FEDERAL INDIAN LAW RULEMAKINGS:

And the Importance of Local Engagement

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Overview of Discussion



Federal Indian Law Basics

- Indian Land Tenure
- Jurisdiction



A Sampling of Proposed Rules

- Fee-to-Trust Acquisitions
- Class III Gaming Compacts
- Water Quality Standards

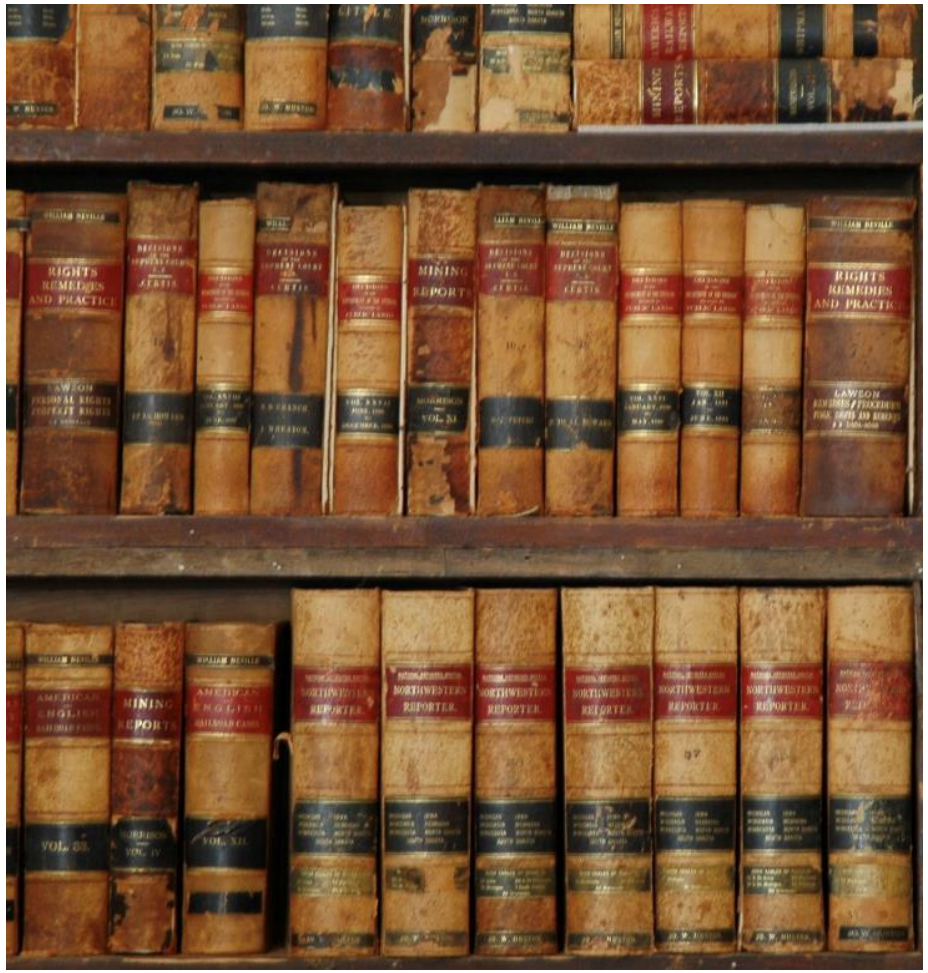


A Path to Better Federal Engagement

- Keeping Abreast of Developments
- Collaboration

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Federal Indian Law Basics



- Federal Indian law is a distinct body of law that governs the legal relationships between the federal government and Indian tribes.
- Although tribes have inherent sovereignty and powers of self-government, Congress has “plenary” power over Indian tribes under the Indian Commerce Clause of the U.S. Constitution.
- Federal Indian policies have vacillated over the past two centuries, resulting in tension between many federal laws that are still in effect and the judicial decisions they precipitated.

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Federal Indian Law Basics

Indian Country

- "Indian country" is the territorial area over which tribes have jurisdiction. (18 U.S.C. § 1151)
  - Land within any Indian reservation under federal jurisdiction, notwithstanding the issuance of any patent, including rights-of-way running through the reservation
  - Dependent Indian communities
  - Indian allotments, including rights-of-way
- "Trust lands" are lands where the United States holds fee title in trust for the benefit of an Indian tribe or individual Indian.

