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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

TUGAW RANCHES, LLC, Plaintiff, and HON. C. L. "BUTCH" OTTER, HON. SCOTT BEDKE, and HON. BRENT HILL, Proposed Plaintiffs-Intervenors, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 4:18-cv-159-CWD **MEMORANDUM IN SUPPORT OF GOVERNOR'S AND LEGISLATIVE LEADERS' MOTION TO INTERVENE [Dkt. 20]**

Governor C.L. "Butch" Otter, Speaker of the Idaho House of Representatives Scott C. Bedke, and President Pro Tempore of the Idaho Senate Brent Hill ("Governor and Legislative Leaders") submit this memorandum supporting the Governor's and Legislative Leaders' motion to intervene as plaintiffs in this case. A proposed Complaint-in-Intervention accompanies this motion.

Introduction

The State of Idaho has dedicated countless hours and tax dollars to the conservation of the Greater Sage-Grouse whose habitat is found throughout the southern portion of the State on federal, state, and private lands. The Bureau of Land Management ("BLM") and U.S. Forest Service manage 22.7 million acres of sage-grouse habitat in the State. The State manages another 1.8 million acres as well as the birds themselves as wildlife owned by the State for the benefit of its citizens.

The spirit of cooperative federalism among the state and federal agencies managing Idaho's sage-grouse and their habitat has ebbed and flowed over the decades. But the nadir of that cooperation occurred with the Defendants' promulgation of rules in 2015 that significantly and negatively altered the State's management of the species and its habitat and impeded Idahoans from accessing millions of acres of federal lands for multiple uses.

Governor Otter, Speaker Bedke, and President Pro Tempore Hill have sworn to uphold the laws of the state and are directly accountable to the citizens through the electoral process. They have, on behalf of the Idaho executive and legislative branches, significant, protectable interests in the Defendants' compliance with the Congressional Review Act ("CRA") and its system of checks and balances that would, if adhered to, subject Defendants' sage-grouse rules to congressional scrutiny and possible disapproval. As alleged in the Governor's and Legislative Leaders' proposed Complaint-in-Intervention, the Defendants' unlawful failure to comply with

the Act deprives Idaho's congressional delegation, and the entire Congress, of their duty to consider the merits of the rules. The Defendants' implementation of the unlawfully promulgated rules continues to harm the State and its citizens. The Governor, Speaker, and President Pro Tem cannot state definitively that Congress would disapprove the 2015 rules if the agencies complied with the CRA by submitting them to Congress. But the proposed intervenors *can* state definitively that Congress will not disapprove the rules if Congress never reviews them. The State's significant interest in Defendants' full compliance with the law therefore could be impaired if the Court were to rule against the Plaintiff, Tugaw Ranches, LLC, (the "Ranches") in this action. None of the existing parties to the action can represent the State's interests.

Because the proposed Plaintiff-Intervenors meet the requirements for intervention as of right under Fed. R. Civ. P. 24(a) or, alternatively, the broad standard for permissive intervention under Rule 24(b), the Governor, Speaker, and President Pro Tem respectfully request the Court for leave to intervene as plaintiffs in this case.

Factual Background

The Sage-Grouse Rules

In March 2010, the United States Fish and Wildlife Service issued a finding that the Greater Sage-Grouse warranted inclusion in the Endangered Species Act's threatened or endangered species list but that it was precluded from being listed by higher-priority listing proposals. 75 Fed. Reg. 13910-14014 (Mar. 23, 2010).

In response to the "warranted but precluded" finding, the BLM and the Forest Service undertook a five-year effort to promulgate the Sage-Grouse Rules. In December of 2011, the Secretary of the Interior invited western governors to develop state-specific management plans, citing the success of the BLM's adoption of a Wyoming plan as an example. Dec'l. of C.L. "Butch" Otter in Supp. of Mot. to Intervene ("Otter Dec'l."), ¶¶ 14, 16; Gov. C.L. "Butch" Otter,

Consistency Review of the Idaho and Southwestern Montana Greater Sage-Grouse Proposed Land Use Plan Amendment and Final Environmental Impact Statement 2 (2015) (hereafter "Otter Review"), Ex. A to Otter Dec'l. Then-Secretary Salazar promised Governor Otter (and other Governors) that if Idaho developed a plan that the agencies "concurred" with, it would be eligible for an exemption from the national management strategy. Otter Dec'l., ¶¶ 16, 24; Otter Review at 2.

