IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THE CALIFORNIA VALLEY MIWOK TRIBE, *et al.*, Plaintiffs, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, *et al,* Defendants, and, CALIFORNIA VALLEY MIWOK TRIBE Defendant-Intervenor	Case No. 1:11-cv-00160-BJR Hon. Barbara Jacobs Rothstein

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION TO EXPEDITE ITS MOTION TO DISMISS

INTRODUCTION

Plaintiffs oppose Intervenor's Motion to Expedite, not because Plaintiffs are opposed to a speedy resolution of the case, but because it does not meet the requirements of 28 U.S.C. § 1657(a) and because it seeks to unfairly segment the Court's consideration of Intervenor's Motion to Dismiss from Plaintiffs' (and Defendants') Motions for Summary Judgment, which also have been pending for nearly a year and a half. Intervenor's Motion to Dismiss is inextricably intertwined with the validity of the Assistant Secretary's August 31, 2011 Decision ("August 31 Decision"). Moreover, Intervenor has not shown good cause to expedite its Motion to Dismiss, because the harm it complains of involves nothing more than financial hardship to four persons who have already wrongly diverted millions of dollars from the California Valley Miwok Tribe ("Tribe") and its members. However, Plaintiffs strongly favor expedited review of *all* dispositive motions, as they have explained to Intervenor.

To be clear: Prompt resolution of this case is of utmost importance to Plaintiffs. As explained in prior pleadings and as evidenced by the revised Constitution that the Plaintiff Tribe adopted in an election on July 6, 2013 [Exhibit N to Affidavit of Robert J. Uram ("Uram Affidavit"), attached hereto], the Tribe includes several hundred lineal descendants of the original Tribal members known from historic documents. The July 6, 2013 Constitution, adopted by a vote of 90 to 10, is consistent with the majoritarian principles that the Court of Appeals mandated for Tribal organization in *California Valley Miwok Tribe v. USA*, 515 F.3d 1252 (D.C. Cir. 2008) ("*Miwok II*"), and with the Department of the Interior's ("Department") efforts to assist the Tribe in organizing prior to the Assistant Secretary's unlawful August 31

Decision.[1] That Decision, which Plaintiffs challenge in this action, interfered with the Tribe's right to self-determination by attempting to exclude these citizens from participating as Tribal members. It also harms Plaintiffs by preventing the Department from recognizing the Tribe as properly organized under the July 6, 2013 Constitution.

Plaintiffs will continue to suffer harm until the August 31 Decision is reversed. Many of the Tribe's members live in low-income rural communities in the vicinity of the Sheepranch Rancheria where employment and educational opportunities are scarce. [AR 2268-2275.] Medical care and social services in these communities are difficult to obtain and often inadequate. With federal recognition, the Tribe would be eligible to receive federal and state funds to assist in providing social services, educational assistance, housing improvement, health care and other benefits to ameliorate these hardships. In addition to federal "tribal self-determination" funds, the approximately 10 million dollars that the California Gambling Control Commission currently holds in escrow for the benefit of the Tribe pending the outcome of this litigation—and the approximately one million dollars in state funds that the Tribe is entitled to annually as a non-gaming California tribe—would help hundreds of Tribal members. Recognition also would publicly validate the Tribal members' cultural heritage and strengthen the fragile hope of a community that has seen a number of members die without recognition since this litigation began. The August 31 Decision prevents the Tribe and its members from receiving any of these benefits.

[1] The Assistant Secretary first issued a December 22, 2010 Decision, but he withdrew that Decision on April 1, 2011, in response to Plaintiffs' filing of this lawsuit, and subsequently issued the August 31, 2011 Decision. Plaintiffs then amended their complaint to address the August 31, 2011 Decision.

In contrast to Plaintiffs, Intervenor represents only four people: Silvia Burley, her two daughters and her granddaughter (the "Burleys"). They do not live on or near the Tribe's historic reservation in Sheep Ranch. They do not recognize or accept anyone else as a Tribal member and have spurned the opportunity to participate in the Tribal community or to share Tribal benefits with the hundreds of bona fide members. This four-person Intervenor "tribe" makes vague and largely unsubstantiated allegations that harm will occur unless the Court expedites hearing of its Motion to Dismiss. But these claims do not establish good cause for expedited review of Intervenor's Motion alone. Nor would Intervenor's request serve the interest of judicial economy, given that Intervenor's Motion to Dismiss is inseparable from Plaintiffs' challenge to the Assistant Secretary's August 31 Decision.

