In the Waitangi Tribunal **Wai 2180**
Taihape: Rangitīkei ki Rangipō District Inquiry **Wai 972**

In the Matter	of the Treaty of Waitangi Act 1975
And	
In the Matter	of the Taihape: Rangitīkei ki Rangipō District Inquiry (Wai 2180)
And	
In the Matter	of a claim by Edward Tautahi Penetito, Shane Dean Penetito, Donald Koroheke Tait, Adeline Francis Anderson, Penahira Simeon, William Papanui, Kewana Emery, Anaru Te One Himiona, Margaret Ann Love, on behalf of themselves, the Kauwhata Treaty Claims Komiti, Te Marae Komiti of Kauwhata Trust and Nga Uri Tangata o Ngāti Kauwhata (Wai 972)

Submissions in response to Crown Closing Submissions on behalf of Wai 972

Dated 27 September 2021

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. These reply submissions are filed for Wai 972, a claim by Edward Tautahi Penetito, Shane Dean Penetito, Donald Koroheke Tait, Adeline Francis Anderson, Penahira Simeon, William Papanui, Kewana Emery, Anaru Te One Himiona, Margaret Ann Love, on behalf of themselves, the Kauwhata Treaty Claims Komiti, Te Marae Komiti of Kauwhata Trust and Nga Uri Tangata o Ngāti Kauwhata ("the Claimants") in response to the Crown's closing submissions.

2. The claimants adopt the various Generic Submissions in Reply to the Closing Submissions of the Crown insofar as they relate to the claims and issues raised by the claimants.

Replies to Crown Closing Submissions

3. In these submissions, the claimants provide specific responses on behalf of Wai 972 to the Crown's closing submissions.

4. In particular, these reply submissions will address the lack of Crown response to the claimants' statement of claim, closing submissions, and other evidence.

Tribal Identity

5. In its closing submissions on Cultural Taonga, the Crown addressed issues concerning the loss of tribal identity.[1]

6. In their closing submissions the claimants claimed that the Crown, in breach of its duties, failed to recognise and actively protect the distinct tribal identity of Ngāti Kauwhata, stripping them of their tino rangatiratanga and

[1] Wai 2180, #3.3.94.

ability to live in accordance with their Kauwhatatanga in the Taihape Inquiry district.[2]

7. Ngāti Kauwhata were "lumped in with Raukawa by the Crown during the purchasing era in the mid 19th Century."[3]

8. The Crown did not mention Ngāti Kauwhata in its submissions on Tribal Identity. The fact that they did not rate a mention is, in the claimants' view, indicative of the Crown's breaches relating to tribal identity. The Crown should have made an effort to acknowledge the existence of Ngāti Kauwhata, which has claims relating to tribal identity, in the Cultural Taonga closings.

9. To the extent that tribal identity is an implicit but essential element of the nature of the Tiriti agreement and resulting partnership between the Crown and Māori, it is submitted that harming or ignoring tribal identity of a group such as Ngāti Kauwhata is a breach of the terms and principles of the Te Tiriti.

Environment

10. In its closing submissions on Issue 16A: Environment (Land), and Issue 16B: Environment (Waterways), the Crown addressed issues concerning the environment, and particularly environmental degradation.

Crown preferment of Pākehā interests

11. In their statement of claim, the claimants submitted that:[4]

> *In breach of its duties, the Crown prioritised its own economic objectives, which focussed primarily on the benefit of Pakeha, over environmental concerns of paramount importance to Ngāti Kauwhata.*

[2] Wai 2180, #3.3.65, at [53].
[3] At [55].
[4] Wai 2180, #1.2.1, at 5.

12. The evidence adduced throughout this inquiry makes it plain that for many years the New Zealand government was focussed toward the pastoral and agricultural development of land and advancement of the economy primarily for the benefit of Pākehā, and this took primacy over the environment and the needs and wants of Taihape Māori.