Spurred by this promise and to help avoid the listing, Governor Otter convened a special task force comprised of industry leaders, working groups, conservationists, and state and local representatives to develop recommendations and policies to aid the State of Idaho with its plan. Otter Dec'l., ¶ 19; Otter Review at 2. In the spring of 2015, the Governor signed an executive order implementing his sage-grouse plan on state land. Otter Dec'l., ¶ 42; Otter Review at 7. Beginning in 2015 and every year since, the Idaho Legislature, presided over by the Speaker and President Pro Tem, has authorized and appropriated millions of dollars in support of the State's sage-grouse plan. Dec'l. of Scott C. Bedke in Supp. of Mot. to Intervene ("Bedke Dec'l."), ¶¶ 10-12; Dec'l. of Brent Hill in Supp. of Mot. to Intervene ("Hill Dec'l."), ¶¶ 7-9.

Despite the State's enormous efforts, in September of 2015, BLM and the Forest Service issued two Records of Decision after notice-and-comment rulemaking procedures amending 98 land use plans in ten western states including Idaho. 80 Fed. Reg. 57633-35 (Sept. 24, 2015); *id.* at 57333-34 (Sept. 23, 2015) ("Sage-Grouse Rules"). They are rules under the CRA. 5 U.S.C. § 804 (broadly defining rules to include agency statements designed to implement, interpret, or prescribe law or policy). Indeed, Congress' recognition in the definition that an agency may attempt to prescribe, or make, law speaks to the rationale for Congress' desire to review such agency actions and possibly disapprove them where they may trespass on Congress' legislative prerogatives. The Sage-Grouse Rules explicitly rejected Idaho's plan, even though the Fish and

Wildlife Service concurred with the plan and BLM designated it as a "co-preferred" alternative in its supporting NEPA analysis. Otter Dec'l. ¶¶ 37-39, 24, 27; Otter Review at 4-5. Contemporaneously, the Fish and Wildlife Service determined that listing Greater Sage-Grouse under the Endangered Species Act was not warranted. 80 Fed. Reg. 59858-942 (Oct. 2, 2015).

The Sage-Grouse Rules limit or eliminate nearly all but the most casual activities in sage-grouse habitat on federal lands in Idaho. Because these plans differ from Idaho's plan, the result has been inconsistencies between state and federal management practices leading to injury to State lands as well. Otter Dec'l., *passim*; Otter Review, *passim*.

At no time have the BLM and Forest Service submitted the Sage-Grouse Rules for congressional review.

The Sage-Grouse Rules conflict significantly with Idaho's laws, sage-grouse plan, policies, and programs.

Toward the end of the Defendants' land use planning process, Defendants invited Governor Otter to review the plan amendments and Final Environmental Impact Statement pursuant to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1712(c)(9). Otter Review at unpaginated first page. Governor Otter responded with an 82-page review detailing the many conflicts among the State's laws, sage-grouse plan, policies and programs, and the plan amendments promulgated by the Defendants. Otter Dec'l. ¶ 36.; Otter Review, *passim*.

As detailed in the Review, the Sage-Grouse Rules materially disrupted the Governor's sage-grouse plan through the introduction of Sagebrush Focal Areas, the introduction of prescriptive adaptive management thresholds, and limitations on anthropogenic disturbance. Otter Dec'l., ¶ 4; Otter Review at 12-15, 16-19, 19-20. The Sage-Grouse Rules also introduced an unprecedented mitigation standard of "net conservation gain." Otter Dec'l., ¶¶ 5, 32; Otter

Review at 21-23. They rendered Idaho's scientifically-based habitat mapping moot by the imposition of lek buffers and other project-level restrictions regardless of the quality of the affected sage-grouse habitat. *Id.* at 56-59. The Sage-Grouse Rules failed to protect valid existing rights and elevated secondary threats such as livestock grazing and mining to a primary focus with increased restrictions on those activities. *Id.* at unpaginated second and third pages.