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Federal Indian Law Basics

Jurisdiction: It's Complicated

- States generally lack civil jurisdiction over Indians on trust lands within Indian country.
- States have civil jurisdiction over non-Indians on fee lands in Indian country and may exercise jurisdiction over non-Indians on trust lands, if the balance of federal, tribal, and state interests involved justify it.
- Tribes generally lack civil jurisdiction over non-Indians on fee lands in Indian country, absent a consensual relationship with the tribe or the non-Indian conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."
- Criminal jurisdiction turns on location, the nature of the crime, the identity of the perpetrator and victim, and state/tribe-specific legislation.

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Federal Indian Law Basics

COMMON CONFLICTS

Gaming

Water

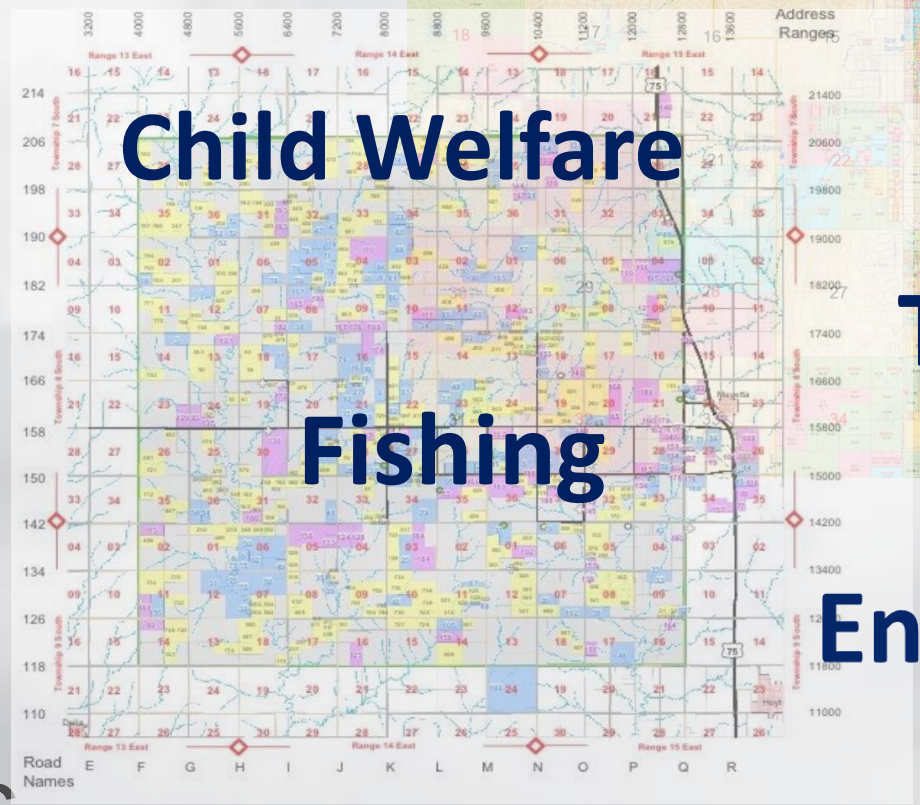
Child Welfare

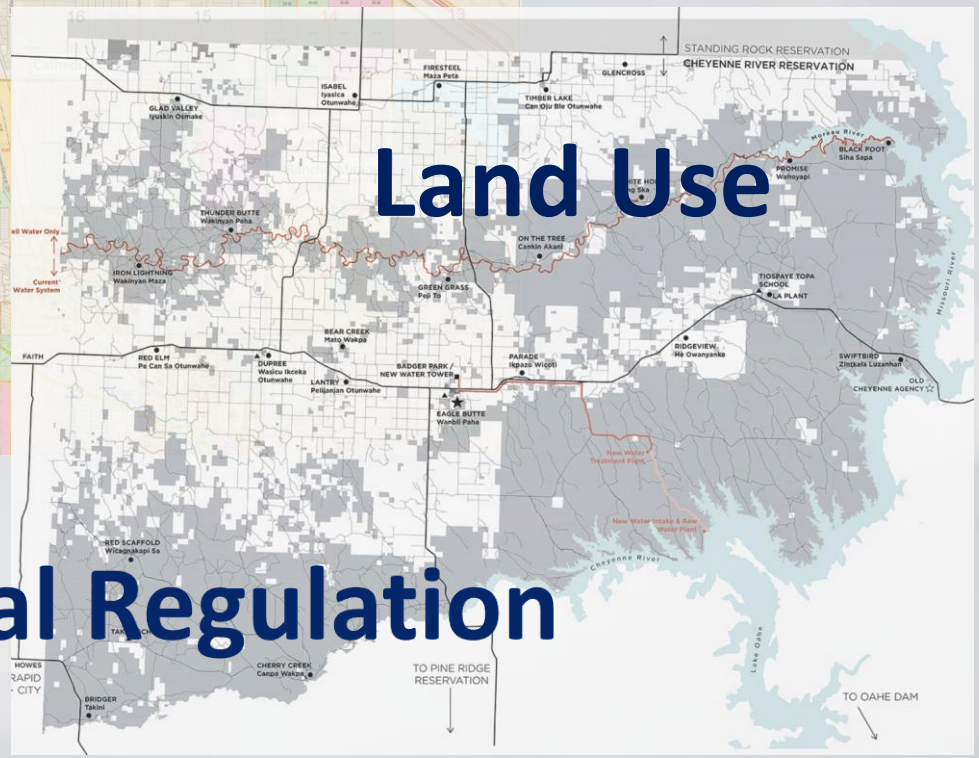
Land Use

Taxation

Fishing

Environmental Regulation





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A SAMPLING OF PROPOSED RULES AND THEIR IMPACTS ON LOCAL GOVERNMENTS

- FEE-TO-TRUST ACQUISITIONS
- CLASS III GAMING COMPACTS
- WATER QUALITY REGULATIONS

Fee-to-Trust Acquisitions (25 C.F.R. Part 151)

NEW AFFIRMATIVE TRUST LAND POLICY

"The prior regulation lacked any affirmative policy in favor of acquisition; it will now be clear Departmental policy to support land into trust, subject to the discretion provided by the IRA."

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Fee-to-Trust Acquisitions (25 C.F.R. Part 151)

STRONG PRESUMPTIONS FOR APPROVAL

- Presumption of approval for on-reservation and contiguous acquisitions and acquisitions for landless tribes