13. The claimants further submitted:[5]

> *From the 1860s, the Crown supported the ethos of recreational hunting and sport over that of protection of indigenous flora and fauna and protection of taonga and Māori food resources.*

14. The Crown has not responded to the allegations that it prioritised Pākehā interests over those of Māori.

Erosion

15. On the subject of erosion, the claimants submitted the following:[6]

> *Erosion was facilitated by the loss of native flora along the river banks which destroyed the banks' foundation. The erosion resulted in the widening of rivers and soil from the banks being deposited on the river bed. Consequently, the river bed became shallow.*
>
> *The shallow water impacted negatively on aquatic fauna which existed within the waterways. The lowered water levels enabled the increase of river temperatures and in turn the deoxygenation of the water. The decreased oxygen levels hindered the ability for aquatic life to thrive comfortably.*

16. The Crown has not addressed the claimants' allegation that erosion causes shallow water, which subsequently affects the downstream aquatic life. In the context of the Taihape inquiry district, it is submitted that extensive claimant and technical evidence in this inquiry has shown that this process

[5] Wai 2180, #1.2.1, at [23].
[6] At [19(d)-(e)].

has led to the destruction of the mahinga kai and the obliteration of the claimants' ability to sustain themselves within their own rohe and on their traditional lands under tikanga.

Waters Pollution Act 1953

17. On the Waters Pollution Act 1953, the Crown submitted that before the Act was passed:[7]

> *there was no general legislative provision relating to the protection of waterways for their own sake. Prior to that Act, the focus of water-related legislation was the protection of introduced fish species and risks to public health. Under the Health Act 1920, the Health Department was given authority to halt the discharge of waste or effluent into waterways passing through a borough or town district into rivers (as was permitted under the Municipal Corporations Act 1923) if public health was endangered.*

18. The Crown alludes to the Waters Pollution Act 1953 as being able to protect waterways "for their own sake". However, as the claimants submitted:[8]

> *the Waters Pollution Act 1953 was ineffective in addressing the severe degradation which had occurred and was occurring in respect of the waterways as provision in the Act allowed for the discharge of waste to continue in particular circumstances.*

19. Therefore, it is submitted that, in particular, the Waters Pollution Act 1953 continued the ongoing post-Tiriti history of the Crown failing to protect the environment "for its own sake". Also, in general, the measure of existing Crown statutes is the lowest possible bar; it represents the Crown setting the measures by which to judge itself. Accordingly, to apply a Tiriti perspective requires the Crown to do better than the minimum with which it can get away, and to have Māori concerns and interests in the forefront of

[7] Wai 2180, #3.3.93, at [52].
[8] Wai 2180, #1.2.1, at [22(c)].

its thinking and actions when doing so. Thus, for example, the destruction of Māori mahinga kai and the endangerment of Māori settlements would be at least as important as flood protection for farms.

Fisheries Act 1908

20. The Crown points to the Fisheries Act 1908, ss 83(n) and 94 as preventing "sawmill refuse being dumped in rivers or waterways."[9] However, it does not acknowledge that "Section 94 of the Fisheries Act 1908, re-enacted in 1923 and 1951, explicitly served the purpose of protecting introduced species."[10]

21. Counsel agree that the prevention of sawmill refuse being dumped in waterways is indeed a worthy outcome. However, the prioritisation of introduced species and the harm caused to native species, potentially to the point of extinction by those introduced species, is not.

22. The Crown points to sections of the Acts mentioned above (at [17-20]) which supposedly demonstrate how it helped to protect the environment. Counsel do not propose to engage in detail with those arguments. At this time, we simply note that those arguments do not acknowledge or deal meaningfully with the claimants' concerns about the Acts as a whole or the other sections of these Acts which were in fact detrimental to the environment.

Consultation

23. On the subject of consultation with Māori, the Crown submitted that it does not accept:[11]

> *that the absence of consultation requirements during this period was a breach of te Tiriti/the Treaty, as the claimants submit. As outlined in the Crown's submissions in previous inquiries, understandings of*

[9] Wai 2180, #3.3.85, at [239] and Footnote 323.
[10] Wai 2180, #1.2.1, at [24(a)].
[11] Wai 2180, #3.3.93, at [18].

what constitutes Tiriti/Treaty consistent processes have developed considerably in response to decisions of the courts and the Waitangi Tribunal since the 1980s.

24. The claimants reply that just because the Crown of the past did not consult with Māori and did not think it needed to because of the attitudes of the time does not mean it is not a Treaty breach. The Treaty existed at 1840 and guaranteed certain things to Māori. The Treaty was drafted by the Crown; if it did not intend to take all practical measures to actively protect Māori interests it should not have drafted the Articles 2 and 3 guarantees.