The Sage-Grouse Rules disrupted the State's plans for large-scale infrastructure development and, inconsistent with the General Mining Law of 1872, proposed to withdraw almost 3 million acres of habitat from mineral entry. The rules also ignored existing regulatory mechanisms that were adequate to protect sage-grouse in the state. *Id.* at 23-49. The science used by the Defendants to support the Sage-Grouse Rules did not reflect the best available science. *Id.* at 59-60. BLM rejected the Governor's recommendations contained in his consistency review. Otter Dec'l., ¶¶ 37-39.

Argument

Rule 24 of the Federal Rules of Civil Procedure provides for two means by which an applicant may intervene in an action: intervention as a matter of right, governed by subsection (a), and permissive intervention, governed by subsection (b). As discussed below, the proposed Plaintiff-Intervenors satisfy both standards.

I. Intervention of Right.

Fed. R. Civ. P. 24(a)(2) governs intervention of right and provides, in relevant part:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The Ninth Circuit provided direction on the Court's application of this standard in the *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001) ("*Berg*"). Generally, the Court must construe the rule liberally in favor of intervention. *Id.* at 818. Additionally, the Court's evaluation is "guided primarily by practical considerations," not technical distinctions. *Id.* Nevertheless, the applicant for intervention must satisfy the four-part test enunciated in *Berg*, 268 F.3d at 817:

> (1) the application for intervention must be timely;
>
> (2) the applicant must have a 'significantly protectable' interest related to the property or transaction that is the subject of the action;
>
> (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and
>
> (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

W. Watersheds Project v. U.S. Fish and Wildlife Serv., No. 4:CV 10-229-BLW, 2011 WL 2690430 at *2 (D. Idaho July 9, 2011), *citing Berg*, 268 F.3d at 817.

Here, the Governor and Legislative Leaders are entitled to intervene of right in this case because their motion is timely, the Governor and Legislative Leaders have significant, protectable interests that could be impaired by the disposition of this action, and the Ranches cannot adequately represent the Governor's and Legislative Leaders' interests.

A. The Governor's and Legislative Leaders' Motion to Intervene is Timely.

Three factors determine whether a motion to intervene is timely: (1) stage of the proceeding; (2) prejudice to other parties; and (3) reason for, and length of delay. *W. Watersheds Project v. Ashe*, Case No. 4:11-CV-00462-EJL, 2012 WL 12899085 at *2 (D. Idaho Mar. 1, 2012) (citations omitted).

The motion to intervene is timely. The complaint (Dkt. 1) was filed April 11, 2018. In lieu of an answer, Defendants moved to dismiss the complaint on June 22, 2018. Dkt. 14. In light of the motion, the parties sought and received an extension of the time to file the Litigation and Discovery Plans and a postponement of the scheduling conference, which was granted by the Court. Dkts. 16, 17, 19. Upon learning of the June 22 motion to dismiss, the Governor and Legislative Leaders conferred and decided to file this motion no later than the Ranches' due date for their response brief. By seeking intervention now, the Governor and Legislative Leaders avoid prejudicing the other parties or disruption of the Court's management of the case. The Governor and Legislative Leaders have not sought to intervene prior to this time, not being sure whether the complaint would prompt an answer or a dispositive motion. This delay has confirmed for the Governor and Legislative Leaders that the case is proceeding first in response to the Defendants' motion to dismiss and is not subject to any other dispositive motion.

