1965

In the Matter of the General Determination of All the Rights To the Use of Water, Both Surface and Underground, Within the Drain Age Area of the Green River Above the Confluence of, but Including Pot Creek, In Daggett, Summit and Uintah Counties, Utah : Brief of Respondents

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF ALL THE RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE GREEN RIVER ABOVE THE CONFLUENCE OF, BUT INCLUDING POT CREEK, IN DAGGETT, SUMMIT AND UINTAH COUNTIES, UTAH.

Case No. 10284

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BRIEF OF RESPONDENTS

Appeal from the Judgment of the Third District Court for Daggett County
Hon. A. H. Ellett, Judge

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Case No. 10284

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This action is for a general determination of the rights to the use of water pursuant to Chapter 4, Title 73, U. C. A., 1953. The water source covered by this proceeding includes all of the drainage area of the Green River, both surface and underground, above the confluence of, but including Pot Creek, in Daggett, Summit and Uintah Counties, Utah.

The respondent State Engineer would like to make it clear at the outset that his position in a general adjudication proceeding is that of a state administrative officer and not as one water user against another.

DISPOSITION IN LOWER COURT

This matter was heard before the District Court in the Third Judicial District, the Honorable A. H. Ellett, Judge, upon appellant's objections to the proposed determination of water rights and the answer of the State Engineer. Insofar as this appeal is concerned, the water users claims filed by the appellant were confirmed as contained in the proposed determination with the exception of Award Number 14 in the decree of September 25, 1964, which involves water users' claim numbers 265, 2716, 2718 and 2719. Certain other awards were made between appellant and others in the decree, but these are not involved in this appeal.

RELIEF SOUGHT ON APPEAL

The respondents submit that the decision of the District Court should be affirmed.

STATEMENT OF FACTS

The respondents submit that the following statement of facts is a more correct statement of the evidence actually before the District Court than is contained in appellant's brief, viewed as it must be in a light most favorable to the decision of the District Court. This action was initiated upon petition of water users in 1948 as provided for in Section 73-4-1, U. C. A., 1953, and subsequently, in 1953,

it was enlarged to cover the present area. (See the general findings prefacing the specific awards in each copy of the proposed determination, Volumes 5 and 6 of the record.) Appellant was made a party to the action pursuant to 43 U. S. C. § 666, and originally filed 715 separate water users claims setting forth in detail the rights to the use of water claimed. Subsequently some additional claims were submitted. (Volumes 2, 3 and 4 of the record.) Each of these water users claims set forth the origin of the right, point of diversion, period of use, nature of use, priority, extent and place of use and such other material as will completely define the right claimed as is provided for in Section 73-4-5, U. C. A., 1953. (Sections 6, 7 and 8 specify certain additional information for the uses specified in these sections.) While all of the information in the claims is relevant, of particular significance insofar as this appeal is concerned is the priority of the claims appellant submitted which can be generally grouped as follows:

1862 — 57 claims
1864 — 37 claims
1870 — 143 claims
1874 — 1 claim
1878 — 5 claims
1879 — 163 claims
1886 — 125 claims
1888 — 25 claims
1892 — 73 claims
1900 — 115 claims
1902 — 22 claims

(The remaining claims bear priorities from 1916 to 1960 and are based upon applications to appropriate filed in the office of the State Engineer, or upon adverse use.)

We would like to point out that the document entitled, "Response of the United States", which was submitted by appellant with its water user's claims and quoted on pages 3 and 4 of appellant's brief, was not a water user's claim. This document appears to be a statement of various legal theories by which appellant asserts it can acquire a water right but does not purport to describe any specific water right.

In accordance with Section 73-4-11, U. C. A., 1953, the State Engineer prepared and submitted to the District Court and the water users a Proposed Determination of Water Rights. (Volumes 5 and 6 of the record.) All of appellant's claims were incorporated into the proposed determination, by the State Engineer, setting forth the information as it was contained in the claim. In each and every case the proposed determination states the origin of the right proposed. For those rights which were based on the beneficial use of water prior to 1903, the appellant claimed and was awarded a diligence right based upon the use of the water by its permittees, licencees and lessees. In other cases, the rights were based upon applications filed in the office of the State Engineer, and in some instances upon adverse use. The appellant did not object to these awards as being incorrect nor offer evidence of any uses in addition to those contained in the proposed determination.