During the meet and confer on the Motion to Expedite, Plaintiffs informed Intervenor's counsel that Plaintiffs "do not agree to single out" the Motion to Dismiss "and have it resolved prior to [Plaintiffs'] long pending motion for judgment." Email dated June 28, 2013, Exhibit A hereto. Instead, Plaintiffs seek a speedy resolution of this entire action. Accordingly, Plaintiffs request that the Court deny Intervenor's motion to the extent that the Court does not address all pending motions.

ARGUMENT

INTERVENOR HAS NOT SHOWN GOOD CAUSE TO EXPEDITE SOLELY ITS CLAIMS

By statute, each federal court generally shall determine the order in which it hears and determines civil actions, except that a court "shall expedite the consideration of" certain types of actions not relevant here, and of "any other action if good cause therefor is shown." 28 U.S.C. § 1657(a). The statute provides that "'good cause' is shown if a right under the

Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." *Id.* The reference to a factual context "suggests that Congress contemplated case-by-case decision making" on motions to expedite. *Ontario Forest Industries Ass'n v. United States*, 444 F.Supp.2d 1309, 1319 (CIT. 2006) (quoting *Freedom Comm'ns, Inc. v. FDIC*, 157 F.R.D. 485, 486 (C.D. Cal. 1994)). However, the legislative history of Section 1657 provides some general guidance, stating that good cause should be found "[1] in a case in which failure to expedite would result in mootness or deprive the relief requested of much of its value, [2] in a case in which failure to expedite would result in extraordinary hardship to a litigant, or [3] actions where the public interest in enforcement of the statute is particularly strong." *Id.* (quoting H. Rep. No. 98-985, at 6 (1984)).

A. Intervenor Has No Authority to Exercise the Tribe's Rights Under Federal Law

Intervenor claims that it has demonstrated good cause under the statute to expedite consideration of its Motion to Dismiss, because it has been denied access to federal benefits made available to federally recognized Indian tribes by federal statute. [Docket No. 72-1 ("Intervenor Brief"), p. 5.] There is no dispute that the Tribe is federally recognized and eligible to receive such benefits. But the critical threshold question of who represents the Tribe—Intervenor or Plaintiffs— and thus who is entitled to exercise those rights, is hotly disputed **and,** unlike the new authority Intervenor includes in its Motion, has never been finally resolved.

Intervenor cannot rely on the Assistant Secretary's August 31 Decision to establish that it has a right to the Tribe's federal benefits, for two reasons. First, the August 31 Decision is stayed by its own terms [AR 2056] and by the Department's stipulation in this case [Docket No. 27, ¶ 13]. Second, the validity of the August 31 Decision is the subject of this

litigation. Thus, Intervenor cannot rely on *the Tribe's* statutory rights to establish good cause for expedited review.

B. The Burleys' Alleged Financial Problems Do Not Constitute 'Extraordinary Hardship'

Intervenor also cannot show the requisite "extraordinary hardship," H. Rep. No. 98-985, *supra*, at 6, based on the Burleys' alleged loss of access to federal funding. As a threshold matter, it is doubtful whether a delay in obtaining purely economic relief can constitute an extraordinary hardship that qualifies as good cause under the statute. *See Ontario Forest Industries*, *supra*, 444 F.Supp.2d at 1320 (economic hardship is a problem faced by "many (if not all) litigants" and therefore does not constitute "extraordinary" circumstances that justify giving a case priority over other pending cases).

Silvia Burley's declaration, which Intervenor relies on to establish good cause, is fraught with vague and unsubstantiated allegations and lacks any meaningful detail. But even accepting all of the allegations as true, they would establish only that a lack of financial resources is causing hardship to the four family members who claim to be the Intervenor "Tribe." These allegations of financial injury do not establish good cause under the statute.