B. The Governor and Legislative Leaders have Significant Protectable Interests in This Action.

Intervention of right requires the proposed intervenor to demonstrate a significantly protectable interest that may be impaired by the proceedings before the court. This factor is often considered together with the third intervention factor that considers whether the applicant's interest could be impaired by the court's determination. *See, e.g.*, *W. Watersheds Project v. U.S. Fish and Wildlife Serv.*, 2011 WL 2690430 at *3. In considering both factors, the court follows "'practical and equitable considerations and construe[s] the Rule broadly in favor of proposed intervenors.'" *Id.*, *citing Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011); *see also W. Watersheds Project v. U.S. Forest Serv.*, 2015 WL 7451169 at *2.

The Governor and Legislative Leaders have significant protectable interests in this action. They are assured by the CRA that Congress will review rules promulgated by the Administration

and may, as a result of that review, disapprove rules rendering them ineffective. Had that process been followed by Defendants, Congress would have had the opportunity to disapprove the Sage-Grouse Rules and the Governor would have pressed Congress to do so. Otter Dec'l., ¶ 45. Because the Defendants illegally promulgated those rules, denying Congress the right to review and possibly revoke them, the agencies have proceeded to implement the rules in a manner transgressing additional interests of the Governor and the Legislative Leaders.

For example, the Governor has an interest in seeing that his Executive Order carrying out his sage-grouse plan is implemented by state agencies in state rules and permits. Otter Dec'l., ¶¶ 11-13, 41-44. Governor Otter has an interest in faithfully executing his duties as a member of the State's constitutionally created State Board of Land Commissioners as it relates to State management of sage-grouse habitat and sage-grouse. *Id.* at ¶¶ 8-10. Speaker Bedke and President Pro Tem Hill have an interest in the Legislature's passage of statutes and memorials promoting conservation of the State's sage-grouse through the State's conservation plan and the funding of State activities to promote that conservation. Bedke Dec'l., ¶¶ 9-13; Hill Dec'l., ¶¶ 7-10. The State's further interest in its ability to manage sage-grouse and in the inconsistencies, problems, and confusion caused by the Sage-Grouse Rules is further detailed throughout Governor Otter's consistency review conducted pursuant to FLPMA, 43 U.S.C. § 1712(c)(9). *See* Otter Review, *passim*.

If the relief requested in Plaintiff's complaint is denied, it would eliminate Congress' opportunity to disapprove the rules and "set in stone" the negative impacts on the ability of the Governor, the Speaker, and the President Pro Tem to fulfill their duties as described above. The negative economic impacts of the rules also negatively affect the local economies and state tax revenue. Otter Dec'l., ¶ 17; Bedke Dec'l., ¶ 3; Hill Dec'l, ¶ 3. Negative economic impacts are sufficient to meet the "significantly protectable" factor. *Alliance for the Wild Rockies v. United*

States Forest Serv., No. 1:15-CV-00193-EJL, 2016 WL 7626528, at *2 (D. Idaho June 9, 2016). The applicant has a protectable interest when "'the resolution of the plaintiff's claims actually will affect the applicant.'" *Perez v. Idaho Falls Sch. Dist. No. 91*, Case No. 4:15-cv- 00019-BLW, 2016 WL 1032790 at *3 (D. Idaho Mar. 15, 2016) (citation omitted). Thus, the Governor and Legislative Leaders' significant, direct, and legally protectable interests in the Defendants' compliance with the Congressional Review Act support intervention as a matter of right.

C. The Governor's and Legislative Leaders' Interest in the Agencies' Compliance with the CRA Will Be Impaired of the Court Rules in Favor of the Agencies.

The third intervention factor—practical impairment of interests—is met through a showing that the Governor's and Legislative Leaders' interests are directly contrary to Defendants' interests, as evidenced by Defendants' motion to dismiss the case. (Dkt. 14). *Alliance for the Wild Rockies*, 2016 WL 7626528 at *2.