After being served with the proposed determination as provided for in Section 73-4-11, U. C. A., 1953, the appellant filed a protest which, among other things, objected

to the fact that no rights were awarded appellant under the reservation theory. Simply stated, this theory is based on the proposition that the reservation of federal lands impliedly reserves the water needed to carry out the purpose for which the land was reserved.

In answer to the protest of the appellant, which is quoted on page 5 of appellant's brief, the State Engineer stated:

> "In answer to paragraph 8 of said protest, the State Engineer admits that the proposed determination does not recognize any water rights for this protestant beyond those set forth in said determination; denies that protestant has any water rights in this area, except those set forth in said determination; the State Engineer further alleges that protestant is required to assert specifically all the rights to the use of water from this source to which it is entitled but has not filed water user's claims for any uses except those contained in said determination."

Still appellant filed nothing in the way of a water user claim based upon this theory, nor did appellant submit any evidence at the trial that it was entitled to any specific water which was not already covered in the claims theretofore submitted. Further, the record does not even show any evidence of the reservations which appellant now quotes in its brief on page 4 as the basis of the right. There was no evidence submitted by the appellant relative to the purposes for which the land was reserved, nor that there is any water used for reservation purposes or that appel-

lant will in the future require any additional water from any of the sources here being adjudicated.

ARGUMENT

POINT I.

THE DECREE OF THE DISTRICT COURT, IN CONFORMANCE WITH SECTION 73-4-12, U C. A., 1953, AWARDS TO APPELLANT ALL OF THE RIGHTS TO THE USE OF WATER TO WHICH APPELLANT ESTABLISHED A RIGHT IN THIS ADJUDICATION PROCEEDING.

A. THE PLEADINGS APPELLANT FILED BEFORE THE TRIAL COURT DO NOT ALLEGE ANY CLAIM TO THE USE OF WATER UNDER THE RESERVATION THEORY.

The gist of appellant's argument, as we understand it, is that the decree of the District Court is correct as far as it goes, but it should also contain a statement that appellant has rights to the water on the lands which have been reserved for national forests. We are not certain from appellant's brief whether it is claiming that the water which was awarded by the court decree should have also been awarded under the reservation theory, or whether it is claiming the right to additional waters from this source. Therefore, we will discuss both propositions. In order to properly evaluate appellant's position, we must review the purpose and scope of these proceedings.

The complete procedure for a general adjudication action, from the initiation through to the final judgment by the court, is provided for in Chapter 4 of Title 73, U. C. A., 1953. The legislature has set out the exclusive manner in which a right to the use of water may be asserted in this type of proceeding. Section 73-4-5, U. C. A., 1953, provides:

> "Each person claiming a right to use any water of such river system or water source shall, within ninety days after the completed service of notice of completion of survey prescribed by section 73-4-3 hereof, file in the office of the clerk of the district court a statement in writing which shall be signed and verified by the oath of the claimant, and shall include as near as may be the following: The name and post-office address of the person making the claim; the nature of the use on which the claim of appropriation is based; the flow of water used in cubic feet per second or the quantity of water stored in acre-feet, and the time during which it has been used each year; the name of the stream or other source from which the water is diverted, the point on such stream or source where the water is diverted, and the nature of the diverting works; the date when the first work for diverting the water was begun, and the nature of such work; the date when the water was first used, the flow in cubic feet per second or the quantity of water stored in acre-feet, and the time during which the water was used the first year; and the place and manner of present use; and such other facts as will clearly define the extent and nature of the appropriation claimed, or as may be required by the blank form which shall be furnished by the State Engineer under the direction of the court."

The individual water users claims become the pleadings in the adjudication. Section 73-4-14, U. C. A., 1953, states:

> "The statements filed by the claimants shall stand in the place of pleadings, and issues may be made thereon."