Moreover, the equities are not on Intervenor's side. The "Tribal citizens" that Silvia Burley refers to in her declaration include Silvia Burley, her two daughters, and her granddaughter. Although Intervenor currently claims to recognize Plaintiff Yakima Dixie as one of five members, Intervenor has never shared any benefits with Mr. Dixie and does not represent his interests. [AR 2198.] This leaves the four Burleys as the only persons for whom harm is claimed. The "tribal employees" who have allegedly lost their jobs are also limited to the Burleys, plus Silvia Burley's husband James "Tiger" Paulk. [AR 456-457 (Burley deposition testimony).] The "tribal governmental offices" in which "Tribal members who have already lost

their homes to foreclosure are compelled to reside" [Burley Decl. ¶ 8] is the 4,300-square-foot Stockton, California home which Burley purchased in March 2002 in her own name—not the Tribe's. [AR 451 (Burley deposition testimony describing 10601 Escondido Place in Stockton, California as tribal office and as residence); Exhibit A to Uram Affidavit (Grant Deed showing Burley's purchase of Stockton property in 2002); Exhibit C to Uram Affidavit (Grant Deed identifying same property as 10601 Escondido Place).] Burley quitclaimed the house to the Intervenor tribe in 2008 after defaulting on her mortgage [Exhibit I to Uram Affidavit], but the deed of trust that is the subject of the Notice of Default is in the name of Silvia Burley, individually [Exhibit H to Uram Affidavit]. It is not a "tribal" obligation.

In contrast to the Plaintiff Tribe, which has received no money, the four Burleys have received millions of dollars in federal and state funds that were intended to support Tribal government and services to Tribal members. [*E.g.*, AR 855-857 (2005 reinstatement of PL-638 contract); AR 1941-1948 (2011 PL-638 contract); AR 816-817 (re state funds); *See also California Valley Miwok Tribe v. California Gambling Control Comm'n*, 2010 WL 1511744, *2 (4th App. Dist. 2010) (receipt of $1.1 million per year in state funds prior to 2005); *California Valley Miwok Tribe v. USA*, 424 F.Supp.2d 197, 203 n.7 (D.D.C. 2006).] Silvia Burley also borrowed an additional $1 million in 2007 against her Stockton home. [Exhibit H to Uram Affidavit.] Her declaration does not account for the expenditure of these funds and does not explain what efforts the Burley family has made to obtain gainful employment or to avail themselves of benefits that may be available to them either as Native Americans or as residents and citizens of California. It does not disclose records of Burley's claimed Tribal government to document the "tribal government services" that can no longer be provided and does not discuss assets that may be sheltered under the names of spouses or family members.

According to Burley, the Intervenor "tribe" does not own any property other than 10601 Escondido Place [AR 453], so the "fire service," "tribal housing and repairs," "water services," "tribal security," "waste management," "electricity," "telecommunications," and other "daily operations" to which Burley vaguely refers [Burley Decl. ¶ 5] can only relate to upkeep of the Burley home in Stockton. They certainly do not relate to the Sheep Ranch Rancheria or the small structure there in which plaintiff Yakima Dixie lives. [*See* AR 2198, ¶ 12]. Burley's reference to these family amenities as tribal "governmental services" [Burley Decl., ¶ 5] is puzzling, since the Burley home is located in an exclusive neighborhood within the Stockton city limits, where fire service, water service, electricity and waste management presumably are provided by the City of Stockton or a commercial utility provider, not by a Tribal entity. Likewise, the "tribal vehicle" and "tribal transportation" appear to be simply the Burleys' vehicle, maintained and insured with Tribal funds. [Burley Decl., ¶ 5.]

The "job training," "child care services," "education" and other "tribal social services" to which Ms. Burley refers can be nothing more than Burley family benefits that would be purchased with the Tribe's money if it were available. [AR 459 (Burley testimony stating Rashel Reznor was the only recipient of tribal education program).] Burley's reference to "Tribal Indian Child Welfare services" is particularly disingenuous, given that the Burleys have consistently argued to local and state authorities that children who are members of this Tribe and in need of protection under the Indian Child Welfare Act are not Tribal members and therefore not eligible for protection under ICWA. [AR 2206, 2214-2215.]