- For off-reservation acquisitions:
  - Presumption of tribal benefits from the acquisition without regard to distance of the land from other trust lands
  - Land location considered only in reviewing state and local comments
- Great weight accorded to a broad array of tribal purposes for all acquisitions

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Fee-to-Trust Acquisitions (25 C.F.R. Part 151)

REDUCED INFORMATIONAL REQUIREMENTS AND A MORE LIMITED ROLE FOR STATE AND LOCAL GOVERNMENTS

- Elimination of tribal business plan requirement
- No information regarding how notice will be provided to state and local governments
- No consideration of state and local impacts for on-reservation acquisitions
- No indication as to how state and local impacts will factor into acquisition decisions where comments requested

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Fee-to-Trust Acquisitions (25 C.F.R. Part 151)

CARCIERI V. SALAZAR (2009) WORK AROUND

- Secretarial authority to acquire land in trust is limited
  - Providing land for "Indians"
  - "Members of any recognized Indian tribe now under Federal jurisdiction"
- Proposed rule largely circumvents *Carcieri* limitations:
  - Tribes acknowledged under Part 83 presumed under federal jurisdiction as of 1934
  - Catch-all category to establish jurisdiction: "other forms of evidence deemed conclusive by the Secretary"
  - Rejection of evidence of federal officials disavowing jurisdiction
  - Acceptance of interactions with individual Indians

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Fee-to-Trust Acquisitions (25 C.F.R. Part 151)

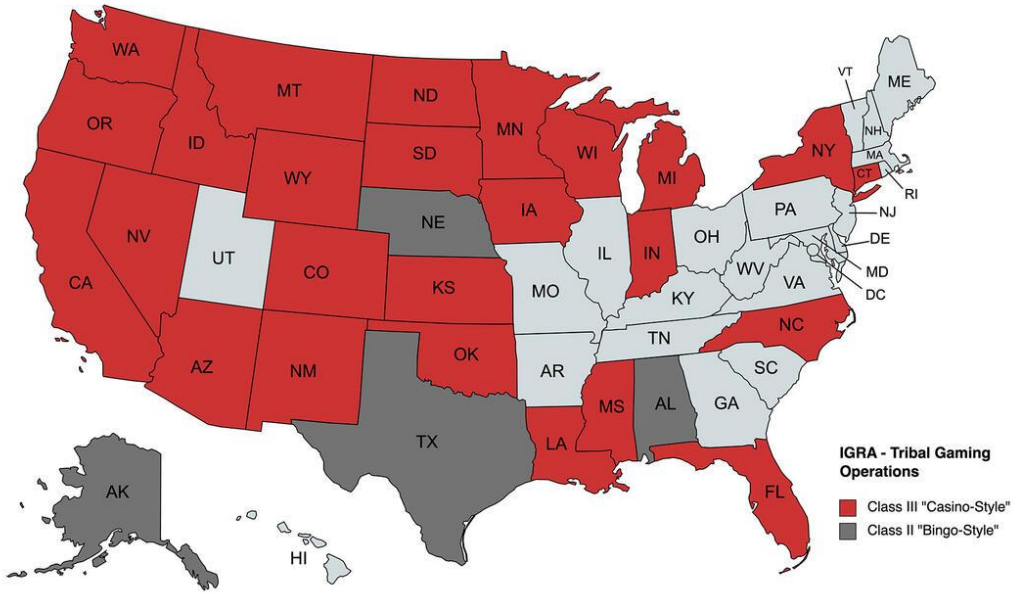
"This rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement."