In the case of *Mammoth Canal & Irr. Co.* v. *Burton*, 70 Utah 239, 259 P. 408 (1927) which involved an adjudication of water rights under this statute, this court recognized that "* * * the familiar rules of practice and procedure by which the courts are guided in ordinary lawsuits do not apply in such cases where the legislature has laid down other and different rules relative to a particular subject". We submit that the only manner by which a claimant in this proceedings can assert his claim to water is by substantial compliance with the above procedure. However, it should be observed that the procedure for pleading a water right under the above sections is not greatly different from any action between two parties to quiet title to water. The person claiming the right to water must establish with certainty the various elements which go to make up a water right. As stated by this court in *Hardy* v. *Beaver Co. Irr. Co.*, 65 Utah 28, 234 P. 524 (1924):

> "None of the respondents claim to have used the water throughout the winter season, and without exception such evidence as was offered by the several respondents in support of their respective claims is wholly insufficient in respect to the quantity used and period of use to satisfy that degree of

> certainty which is required to establish priorities to the use of the public waters of the state and to enable the court, by its decree, to establish the respective rights of the parties to the use of the common resource. As was said by this court in the case of Sharp v. Whitmore, 51 Utah 14, 19, 168 P. 273, at 274:
>
> " 'One of the essentials of a valid judgment is that the judgment be definite and certain respecting the relief granted. In judgments defining and determining conflicting claims, rights, and interests in and to the use of water in this arid region, the application of the foregoing rule is indispensable. The rule, the soundness of which is self-evident, is so well established that it would be a work of supererogation to cite authorities illustrating and supporting it.'
>
> "It is but stating the corollary of the foregoing pronouncement to add that it is equally incumbent upon claimants in actions of this kind to prove the extent of their appropriations both in time and amount with the same degree of certainty. Sowards v. Meagher, 37 Utah 222; Walsh v. Wallace, 26 Nev. 299, 67 P. 914, 918, 99 Am. St. Rep. 692."

Appellant did not file a single water users claim based on the so-called "reservation theory". This is apparent when one reviews the claims. However, before discussing these claims in detail we would like to emphasize that the document entitled, "Response of the United States" which appellant quotes on pages 3 and 4 of its brief is not a water users claim. This document can be construed as nothing more than an allegation of various legal theories by which the appellant claims it can acquire water rights. In effect

it was submitted as a letter of transmittal to accompany the 715 specific claims which were filed. Further, the record before this court does not contain any of the evidence relative to the reservation of lands for forest purposes which is set forth on page 4 of appellant's brief. The rights of the parties are to be determined from the record that is before this court, 5 *Am. Jur. 2d, Appeal and Error* § 491.

Turning now to the specific water users' claims which were originally filed, plus those subsequently submitted, we would like to point out certain facts which we consider relevant to this appeal. Paragraph 4 of each statement of water users' claim contains the user's declaration of the origin of the water right claimed. All of appellant's claims assert a right acquired pursuant to state law and make no reference to the reservation theory. In those cases where the water was put to a beneficial use prior to 1903 the appellant claimed and was awarded a diligence right. These rights rest on proof of an appropriation of the water to a beneficial use prior to the 1903 date, *Yardley* v. *Swapp*, 12 Utah 2d 146, 364 P. 2d 4 (1961). In this regard it is significant that the priorities of the majority of the claims filed by appellant predate the earliest date of withdrawal of land for forest purposes, according to the statements of withdrawal of these lands in appellant's brief. We wish to make it clear that we deny that the statements in appellant's brief can now be considered as evidence of a water right under the reservation theory. Certainly appellant cannot seriously contend that these rights were also reserved with a priority ahead of the date of the reserva-

tion of the land. If water was reserved at the time of the withdrawal of the land it would have to take the priority of the date of the reservation, *Arizona* v. *California,* 376 U. S. 340 (1964) : and *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (1939).