In short, the fact that four people have squandered millions of dollars intended for Tribal members, and now have little to show for it, does not establish "extraordinary hardship" that is cognizable under the statute.

THE *TIMBISHA SHOSHONE* CASES HAVE NO BEARING ON THE MOTION TO EXPEDITE AND DO NOT REQUIRE DISMISSAL OF PLAINTIFF'S CLAIMS

Intervenor's real motive for filing its Motion to Expedite appears to be to place two recent cases before the Court in support of its Motion to Dismiss: *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935 (D.C. Cir. 2012) ("*Timbisha I*"); and *Timbisha Shoshone Tribe v. U.S. Dep't of the Interior*, No. 2:11-cv-00995, 2013 WL 1451360 (E.D. Cal. Apr. 9, 2013) (appeal pending) ("*Timbisha II*"). Intervenor cites the cases in support of its Motion to Expedite, even though the cases have nothing to do with expedited review and do not address the standard under 28 U.S.C. § 1657. Intervenor essentially reargues its Motion to Dismiss by claiming that these cases deny Plaintiffs standing to challenge the August 31 Decision and require dismissal of Plaintiffs' claims. [Burley Brief, p. 4.] This is procedurally defective because Intervenor should have filed an appropriate motion to supplement its Motion to Dismiss with this allegedly (but actually not) relevant new authority. But even had Intervenor filed the proper motion it would be immaterial. As set forth below, the *Timbisha* cases do not impact the pending Motion to Dismiss.

Both *Timbisha* cases involved the federally recognized Timbisha Shoshone Tribe, which since 2007 has been embroiled in a dispute between two factions, each claiming to govern the tribe: the "Kennedy Faction" and the "Gholson Faction." *Timbisha II*, 2013 WL 1451360 at *1. Prior to 2007, the Timbisha Shoshone Tribe had already organized itself under a written constitution and had a federally recognized, elected government. *Id.* at *1. After the dispute arose, both sides purported to hold tribal elections establishing new tribal governments, but the Department issued a series of decisions declining to recognize either faction as the tribe's government, including a decision on February 24, 2010. *Id.* at *2-3. However, on March 1, 2011, the Assistant Secretary issued a decision recognizing the Gholson Faction for the limited

purpose of holding a special tribal election. *Id.* at *3. The Assistant Secretary reasoned in part that he should recognize the Gholson Faction because more people participated in its prior tribal election than in the election conducted by the Kennedy Faction, and because the Kennedy Faction improperly excluded tribal members from its election. [Exhibit M to Uram Affidavit, p. 10.] Thus, he concluded that recognizing the Gholson Faction would be consistent with the Department's acknowledged duty to protect the rights of the tribe's individual members and to ensure that federal resources allocated to a tribe would be "transmitted to an entity that legitimately represents the tribe." [Exhibit M to Uram Affidavit, p. 5.]

The Gholson Faction then held another election in which both factions had the opportunity to participate. After the election was held, the Assistant Secretary issued another decision on July 29, 2011, recognizing the Gholson Faction as the Tribe's government based on the election results (the "Echo Hawk Decision"). *Id.* at *4. The Echo Hawk Decision was not stayed. [*See generally* Exhibit M to Uram Affidavit; 25 C.F.R. § 2.6(c) (decisions of AS-IA final and effective immediately unles the decision provides otherwise).]

C. *Timbisha I* Did Not Involve a Challenge to the Acknowledgment of a Tribal Government

Timbisha I, the opinion by the D.C. Circuit Court of Appeals, involved a challenge that was essentially unrelated to the Shoshone tribal governance dispute. In that case, the Kennedy Faction (in the name of the Timbisha Shoshone tribe) challenged the constitutionality of the Western Shoshone Claims Distribution Act, which directed the Department to distribute funds to Western Shoshone Indians as compensation for the historic taking of their lands by the United States. *Timbisha I*, 678 F.3d at 936. The case was filed during the period when the Department did not recognize any tribal government. *Id.*at 937. The United States and the Gholson Faction (as amicus curiae) argued that the suit should be dismissed because the Kennedy Faction (lacking federal acknowledgment) did not have the

authority to sue on behalf of the tribe. *Id.* The District Court rejected this argument, concluding that the United States' failure to recognize a tribal government did not bar a group from suing on behalf of the tribe, but it held the Distribution Act constitutional. *Id.*