25. The Crown further submitted that, "'deference to Māori values' by local authorities was not required under te Tiriti/the Treaty."[12] The claimants do not accept the implied separation between central and local government in terms of Treaty responsibilities. This separation could not have been written into the Treaty because of course local authorities of any sort did not exist until the creation of the provinces over a decade later. In any case, if the local authorities were ignoring Māori interests and values there is much existing Tribunal jurisprudence to indicate that the Crown should have stepped in to ensure the values/interests were protected.

26. The Crown noted that it acknowledged, "that the extent of Māori participation in local government processes generally has historically been low", but stated that "throughout the 20th century there have been opportunities across a wide range of different boards and bodies for Taihape Māori consultation and participation."[13]

27. In reply the claimants submit that no doubt there were opportunities – for non-Māori. However, how available (in reality) would they have been to Māori? What would the reception have been like? Would they have been accepted on the committees? Would they have the ability to attend?

[12] At [18].
[13] At [24.1].

28. The Crown states that opportunities were available "throughout the 20th century". Is 1905 as realistic and with as many opportunities as 1995? Given the present considerable resistance to Māori wards in 2021, what consultation and participation could Taihape Māori have expected and exercised several generations ago? The claimants consider that this is a totally unrealistic Crown submission and open to being described as presentist.

Resource Management Act

29. In regards to the Resource Management Act 1991 (RMA), the Crown considers that the Act:[14]

> *strikes an appropriate balance between providing for the needs of economic and social development, conservation, and the protection of other interests in the environment and natural resources, including Māori interests.*

30. In the claimants' submission, if the RMA was the appropriate tool, the government would not be overhauling it so comprehensively, with one of the key drivers of the new legislation being "[t]he need to ensure that Māori have an effective role in the system, consistent with the principles of Te Tiriti o Waitangi".[15]

Adverse environmental impacts

31. The Crown questions the causative link between Crown "action, omission, or policy and the degradation of waterways complained of". It states that "[a]dverse environmental impacts are an inevitable consequence of human development and progress, and some degree of environmental degradation will always occur."[16]

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[14] At [21].
[15] Ministry for the Environment, "New directions for resource management in New Zealand: Report of the Resource Management Review Panel: Summary and key recommendations" (July 2020) <https://environment.govt.nz/publications/new-directions-for-resource-management-in-new-zealand-report-of-the-resource-management-review-panel-summary-and-key-recommendations/>.
[16] Wai 2180, #3.3.93, at [32].

32. The claimants reject this categorisation. Short-term and unforeseen degradation, as with unusual floods, is one thing. Sustained degradation is clearly tied to a lack of oversight, which the Crown claims to have (as an attribute of kāwanatanga) over waterways. Also, if the only possibility is a downward trend, as the Crown contends regarding "adverse environmental impacts" and "environmental degradation", then our ambitions and attempts to reverse climate change are futile. Clearly neither politicians nor scientists agree that it is all one-way traffic. Frequent or usual maybe, because of the lack of care and oversight, but surely not inevitable and irremediable.

33. Also, the Tribunal has before it evidence such as David Armstrong's regarding Crown knowledge since the 1870's of many of the effects of deforestation.[17] It is submitted that such knowledge indicates a causative effect of Crown actions, policies and omissions to act.

34. The Crown submits that the "implementation of water management regimes has not, in itself, caused adverse environmental effects on waterways."[18]

35. The claimants agree that implementing environmental regimes hopefully does not directly damage waterways. However, waterways are damaged by, for example, policies favouring farming over the environment, whether pollution today or huge deforestation in the past to create those farms. Such policies have the direct consequence of environmental degradation. Indirect damage is also perfectly possible, even if through unintended consequences. The waterways are damaged nonetheless and in this inquiry district the tangata whenua suffer from loss of their resources, mahinga kai generally and their ability to support themselves.

36. The Crown submits that: [19]

> *the health of a waterway is affected by a wide range of factors, not all of which the Crown can control or influence. This makes*

[17] Wai 2180, #A45, at 42.
[18] At [34].
[19] At [34].