- Delegation Doctrine
- Unfunded Mandates Reform Act
- *City of Sherrill*
- *Carcieri*
- Notice

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Proposed Rule: Class III Gaming Compacts (25 C.F.R. Part 293)

Indian Gaming Regulatory Act of 1988 (IGRA)



- The tribal gaming industry produced a record $40.9 billion in gross gaming revenue in FY2022.
- Class III gaming or “casino style” gaming requires a tribal-state gaming compact.
- Many states have elected not to legalize class III gaming by non-Indians in exchange for revenue sharing and other provisions.
- Other states have opted to legalize gaming for various reasons.

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Proposed Rule: Class III Gaming Compacts (25 C.F.R. Part 293)

THE CURRENT RULE GIVES TRIBES AND STATES FLEXIBILITY IN STRUCTURING TRIBAL-STATE GAMING COMPACTS

- The Secretary will approve (or allow to go into effect) a compact, as long as it does not violate:
  - Any provision of IGRA
  - Any other provision of federal law
  - Federal trust obligations
- Revenue sharing is permissible, as long as:
  - It is used to fund operations of local government agencies, or
  - The state has made a meaningful concession, such as tribal exclusivity.

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Proposed Rule: Class III Gaming Compacts (25 C.F.R. Part 293)

MAJOR CHANGES—EXPANDED GAMING OPPORTUNITIES



Requires a state that "allows any form of class III gaming" under its own laws to negotiate to allow "all forms of class III gaming."



Allows compacts between states and tribes to allow i-gaming, except when a player is located on another tribe's land



Establishes a process to obtain a preliminary determination whether an agreement is subject to Secretarial approval



Authorizes the issuance of guidance after a compact has gone into effect on provisions that are inconsistent with IGRA

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Proposed Rule: Class III Gaming Compacts (25 C.F.R. Part 293)

MAJOR CHANGES-15 NEW SECTIONS RESTRICTING SCOPE OF COMPACT



New narrow definitions of “meaningful concessions” and “substantial economic benefits.”



No revenue sharing if not justified by meaningful concessions of substantial economic benefit to the tribe.



States are required to show actual and reasonable expenses for regulating the specific tribe’s gaming activity.



Compact topics limited to those “directly related to the operation of gaming activities,” which is narrowly defined.

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Proposed Rule: Class III Gaming Compacts (25 C.F.R. Part 293)

THE PROPOSED RULE DOESN'T JUST AFFECT STATES AND TRIBES

- Compacts can no longer address tobacco sales, environmental regulation, wage garnishment, hotels, gas stations, convenience stores, and other casino activities that aren't "directly related to the operation of gaming activities."
- The proposed rule will make local mitigation agreements more difficult to negotiate:
  - Requirements for local mitigation agreements impermissible
  - DOI review of mitigation agreements

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Proposed Rule: Class III Gaming Compacts (25 C.F.R. Part 293)



MOST IMPACTS ARE LOCAL . . .

- Land conversion, traffic, housing, schools, tax revenues, water, environmental, infrastructure, police, emergency services . . .
- Only one local government in the country commented.

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EPA's Proposed Rules: Water Quality Standards

WHAT ARE WATER QUALITY STANDARDS?

- Section 303(c) of the Clean Water Act (CWA) requires states to establish WQS for the waters of the United States.
- WQS describe the desired condition of a water body and how that condition will be protected or achieved through 3 core components: designated uses, criteria, and antidegradation requirements
- EPA reviews WQS for compliance with federal regulations (40 C.F.R. 131).
- Tribes can seek "Treatment as State" (TAS) authority and establish their own WQS, subject to EPA approval.

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EPA's Proposed Rules: Water Quality Standards

The federal government and state agencies set the goals and establish priorities, but the local governments must implement the measures to meet WQS.

