

Provisional Permit and Change Bill 10.10.24

*** Bill No. ***

Introduced By *****

By Request of the (Agency or Department)

A Bill for an Act entitled: "An Act ; amending sections 85-2-313, 85-2-315 and 85-2-402, MCA; providing an effective date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 85-2-313, MCA, is amended to read:

"85-2-313. Provisional permit. (1) A permit issued prior to ~~a final determination of existing water rights~~ the issuance of a final decree pursuant to 85-2-234 in the basin where the permit is located is provisional and is subject to that final decree. ~~determination. Upon petition,~~ ~~the amount of the appropriation granted in a provisional permit must be reduced, modified, or revoked by the department following a show cause hearing in which it is determined that reduction, modification, or revocation is necessary to protect and guarantee existing water rights determined in the final decree. Because a provisional permit is issued on a reasonable determination of legal availability under 85-2-311(1)(b), in a show cause hearing~~

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~~under this section, legal availability must be determined on a consideration of the final decree in the affected basin or subbasin.~~ A person may not obtain any vested right to an appropriation obtained under a provisional permit by virtue of construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the permit would have been denied or modified if the final decree had been available to the department.

(2) (a) Within 60 days after the issuance of a final decree pursuant to 85-2-234, the department shall serve by first-class mail a notice of availability and opportunity to petition for the reduction, modification, or revocation of any provisional permit located in the basin subject to the final decree. For basins in which final decree was issued pursuant to 85-2-234 prior to October 1, 2025, the department shall serve by first-class mail a notice of availability and opportunity to petition for the reduction, modification, or revocation of any provisional permit located in the basin subject to the final decree on or before December 1, 2025. The notice shall be mailed to the owners of record of existing water rights and provisional permits within the decreed basin.

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(b) The department shall also provide notice on other interested persons who request service of the notice of availability from the department.

(3) (a) An owner of an existing water right in the basin subject to the final decree may file a correct and complete petition to reduce, modify, or revoke a provisional permit issued prior to the final decree in the subject basin. The petition must be made on a form prescribed by the department. The petitioner must file the petition with the department and serve the petition by first-class mail on all owners of record for the provisional permit within 180 days of issuance of the notice provided for in subsection (2).

(b) (i) The department shall notify the petitioner of any defects in a petition within 60 days of the close of the petition period in subsection 3(a). A petition that is not corrected and completed within 30 days of the notice of the defects is terminated.

(ii) If the department does not notify the petitioner of any defects within 60 days, the petition must be treated as correct and complete.

(c) The department must provide notice by first-class mail of a correct and complete petition to the petitioner and each owner of the provisional permit identified in the

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petition. Within 60 days of the notice, the owner of a provisional permit identified in the petition may file a response to the petition with the department and serve the response on the petitioner by first-class mail.

(d) The petitioner must prove by preponderance of evidence:

(i) reduction, modification, or revocation of the provisional permit is necessary to protect the petitioner's existing water rights determined in the final decree; and,

(ii) the provisional permit would have been denied or modified if the final decree had been available to the department.

(e) Within 120 days of the close of the 60-day response period provided in subsection 3(c), the department shall deny the petition, or propose to reduce, modify, or revoke a provisional permit based on the information in the petition, response, final decree, records of the department, and other evidence submitted to the department. The department must consider whether, based on the final decree, unappropriated waters or legally available water existed at the time the provisional permit was issued.

(i) If the department proposes to reduce, modify, or revoke a provisional permit it must provide the owner of the provisional permit with the opportunity to show cause

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why the department should not take the proposed action. If the owner of the provisional permit fails to show sufficient cause, the department shall reduce, modify, or revoke the provisional permit in accordance with the department's findings and conclusions.

(ii) A department determination to deny a petition is final.

(4) If no petition to reduce, modify, or revoke a permit is filed pursuant to subsection (3) the department shall issue a certificate of water right in accordance with 85-2-315."

{Internal References to 85-2-313:
85-2-101 85-2-102 * 85-2-401}

Section 2. Section 85-2-315 , MCA, is amended to read:

"85-2-315. Certificate of water right. (1) (a) Upon actual application of water to the proposed beneficial use within the time allowed, the permittee shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed. The department shall review the certified

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~~statement and may then inspect the appropriation to verify whether the appropriation was completed in substantial accordance with the terms of the permit, including any reduction or modification pursuant to 85-2-313, and if it determines that the appropriation has been completed in substantial accordance with the permit, it shall issue the permittee a certificate of water right. The original of the certificate shall be sent to the permittee, and a duplicate shall be kept in the office of the department in Helena.~~

(b) If the department determines that the appropriation has been completed in substantial accordance with the terms, conditions, restrictions, and limitations of the permit approval and any reduction or modification pursuant to 85-2-313, it will issue a certificate of water right for the permit.