> *determining the cause of any particular adverse environmental impact difficult, and attributing responsibility problematic.*

37. The claimants disagree that particular environmental impacts in particular waterways are difficult to determine, e.g. dairy farming pollution, cows destroying streams and stream banks, farms putting sewage, offal and rubbish into or beside streams, siltation caused by deforestation, destruction of tuna habitats by removal of riverside trees, and so on.

38. The Crown continually submits that everything must be considered on a "case-by-case" basis. The claimants reject this – it is a tool to obfuscate the issue by disclaiming general findings. It also forces the prolonging of the inquiry process as claimants must prove every element of every claim. The environment in Taihape generally is difficult and its quality is poor, and the whole situation is fragile, but has become hugely worse in the last 130 years since sheep arrived. The Crown aided this in occurring and in fact encouraged it for its own policy reasons and fixation on pastoral farming. In general terms and if its policies and legislation are not to be held to account, of what does the Crown's claimed "kāwanatanga" consist if it is so empty that it includes no accountability? It is submitted that, in a democratic society, all governmental institutions and policies must be able to be held to account.

39. The Crown submits that there is a:[20]

> *wide range of interests in waterways and in the use of those waterways for particular activities, such as the collection of food, drinking water, irrigation for agriculture, recreational purposes, and the discharge of waste. There are public interest considerations in respect of each of these activities, and the various interests must be carefully balanced.*

40. The claimants say that the Crown has not "balanced" public interests in the correct manner. It has favoured rich, landowning Pākehā who supported its vision of economic development over others, especially Māori as tangata

[20] At [36].

whenua. The claimants also say that the interests of Māori tangata whenua are not qualitatively the same as other interests; they are those of tangata whenua with certain Tiriti guarantees and protections. And frequently those Māori interests have been weighed as being less than "public interest", as if Māori were not members of "the public". And, counsel respectfully submit, those concerns are precisely the jurisdiction of this Tribunal.

Gravel extraction

41. On gravel extraction, the Crown submits that "[v]arious obligations to take the views and values of tangata whenua into account apply to decision-makers acting under the RMA."[21]

42. "Taking into account" is not partnership. It comes back to the point above of treating Māori as no more than members of "the public", if that. There have been submissions and Tribunal jurisprudence on that issue. It also limits the Crown's "various obligations" to those required in the RMA, which the claimants would say is hardly a Tiriti principles standard.

43. Further, the Crown submits that if it "has extracted gravel or authorised its extraction from riverbeds in the inquiry district", it must have been on a lawful basis.[22] The Crown claims that "government agencies would not have taken gravel without their bona fide belief that the Crown had the right to do so".[23]

44. The claimants ask, how does the Crown know that all gravel was extracted lawfully? It is a poor and unsupported argument that just because the Crown did it, it must have been legal. The measure again is legislative requirements, i.e. another example of the Crown constantly measuring itself by the standards it has set itself. In effect the Crown is saying, we give ourselves the authority to do this, so it must be acceptable if we do it according to the standards set under that authority.

[21] At [41].
[22] At [44].
[23] At [45].

Discharge of human effluent into waterways

45. On the discharge of human effluent into waterways, the Crown states that:[24]

> *methods of sewage disposal at any one time must be considered in light of the limited options that were available at that time, including having regard to the development of technology.*

46. The claimants do not accept that it can be argued that the discharge of waste into the waterways was fine because people back then did not know any better. Even 150 years ago it was known that waste pollutes and makes water unsafe for other activities. Admittedly, many of the exact means of infection, pollution and such were still being figured out by scientists in the mid-nineteenth century, but people always drank fresh water rather than water with cow and human effluent in it. And from the mid-nineteenth century through to the passage of the RMA, infection, pollution and the like and their effects were of course well known.

47. The Crown again brings up competing public interests, as if Māori interests were no different from those of random farmers. Pākehā caught typhoid and other diseases derived from polluted water too if they were drinking impure water. Regarding "public interest", was it simply equated to farmers' economic interests as opposed to everyone's health, before Māori Tiriti rights were factored in?

48. To focus on meeting the pre-1990 legislative requirements as the standard of acceptability is, it is submitted, again, the Crown unilaterally creating the bar and then declaring it has cleared it, as if that was all that were needed. Again, the Tiriti guarantees regarding "lands, estates, forests and fisheries" must be considered; they preceded the RMA by 150 years.