Moreover, the Governor's and Legislative Leaders' ultimate objective is to protect the sovereignty of the State. Otter Dec'l., ¶¶ 2, 15, 18; Bedke Dec'l., ¶ 13; Hill Dec'l., ¶ 10. Here, that sovereignty is protected by Congress' right to review the rules and possible disapproval and the State's consequent ability to manage its wildlife, and lands and promote the State's economy and the welfare of its citizens. The Governor's and Legislative Leaders' interests are directly contrary to those of Defendants, leaving the Governor and Legislative Leaders unable to protect their interests that are directly at issue in the case if intervention is denied. *Alliance for the Wild Rockies*, 2016 WL 7626528 at *2. Thus, the Governor and Legislative Leaders demonstrate significant protectable interests that could be impaired by the outcome of this case.

D. The Governor's and Legislative Leaders' Interests Cannot be Adequately Represented by Existing Parties.

In determining the final intervention factor—adequacy of existing representation—a court considers (1) whether the present parties will undoubtedly make all of the intervenor's arguments, (2) whether the present parties are capable and willing to make those arguments, and (3) whether the intervenor would offer any necessary elements to the proceedings that the other parties would neglect. *Animal Legal Def. Fund v. Otter*, 300 F.R.D. 461, 464 (D. Idaho 2014), *recons. den.* 2014 WL 5223068 (D. Idaho Oct. 14, 2014) (*citing Berg*, 268 F.3d at 822).

The Governor's and Legislative Leaders' burden in showing inadequacy of representation is minimal. *W. Watersheds Project v. U.S. Fish and Wildlife Serv*., 2011 WL 2690430 at *3. The burden of persuasion is such that the applicant should be allowed in the case unless the court is persuaded that the representation is in fact adequate, causing courts to resolve doubts in favor of intervention. 7C Charles Allen Wright et al., FED. PRAC. AND PROC. § 1909 (3d ed. 2017). Where the Governor and Legislative Leaders and the Ranches share the same ultimate objective, a presumption of adequacy applies that is rebuttable by a compelling showing to the contrary. *W. Watersheds Project v. U.S. Fish and Wildlife Serv*., 2011 WL 2690430 at *3.

The focus of the Governor's and Legislative Leaders' motion is to protect the State of Idaho's interest in the agencies' compliance with the CRA in the context of the Sage-Grouse Rules where the contrast between the Defendants' objectives and those of the Governor and Legislative Leaders are clear as evidenced by the Defendants' motion to dismiss. Dismissal of the Ranches' complaint would significantly affect the Governor's and Legislative Leaders' interests in CRA compliance which is sufficient to make a compelling case for intervention. *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2012 WL 32714 at *2 (D. Idaho Jan. 6, 2012).

As explained above, the Governor's and Legislative Leaders' interests extend to all 22.7 million acres of sage-grouse habitat managed by the Defendants as well as the 1.8 million acres of State lands with habitat and the entire sage-grouse population in Idaho that belongs to the State. Idaho/Sw. Mont. Proposed Land Use Plan Amendment and Final EIS[1] at Table 3-33; I.C. § 36-103(a). The Ranches' ultimate objective, on the other hand, is necessarily limited to its private lands and federal grazing allotments.

1. The Ranches will not make all of the Governor's and Legislative Leaders' arguments.

As noted, the Ranches cannot address the larger State interests represented by the Governor and Legislative Leaders. Thus, it is doubtful, at best, that the Ranches will make those arguments. Indeed, the Ranches' would be incapable of making those arguments from direct, personal knowledge since the Ranches operates on a for-profit, private sector basis and not in a governmental capacity.

2. The Ranches are incapable and not necessarily willing to make such arguments.

As argued above, the Ranches would not be competent to address the State's interests. Additionally, at such time as the Ranches seek injunctive relief, the Court will balance the equities among the existing parties and determine the public interest. The Ranches will be incapable of expressing the Governor's and Legislative Leaders' equities as a result of a possible injunction nor the State's interest in the agencies' compliance with the CRA. Finally, the Governor and Legislative Leaders protect many different public interests that are not identical to the Ranches' interests, thus satisfying this element of the test for inadequate representation. *W. Watersheds Project v. U.S. Forest Serv.*, 2015 WL 7451169 at *2, *citing Citizens for Balanced*

[1] Available at: https://eplanning.blm.gov/epl-front-office/projects/lup/31652/58634/63697/07_-_ID_swMT_FEIS_Chapter_3.pdf at page 3-85 (last accessed on July 13, 2018).