The Kennedy Faction filed an appeal on March 8, 2011. While the appeal was pending, the Assistant Secretary issued the Echo Hawk Decision, recognizing the Gholson Faction as the government of the Shoshone tribe. *Id.* at 937. The Court of Appeals thereafter held that the Echo Hawk Decision had deprived the Kennedy Faction of standing to challenge the Distribution Act in the name of the Tribe, and ordered the case dismissed for lack of jurisdiction. *Id.* at 938-939. But the Court of Appeals explicitly recognized that the Kennedy Faction had challenged the Echo Hawk Decision in a separate action (*i.e.*, *Timbisha II*) which at that time was pending before the District Court for the Eastern District of California. The Court of Appeals stated: "Our decision has no impact on the litigation in the Eastern District of California or, if that litigation is successful, on the plaintiffs' ability to re-file this lawsuit." *Id.* at 939. Thus, *Timbisha I* has no bearing on Plaintiffs' challenge to the August 31 Decision in this case.

D. *Timbisha II* Did Not Involve a Stayed Decision by the Assistant Secretary and Is Not Persuasive

In *Timbisha II*, the Kennedy Faction (in the name of the tribe) challenged the Assistant Secretary's decisions recognizing the Gholson Faction as the government of the Shoshone tribe. 2013 WL 1451360 at *1. The District Court held that the Gholson Faction, as the federally acknowledged government of the Tribe, was a necessary party but could not be joined because it (like the Tribe itself) enjoyed sovereign immunity from suit. *Id.* at *7-8. The District Court therefore dismissed the case for failure to join indispensable parties. *Id.* at *11.

Timbisha II does not control here because it is not on all fours with the present case. In *Timbisha II*, the Department of the Interior did recognize, *while the litigation was pending*, the Gholson Council as the government of the Timbisha Shoshone tribe. *Id.* at *4. In this case, however, the Assistant Secretary explicitly stayed the effectiveness of the August 31 Decision recognizing Intervenor as the Tribal government, pending the outcome of this suit. The August 31 Decision states that "implementation shall be stayed pending resolution of . . . *California Valley Miwok Tribe v. Salazar*, C.A. No. 1:11-cv-00160-RWR (filed 03/16/11)." [AR 2056]. The Department also stipulated in a joint status report that "the August 31, 2011 decision will have no force and effect until such time as this court renders a decision on the merits of plaintiffs' claims or grants a dispositive motion of the Federal Defendants." [Docket No. 27, ¶ 13.] The August 31 Decision also explicitly declined to rescind prior Department decisions stating that the Department did not recognize any Tribal government, including the Intervenor Burley government. [August 31 Decision, AR 2056; 2004 decision, AR 0499-0502; 2005 decision, AR 0609-0611; 2007 decision, AR 1494-1500.]

As Intervenor recognized in its brief, the "stay" language contained in the August 31 Decision prevents Intervenor from being recognized as the Tribe's government and from exercising the Tribe's "recognized sovereign rights," and prevents the United States from having a "government to government relationship [with] the Tribe." [Intervenor Brief, p. 5.] Because the August 31 Decision is stayed and the United States does not currently recognize Intervenor's alleged Tribal government, Intervenor cannot rely on the August 31 Decision to exercise the Tribe's sovereign immunity and is not an indispensable party. Likewise, the District Court's concerns in *Timbisha II*, that the litigation "could interfere with the Tribe's government-to-government relations with the United States" and "deprive the Tribe of any stability it might

enjoy by having a single recognized [governing] body," 2013 WL 1451360 at *8, do not apply here. This Tribe currently has neither a federally recognized governing body nor a government-to-government relationship with the United States, as Intervenor has pointed out. [Intervenor Brief, p. 5.]