49. The Crown considers that the efforts around disposal of human effluent

[24] At [58]

"were made in good faith and were reasonable in terms of the options available at the time."[25] The claimants do not understand how discharge of human waste into the rivers is something that can be described as being in "good faith", especially when it ignored the needs of their Tiriti partner, who fed and otherwise resourced themselves out of the waterways.

50. These comments from the Crown also detract from the Crown's statements previously which actually do acknowledge the harm done. For example:[26]

> *The Crown acknowledges that historic environmental legislation before the late 1980s did not provide for the recognition of Māori cultural values and practices and limited the ability of Taihape Māori to exercise kaitiakitanga over their natural environment and taonga. There also appears to be no evidence of consultation with Taihape Māori in relation to the establishment of the sewage discharge systems in the inquiry district.*
> *The Crown also recognises the discharge of human effluent to waterways is highly offensive to Māori due to the impact it has on the mauri of the waterways and that the discharge of human waste into awa in their rohe has been a source of considerable grievance for Taihape Māori.*

Have Taihape Māori raised concerns about the impact of the policies and processes of the Crown, local authorities, and autonomous bodies on non-commercial fisheries? If so, how has the Crown responded to these concerns, and was the response adequate?

51. In response to the above question (from the SOI) in its closing submissions on Environment (Waterways), the Crown states that:[27]

> *The claimants acknowledge in their closing submissions that they "did not see specific evidence of these concerns being raised". However, the Crown accepts that Taihape Māori have in more recent times, on a number of occasions, expressed concerns about the state*

[25] At [59].
[26] At [55-56].
[27] Wai 2180, #3.3.93, at [136].

> *of non-commercial fisheries and freshwater habitats. In his evidence,* ***Edward Tautahi Penetito*** *described how "Ngāti Kauwhata seek every opportunity to actively engage with local bodies as Kaitiaki over the natural resources within their rohe".*

52. This quote, which the Crown has copied from Mr Penetito's Brief of evidence, imputes the conclusion that satisfactory engagement has taken place between local bodies and the claimants. However, the Crown has omitted to quote the surrounding text in Mr Penetito's Brief of Evidence. The full quote is as follows:[28]

> ***Although*** *Ngati Kauwhata seek every opportunity to actively engage with local bodies as Kaitiaki over the natural resources within their rohe,* ***we feel our ability to do so and to protect Kauwhata's waters is not reflected in agreements on shared water management with local bodies, nor through the consultation efforts of those organisations.***

53. The claimants have struggled to find opportunities to engage, and where they have been able to engage with the Crown and local bodies, this does not mean that the engagement has gone well.

54. The Crown submits that overall there is "little evidence of Taihape Māori raising concerns about the mauri of the waterways in the district with the Crown or local authorities in the 19th and early 20th centuries."[29]

55. In the claimants' view, there was no doubt there was concern even if there is no record of it. Perhaps Māori even tried to contact the Crown or local authorities on the matter but it was brushed aside – the communications not even recorded. Also, as a historian would say: "the absence of evidence is not evidence of absence" – for just those sorts of reasons. It might also be noted that in the nineteenth century there was a large quantity of land, water and other resources and nowhere was farmed or inhabited

[28] Wai 2180, #L01, at [30].
[29] Wai 2180, #3.3.93, at [61].

intensively, so such problems were minimised. It became rapidly worse as farming achieved an increasingly industrial scale, towns grew, as did the population being supported in the twentieth century.

Non-commercial fisheries

56. The Crown states that it "rejects the contention that it has a general duty to prevent all negative impacts on fisheries resources and their habitats, and nor could such a duty practically exist."[30]

57. The claimants submit that, in the English version of the Treaty, Article 2 states that the Queen guaranteed to Māori the undisturbed possession of their properties, including their lands, forests, and *fisheries*, for as long as they wished to retain them. In the claimants' view, this appears to be a duty to protect fisheries and a specific guarantee being provided by the Crown.

58. The general duty from te Tiriti described above obviously does not extend to natural disasters – unless of course they are created or exacerbated by human failure and carelessness – but as submitted above "kāwanatanga" means accepting responsibility as well as benefits. If the Crown says it has the control, then it has the responsibility that goes with those powers.