Use v. Montana Wilderness Ass'n, 647 F.3d 893, 899 (9th Cir. 2011) ("the government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'"); *Clearwater Cty., Idaho v. The United States Forest Serv.*, No. 3:13-CV-519-EJL, 2016 WL 1698265, at *2 (D. Idaho Apr. 27, 2016).

3. The Governor and Legislative Leaders would offer necessary elements to the proceedings that the other parties would neglect.

The Governor and Legislative Leaders would vigorously prosecute their complaint on behalf of all the citizens of Idaho to protect the State's interests in this litigation. Additionally, the Governor's and Legislative Leaders' executive and legislative experience would assist the Court in understanding the broader implications of the case on Idaho laws and governance, thus demonstrating their interests may not be adequately represented by the Ranches. *W. Watersheds Project v. U.S. Forest Serv.*, 2015 WL 7451169 at *2. The Ranches lack the Governor's and Legislative Leaders' specialized knowledge of the State's lengthy and expensive engagement in sage-grouse conservation and the State's experience—some good, some bad—in working with the Defendants on cross-jurisdictional sage-grouse conservation. *Animal Legal Def. Fund*, 300 F.D.R. at 465. This knowledge would provide invaluable context for the State's interest in the agencies' compliance with the CRA.

For the reasons stated above, this Court should allow the Governor and Legislative Leaders to intervene of right because the motion is timely, the Governor and Legislative Leaders have significant protectable interests in their ranching operations that would be impaired if the Ranches lose the case, and neither Defendants nor the Ranches can adequately represent the State's interests as represented by the Governor and Legislative Leaders.

II. In the Alternative, Permissive Intervention Should be Granted.

In the event this Court does not grant intervention of right, the Governor and Legislative Leaders should be permitted to intervene in this matter pursuant to Fed. R. Civ. P. 24(b)(1)(B), which provides:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.

Permissive intervention may be granted where "(1) there is an independent ground for jurisdiction; (2) the motion is timely; and (3) the movant's claim or defense and the main action must have a common question of the law or fact in common." *Amanatullah v. United States Life Ins. Co.*, Case No. 4:15-cv-00056-EJL, 2017 WL 2906045 at *1 (D. Idaho June 29, 2017) (citation omitted). Additionally, the court will consider whether intervention will unduly delay or prejudice the original parties and whether the movant's interests are adequately represented by existing parties. *Id.*

The Governor and Legislative Leaders easily satisfy each of these requirements. An independent ground for jurisdiction exists through the federal question doctrine, 28 U.S.C. § 1331, augmented through supplemental jurisdiction under 28 U.S.C. § 1367. As explained in the argument for intervention of right, the motion is timely and will not delay proceedings or otherwise prejudice existing parties. The Governor and Legislative Leaders will comply with any briefing schedule set by the Court. Similarly, the Governor and Legislative Leaders explained above why the existing parties cannot adequately represent the Governor and Legislative Leaders' interests. The common questions for the Court will be the factual and legal bases supporting the Ranches' and proposed intervenors' complaints and any remedy if the Court finds in favor of the Ranches and intervenors. Information and argument provided by the Governor and Legislative Leaders will squarely address these factual and legal questions.

Therefore, because (1) an independent ground for jurisdiction exists, (2) the Governor and Legislative Leaders will address similar issues of law and facts, and (3) the Governor's and Legislative Leaders' motion to intervene is timely, the criteria for permissive intervention are met. Further, there is also no prospect that the sought-after intervention will cause undue delay or prejudice.

Conclusion

For the foregoing reasons, the Court should grant the Governor's and Legislative Leaders' motion and order their intervention in this action (1) as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, (2) permissively pursuant to Rule 24(b).

Respectfully submitted this 13th day of July, 2018.

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Certificate of Service

I HEREBY CERTIFY that on the 13th day of July, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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