With regard to the remaining diligence claims none of the priorities claimed correspond with the dates appellant now asserts for the reservation of the land for forest purposes. The remaining claims of the appellant, with priorities subsequent to 1903, are either based on applications filed in the office of the State Engineer or upon adverse use. When the rights of appellant were set forth in the proposed determination of water rights by the State Engineer, he listed the source and type of right proposed. In the case of each claim by appellant the right is shown as being vested under state law. The appellant did not protest these awards, but simply stated in its protest that it was entitled to rights based upon the reservation theory; to which the State Engineer answered that appellant "* * * has not filed water users' claims for any uses except those contained in said determination." (See paragraph 7 of the answer of the State Engineer.) We respectfully submit that appellant has not filed any pleading which would form the basis of an award for an additional water right in this adjudication proceedings.

B. THE PROPOSED DETERMINATION AND THE DECREE OF THE DISTRICT COURT ARE FULLY SUPPORTED BY THE EVIDENCE AND THERE IS NO EVIDENCE

UPON WHICH THE COURT COULD BASE THE AWARD OF AN ADDITIONAL WATER RIGHT TO APPELLANT IN THIS PROCEEDINGS.

Appellant did not offer any evidence which would support the right which is now claimed. The only evidence which the record shows was before the trial court was the water user's claims and the proposed determination. Section 73-4-14, supra, provides that the water user's claims shall be competent evidence of the facts stated therein unless the same are put in issue. As we have pointed out above, the claims of the appellant were evidence of rights acquired according to state law. This is also reflected in the proposed determination; and if we correctly assess appellant's position, it does not question these awards. Rather, it would assert that the same right should again be awarded to it under the reservation theory. The obvious conclusion is that since the majority of rights claimed were already vested there was nothing further appellant could acquire with regard to these specific awards. However, if appellant was seeking a right based on the reservation theory it would be essential to prove: the area covered by the reservation; what, if any water was intended to be reserved; the quantity, priority, point of diversion, place and nature of use of the water. In other words, it would be necessary to submit some evidence of the right claimed. Certainly, no court could formulate a decree defining a water right without this information. Again it is obvious from the record there was not sufficient evidence before

the court upon which it could make a finding. Appellant was not in any way limited in its proof, and if it had additional claims it was required to prove them. In this regard we believe the report of the Special Master, in *Arizona* v. *California,* 373 U. S. 546 (1963) dated December 5, 1960, is particularly significant.[1] His findings and decree formed the basis of the ruling from the United States Supreme Court upon which appellant now so heavily relies. On page 334 of the report in discussing the claims of the United States under the reservation theory, the Master stated:

> "With the exception of the Gila National Forest, it is unnecessary to pass on the claims of the United States for water for any of the other nine federal establishments, because the United States has not demonstrated, except as to the Gila National Forest, that it presently utilizes or requires water from the mainstream of the Gila or its interstate tributaries in order to carry out the purposes of these establishments. Nor has the United States demonstrated, again excepting the Gila National Forest, that it will in the future require water from these sources. There is, therefore, no controversy over uses by these federal establishments to be adjudicated. Certainly it would be inappropriate to adjudicate the claims of the United States (with the exception noted) at this time since those claims may never be exercised much less questioned. Moreover, it would be impossible on the basis of this record to determine the water rights of the United States (except for the Gila National Forest) either on the basis of state law or on the basis of federal reservation of water."

[1]A copy of this report can be found in the library adjacent to the offices of the Utah Water and Power Board, Room 435, State Capitol.

In an early decision this court announced that it would not reverse a decision which conformed to the pleading and evidence presented to the trial court, *Gunnison Irr. Co.* v. *Gunnison H. C. Co.*, 52 Utah 347, 174 P. 852 (1918):

> "There is another and even more elementary reason why the respondent's contention cannot prevail. This case was tried to the court below under pleadings drawn, evidence heard, and findings, conclusions, and decree made solely under the theory of acquisition of rights to the use of water under the doctrine of appropriation for beneficial use. Upon the part of all parties the suit was a simple suit to quiet title to the usufruct under such theory. In no way whatever did the case as pleaded and tried involve any element either of title to the corpus of water, or right to change the mode of enjoyment from that of direct irrigation to that of storage for use from time to time as crops require. To sustain the position of respondent upon this appeal, it would be necessary to hold that the trial court in its decision departed from the path marked out by the pleadings. The record does not justify such a conclusion. But even if the trial court had so departed from the issues, the legal effect of its decree would be limited to the issues raised by the pleadings. Vicksburg v. Henson, 231 U. S. 259, 34 Sup. Ct. 95, 58 L. Ed. 209, at 216."