59. The Crown notes that while "DOC has undertaken little specific fisheries management in the middle and upper Rangitīkei, upper Ōroua, upper Ngaruroro and other nearby catchments in this District", it does it admit to having done "little in respect of indigenous freshwater fisheries in the Inquiry District".[31]

60. The claimants ask, how can the Crown claim to have done anything other than "little" in respect of Taihape, if it has not undertaken much management in the inquiry district? National regimes need to be accompanied by on the ground management. The government cannot expect that only implementing a national regime will solve problems in

[30] At [112].
[31] At [116].

individual districts.

Classification of tuna as vermin and eradication efforts

61. On the introduction of exotic species, including trout, the Crown notes while it is: [32]

> *clear the Crown supported the introduction of trout, the evidence does not establish that the Crown specifically encouraged the eradication of tuna in the inquiry district. That was done by acclimatisation societies…*

62. The claimants reject the idea that acclimatisation societies are not part of the Crown's aims and policies. The Crown itself acknowledges that "it played a role in the introduction of trout and some salmon into the Rangitīkei River and its tributaries by acclimatisation societies in the late 19th century."[33]

63. The acclimatisation societies were authorised to do what they did around the country by specific late-nineteenth century legislation. And most of what they did was directly for Pākehā "sportsmen", by *acclimating* exotic species such as trout and salmon.[34] One still pays them fees to fish in their district. They may not have been Crown departments per se but they were and are totally a Crown-sponsored and authorised set of bodies.

Local Government

64. The Crown further addressed Mr Penetito's concerns about local bodies in its "Local Authorities and Rating" closing submissions.

65. In Mr Penetito's evidence, he states that during a hui between Te Marae Komiti o Kauwhata Trust and Horizons Regional Council, he was "incensed with the Councillors' arrogance and attitude towards us from the marae, by insisting that their farms were very pristine."[35]

[32] At [131].
[33] At [126].
[34] Wai 2180, #A45, at Chapter 12.
[35] Wai 2180, #L01, at [7].

66. The Crown acknowledged "the concerns raised about the engagement by local authorities", and pointed to the fact that there was:[36]

> *evidence of ongoing engagement between Taihape Māori under the RMA framework, including through local government committees such as Ngā Pae o Rangitīkei, Te Roopu Ahi Kaa, Te Roopu Āwhina, and other groups such as the Environmental Working Party of Ngāti Whitikaupeka and Ngāti Tamakōpiri.*

67. The claimants note that the fact that there is "engagement" with these groups (of what quality, we are unaware) does not allay Mr Penetito's concerns about engagement with local authorities.

68. Firstly, these groups are not affiliated with Mr Penetitio's iwi, Ngāti Kauwhata. Engaging with "some Māori" is not the same as engaging with specific iwi, as Māori are not a monolith.

69. Secondly, it does not engage with Mr Penetito's point that a large proportion of members of regional local bodies are farmers, and therefore have a vested interest in using the land as it benefits them, and not Māori.

70. In delegating some of its responsibilities to local bodies, it is understood that the Crown cannot divest itself of its Tiriti obligations.[37] By allowing local bodies to be populated with people who have no interest in the concerns of Māori (indeed, it probably benefits them *not* to take Māori interests into account) the Crown has failed in its duties of partnership and active protection under te Tiriti.

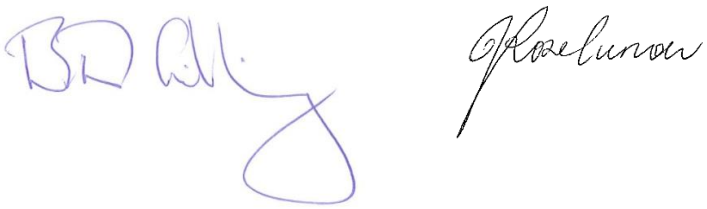
Conclusion

71. The Crown has not made an adequate response to the topics raised in these submissions.

[36] Wai 2180, #3.3.80, at [59].
[37] Wai 2180, #3.3.51, at [18-20].

72. Therefore, Counsels' overall submission is, with respect, that since the evidence and submissions on these topics have gone unchallenged the Tribunal should accept them and make findings and recommendations accordingly.

Dated at Wellington this 27th day of September 2021



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