen, Robert C. Nielsen, Lonnie Nielsen and L.W. Foulds (a.k.a Bill Foulds) are authorized signers.

Nielsen Brothers, Inc.

Timberline Logging, LLC

West Side Logging, LLC



**Robert C. Nielsen**

President/Director of Nielsen Brothers, Inc.  
President of Timberline Logging, LLC  
Member of West Side Logging, LLC



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