We respectfully submit that based upon the evidence in this case appellant has not proved that it is entitled to any additional awards in this proceeding.

The decree of the court, in confirming the claims in the proposed determination, awarded to appellant all the rights to the use of water to which it was entitled. Section

73-4-15, U. C. A., 1953 specifically states that after a hearing judgment shall be entered as provided for in Section 73-4-12, U. C. A., 1953. This latter section of the statute provides that the court will enter judgment:

> "* * * which shall determine and establish the rights of the several claimants to the use of the water of said river system or water source; and among other things it shall set forth the name and post-office address of the person entitled to the use of the water; the quantity of water in acre-feet or the flow of water in second-feet; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the point on the stream or other source from which the water is diverted; the priority date of the right; and such other matters as will fully and completely define the rights of said claimants to the use of the water."

This court has stated the findings must set forth the information required by this statute, *Plain City Irr. Co.* v. *Hooper Irr. Co.*, 87 Utah 545, 51 P. 2d 1069 (1935). The decree in this action fully complies with the requirements of this section of the code, and awards to appellant all of the water the evidence shows that it has a right to use. The fact that appellant may sometime in the future have additional uses of water does not present the court with a basis for a determination of what those rights may be. The above quoted statute specifically states that the judgment shall reflect the claimant's right to the *use* of the water, not some possible or potential use. This court has on numerous occasions held that the nature of a general determination proceedings, is, in effect, a determination of the

present rights to the use of water. It is not a determination of uses which may in the future come into existence; rather its purpose is to settle and determine in one decree the present existing rights and uses of the parties. In *Smith* v. *District Court of Second Judicial District for Morgan County,* 69 Utah 493, 256 P. 539 (1927) at p. 501 of the Utah Reporter, the court after making a review of the general adjudication statute stated:

> "After a most careful and thorough examination of the statute in question we have been unable to find any warrant for the court in such action to undertake to determine any question except rights to the use of the water involved and, perhaps, as a necessary corollary injunctive relief for the protection of such rights after they have been adjudicated and determined. No provision appears to have been made for cross-actions for any further or different relief than the determination of such rights."

In a subsequent decision the court again took occasion to point out what is contemplated in a general determination action, *Mammoth Canal & Irrigation Co.* v. *Burton,* 70 Utah 239, 259 P. 408 (1927) at pp. 249 and 250 of the Utah Reporter:

> "The terms 'general determination,' as used in this section and elsewhere in the statute, as we understand them, without attempting an exact definition, connote a determination of all rights within the system or other source existing at the time that the court is called upon to act or when the decree is made, and which is based upon the surveys and investigations made by the state engineer that are provided for in the statute, and made in an action

> conducted under and substantially in conformity with that law."

The Utah Court in *Huntsville Irrigation Association* v. *District Court of Weber County,* 72 Utah 431, 270 P. 1090 (1928) discused these actions in terms of present existing uses of water.

> "As stated in effect in the passage last quoted, the old system of trying such cases by piecemeal had proved ineffectual in many cases and was in the highest degree unsatisfactory. The intent of the Legislature and the purpose of the statute apparently was to remedy the evil then existing in determining the rights of parties in this class of cases. The statute provides no remedy for any relief except the determination of rights *to the use of water* and as a necessary corollary thereto such injunctive relief as may be necessary to protect and enforce such rights." (Emphasis added.)

Viewed in light of the above statements by this court concerning the result to be accomplished in a general determination action, we submit that there is no issue presented on this appeal. Appellant was awarded the rights to the use of water requested in its water user's claims. Clearly there is nothing more contemplated in a general determination action. If appellant were seeking relief because the trial court denied a claim for an existing use of water, there would then be some grounds for appeal. However, we are hard put to see how a water user who is awarded rights for all of the uses which are claimed upon the theory which he claimed them can now find cause to appeal to this court. Appellant makes no claim that it

should not be awarded the uses which it claims under state law. In addition to assertions made in the individual water user's claims, the very document which appellant asserts as its claim to water based on the reservation theory states: "* * * the United States bases its claims upon appropriations made under Utah law and also upon such other rights under Utah law as may be valid * * *."