- Operation of wastewater treatment plants
- Management of urban stormwater
- Zoning and land use decisions
- Local ordinances



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EPA's Proposed Rules: Water Quality Standards

TWO PROPOSED WATER QUALITY STANDARDS RULES

Federal Water Quality Standards to Protect Tribal Reserved Rights:

Would require states, tribes, and EPA to consider treaty rights to aquatic and aquatic-dependent resources when setting WQS and details the requirements and mechanisms for doing so.

Federal Baseline Water Quality Standards for Indian Reservations:

Would apply WQS established and implemented by EPA to all Indian reservation waters where the tribe has not received TAS authority and the state does not have authority.

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EPA's Proposed Rules: Water Quality Standards

FEDERAL WATER QUALITY STANDARDS TO PROTECT TRIBAL RESERVED RIGHTS



State WQS must protect "the exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource."



States must incorporate reserved rights in WQS, including in designated uses, water quality criteria, and antidegradation requirements.



WQS must include (1) information about the "scope, nature, and current and past use of the tribal reserved rights, as informed by stakeholders" and (2) data and methods used.

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EPA's Proposed Rules: Water Quality Standards

FEDERAL WATER QUALITY STANDARDS TO PROTECT TRIBAL RESERVED RIGHTS

- Would broadly apply to "aquatic or aquatic dependent resources"
- Reserved rights defined to include "treaties, statutes, executive orders, or other sources of federal law"
- State water agencies ill-equipped to interpret treaty obligations and develop WQS based on those interpretations
- No evidence that existing WQS do not adequately protect tribal interests
- No clear authorization for the proposed rule

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EPA's Proposed Rules: Water Quality Standards

FEDERAL BASELINE WATER QUALITY STANDARDS FOR INDIAN RESERVATIONS



Establishes three designated uses: aquatic life, primary contact recreation, and cultural and traditional uses



Includes nationally applicable narrative water quality criteria to protect the three designated uses throughout Indian country



Includes four options for "binding numeric translations" of the narrative criteria



Explains how the baseline WQS must be considered in CWA Section 404 permitting and Section 401 certification process

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EPA's Proposed Rules: Water Quality Standards



- Source of EPA's the authority to promulgate WQS applicable to all of Indian country?
- What waters will be covered by the rule?
- How will checkboard jurisdictional problems be addressed?
- Why are existing WQS insufficient to protect waters in Indian country?

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A Path to Better Federal Engagement



ROBUST TRIBAL CONSULTATION

- Tribal consultation is formal government-to-government dialogue between official representatives of tribes and federal officials.
- Agencies must provide advance notice to tribal leaders of upcoming consultation sessions and later explain how final agency decisions incorporate tribal input.

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Federal Indian law regulations affect a broad range of issues important to state and local governments.

But regulatory changes can be hard to track:

- Rules come from a wide range of federal agencies.
- Federal outreach tends to be limited.
- Impacts on local governments are often minimized or poorly understood.

A Path to Better Federal Engagement







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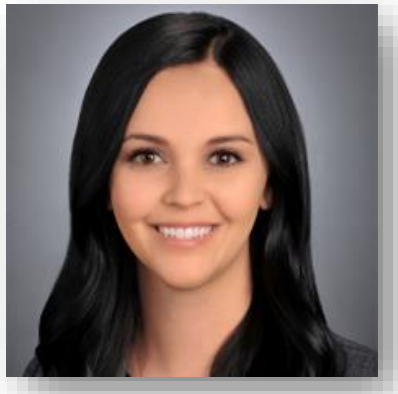
A Path to Better Federal Engagement

MORE INITIATIVES TO COME…

- Tribal co-management and co-stewardship of federal lands and waters
- Focus on environmental justice
- New indigenous knowledge guidance for federal agencies
- New regulations to consider tribal benefits in water resources development projects
- Investments in Clean Energy Infrastructure

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Thank You



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Sarah's practice includes environmental, natural resources, and energy law, with an emphasis on Native American law. She advises clients on tribal and treaty-related issues, including considerations surrounding economic development projects on or affecting tribal lands and how to effectively collaborate with tribes as agencies fulfill government-to-government consultation requirements, including those under the National Environmental Protection Act and the National Historic Preservation Act.



JENA MACLEAN, PARTNER

Chair of Perkins Coie's Native American Law & Policy practice, Jena serves clients facing a wide range of Indian law questions, including infrastructure and natural resource development, water rights, trust acquisitions and gaming compliance, federal preemption claims, treaty rights, tribal sovereign immunity, and land claims. Jena maintains both a counseling and litigation practice and has represented clients in Indian law matters before the U.S. Supreme Court and other federal and state courts around the country.

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