More fundamentally, *Timbisha II—and indeed the entire situation involving the Timbisha Shoshone Tribe*—is inapposite because that tribe was already organized under a written constitution and, at a prior point, had a duly elected governing body that was fully and undeniably recognized by the federal government. *See* 2013 WL 1451360 at *1 ("it is undisputed that in 2006 the Tribal Council consisted of Joe Kennedy . . . who was elected as Chairman, Ed Beaman . . . Madeline Esteves, Virginia Beck . . . and Cleveland Case"). The governance dispute at issue in the case arose out of a battle for control of the tribe that was subsequent in time. *See id.* ("The current fracture in the Tribe's governance began on August 25, 2007, when the 2006 Council held a Tribal Council meeting"). The Assistant Secretary relied on his interpretation of the Tribe's established Constitution to determine that he should recognize the Gholson Faction for the purpose of conducting a tribal election. [Exhibit M to Uram Affidavit, pp. 8-9.]

The situation here involving the Miwok Tribe is entirely distinct. The dispute over control the Tribe goes to the Tribe's initial organizing functions. As the D.C. Circuit already found:

> Although CVM, by its own admission, has a potential membership of 250, only Burley and her small group of supporters had a hand in adopting her proposed constitution. This antimajoritarian gambit deserves no stamp of approval from the Secretary. As Congress has made clear, tribal organization under the Act must reflect majoritarian values. . . . And as we have previously noted, tribal governments should "fully and fairly involve tribal members in the proceedings leading to constitutional reform."

Miwok II, 515 F.3d at 1267-68 (citations omitted). Thus, in ruling on the Motion to Dismiss, the Court should act consistently with the D.C. Circuit's decision (and reasoning) and not accept Intervenor's self-serving invitation to place the proverbial "cart before the horse" and hold that the Burley faction was properly instituted as the tribal government and that, therefore, any challenge to Burley's "antimajoritarian gambit" is an internal tribal dispute which, if the tribe wishes, can never see a courtroom.

Even if *Timbisha II* were factually analogous to the present case, it is neither controlling law in the D.C. Circuit nor persuasive authority. The Assistant Secretary's decision in *Timbisha II*, as in this case, was indisputably final agency action subject to review under the Administrative Procedure Act. 25 C.F.R. § 2.6(c); 5 U.S.C. § 704. But *Timbisha II* denied review of the Assistant Secretary's decision based on the legal effect of the decision itself—*i.e.*, because the Assistant Secretary's decision recognized the Gholson Faction as the Shoshone tribal government, the District Court held that no one but the Gholson Faction could challenge that decision. This reasoning is blatantly circular and would render all acknowledgment decisions by the Department immune from judicial review, contrary to long-established precedent in this and other Circuits. Both Plaintiffs and federal Defendants have pointed this out in their Opposition to Intervenor's Motion to Dismiss. [Docket Nos. 59, 60.] Thus, *Timbisha II* does not justify either expedited consideration of Intervenor's motion or dismissal of Plaintiffs' claims.

HEARING INTERVENOR'S MOTION TO DISMISS IN ISOLATION WOULD NOT PROMOTE JUDICIAL ECONOMY

Finally, Intervenor claims that expediting consideration of its Motion to Dismiss would serve the interests of judicial economy. The statute does not mention judicial economy as a basis for expediting review. *See* 28 U.S.C. § 1657. In any case, expedited consideration of Intervenor's Motion would not promote judicial economy. Intervenor's Motion to Dismiss

attempts to exercise the Tribe's sovereign immunity to obtain dismissal of Plaintiffs' claims. But Intervenor's ability to exercise the Tribe's rights, including the right of sovereign immunity, is inextricably intertwined with consideration of the validity of the Assistant Secretary's August 31 Decision. A decision on Intervenor's Motion to Dismiss requires the Court to determine the validity of the 2011 Decision. Because the Court cannot decide Intervenor's Motion to Dismiss without reaching the merits of Plaintiffs' claims, granting Intervenor's Motion to Expedite would only delay the final resolution of all claims in this case. There is no benefit to expediting consideration of Intervenor's motion in isolation.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Intervenor's motion to expedite consideration of only Intervenor's Motion to Dismiss. Plaintiffs strongly favor expedited resolution of all pending motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 19, 2013, I caused a true and correct copy of PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S MOTION TO EXPEDITE ITS MOTION TO DISMISS to be served on the following counsel via electronic filing:

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