C. APPELLANT'S REQUEST FOR A DETERMINATION BY THIS COURT OF RIGHTS UNDER THE RESERVATION THEORY PRESENTS TO THIS COURT AN ABSTRACT, MOOT ISSUE.

In light of the pleadings, evidence and decree of the court in this action, we submit that appellant is requesting this court to determine a question of law in advance of a right be asserted or contested. It would be just as logical for appellant to request this court to rule on whether or not it has or may have rights by reason of its treaty making powers, its requirements for flood control and navigation, and any other applicable rights and powers under the Constitution of the United States and the Acts of Congress. All of these possibilities are stated in the "Response of the United States", which appellant contends raises the reservation question.

We urge that appellant's contention that it should be awarded water rights under the reservation theory comes within the rule that courts on appeal will not consider moot, abstract questions on appeal.

> "The term 'moot' as used in connection with cases or questions which the courts refuse to review

> as merely academic has been variously defined to include cases in which determination is sought of an abstract question which does not rest upon existing facts or rights, cases or questions as to which in reality there is no actual controversy existing, cases in which the rights in contest have expired by lapse of time, cases as to which no judgment rendered could be carried into effect, and cases which seek a decision in advance about a right, before it has been actually asserted and contested. 5 *Am. Jur.* 2d, *Appeal and Error* § 762."

The Supreme Court of Wisconsin in the case of *Wisconsin Employment Relations Board* v. *Allis-Chalmers Workers Union, Local* 248, 32 N. W. 2d 190 (1948) gives a good definition of the proposition which appellant is seeking to advance in this case:

> "A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seek a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy."

To decide the question as appellant proposes would fall squarely within the prohibition of the above announced rule of law. With the great quantity of land in Utah under Federal ownership a question that has the far-reaching effects of appellant's claim under the reservation theory certainly should not be decided as an abstract proposition in this action.

D. THE AWARDS TO NEBEKER UNDER WATER USER'S CLAIMS NOS. 265, 2716, 2718 AND 2719 DO NOT CONFLICT WITH THE SECRETARY OF THE INTERIOR'S ADMINISTRATION OF LANDS UNDER THE TAYLOR GRAZING ACT.

Finally we urge that it was not error for the District Court to award to Nebeker the use of water under Claims Nos. 265, 2716, 2718 and 2719. None of the cases which appellant cites so hold. The cases of *United States* v. *Cox*, 190 F. 2d 293 (1951); *Osborne* v. *United States*, 145 F. 2d 292 (1944); and *LaRue* v. *Udall*, 324 F. 2d 428 (1963), all dealt with the government's right to take the land used by the permittees for other purposes. In each case the right of the government to take the land for the new use was upheld, and the permittee was not considered to have any vested property right in the public lands; but none of these cases dealt with water or water rights problems. However, we do not contend that this proceeding binds the Secretary of the Interior in his administration of federal lands. As we have previously discussed in this brief, this is solely an adjudication of existing uses to water and certainly it cannot be construed as adjudicating any right to federal lands. Appellant asserts that the alleged error in regard to these awards could be solved by merely an inclusion of a provision in the decree which would state that the Nebeker rights are subject to all authority of the Secretary of the Interior under the Taylor Grazing Act. We submit that insofar as this administration of federal lands is concerned,

this action does not purport to govern the Secretary of the Interior in his administration of the lands under the Taylor Grazing Act. Further, there was no evidence presented to the trial court of any conflicting claims of appellant's permittees to these sources. If a dispute to the use of these sources arises in the future, it will have to be resolved at that time.

CONCLUSION

Based upon the water user's claims submitted by appellant the decree of the trial court properly awards the rights covered by these claims to appellant as being acquired under state law. Appellant did not plead or prove a right to the use of any water in excess of the rights contained in the proposed determination. Further, appellant failed to demonstrate that the decree of the District Court purports to interfere with the administration of federal lands by the Secretary of the Interior. Therefore, the decree of the District Court should be affirmed.

Respectfully submitted,

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