(c) If the department determines that the appropriation was not completed in substantial accordance with the terms, conditions, restrictions, and limitations of the permit approval, including any reduction or modification pursuant to 85-2-313, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked pursuant to 85-2-314.

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(2) After a final decree is issued in a basin pursuant to 85-2-234, the department will issue a certificate of water right for a change in appropriation right that is verified or modified pursuant to 85-2-402 (9) and (10).

(3) The original of the certificate of water right will be sent to the owner of the provisional permit or change in appropriation right, and a duplicate will be maintained in the department's centralized database."

*{Internal References to 85-2-315:
85-20-501}*

Section 3. Section 85-2-402 , MCA, is amended to read:

"85-2-402. Changes in appropriation rights -- definition. (1) (a) The right to make a change in appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-

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2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(b) If an application involves a change in a point of diversion, conveyance, or place of use located on national forest system lands, the application is not correct and complete until the applicant has submitted proof to the department of any written special use authorization required by federal law for the proposed change in occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been

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issued or for which a state water reservation has been issued under part 3. For purposes of this section, adverse effects analysis is specific to the proposed change in appropriation right and a determination that water is not legally available pursuant to 85-2-311 does not necessarily mean that an adverse effect will occur.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for:

(i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

(ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

(iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of

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diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection

(2) (d) does not apply to:

(i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436;

(ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or

(iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

(f) The water quality of an appropriator will not be adversely affected.

(g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(3) The applicant is required to prove that the criteria in subsections (2) (f) and (2) (g) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to

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the satisfaction of the department that the criteria in subsection (2) (f) or (2) (g), as applicable, may not be met.

(4) The department may not approve a change in purpose of use or place of use of an appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by a preponderance of evidence that:

(a) the criteria in subsection (2) are met; and

(b) the proposed change in appropriation right is a reasonable use. A finding of reasonable use must be based on a consideration of:

(i) the existing legal demands of water rights on the state water supply, as well as projected legal demands of water rights for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the effects on the quantity and quality of water for existing uses in the source of supply;

(iv) the availability and feasibility of using low-quality water for the purpose for which application has been made;

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(v) the effects on private property rights by any creation of or contribution to saline seep; and

(vi) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(5) The department may not approve a change in purpose of use or place of use for a diversion that results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed unless:

(a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (2) and (4) are met; and

(b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then petitions the legislature and the legislature affirms the decision of the department after one or more public hearings.

(6) The state of Montana has long recognized the importance of conserving its public waters and the necessity to maintain adequate water supplies for the state's water requirements, including requirements for federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in trust

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for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before out-of-state use may occur:

(a) The department and, if applicable, the legislature may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public hearings that:

(i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of subsection (2) or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(b) In determining whether the appropriator has proved by clear and convincing evidence that the

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requirements of subsections (6) (a) (ii) and (6) (a) (iii) will be met, the department and, if applicable, the legislature shall consider the following factors:

(i) whether there are present or projected water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the existing legal demands of water rights placed on the applicant's supply in the state where the applicant intends to use the water.

(c) When applying for a change in appropriation right to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change in appropriation

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right in accordance with 85-2-307 and shall hold one or more hearings in accordance with 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it determines that the proposed change in appropriation right might adversely affect the rights of other persons.

(8) The department or the legislature, if applicable, may approve a change in appropriation right subject to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this section, including limitations on the time for completion of the change in appropriation right. The department may extend time limits specified in the change in appropriation right approval under the applicable criteria and procedures of 85-2-312.

(9) Upon actual application of water to the proposed beneficial use within the time allowed, the appropriator shall notify the department that the appropriation has been completed. The notification must contain a certified statement by a person with experience in the design, construction, or operation of appropriation works describing how the appropriation was completed. The

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department will review the certified statement and may inspect the appropriation to verify whether the appropriation was completed in substantial accordance with the terms of the change in appropriation right.

(a) For a change authorization of an existing water right that is granted prior to issuance of a final decree being in the basin where the existing water right is located, the department shall verify that the elements and conditions of the change in appropriation right are in substantial accordance with the elements of the existing water right as adjudicated by the final decree. If the notice of completion of the change in appropriation of an existing water right was verified prior to issuance of a final decree in the basin where the existing water right is located, the department will reverify that the elements and conditions of the change in appropriation right are in substantial accordance with the elements of the existing water right as adjudicated by the final decree. The department verification is subject to any modifications to the final decree based on an appeal under 85-2-235.

(b) For a change in appropriation right on a provisional permit that was granted before issuance of a final decree in the basin where the provisional permit is located, the department will verify that the elements and

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conditions of the change in appropriation right are in substantial accordance with any modification or reduction of the provisional permit pursuant to 85-2-313. If the notice of completion for a change in appropriation right was verified by the department prior to an order reducing or modifying the provisional permit pursuant to 85-2-313, the department will reverify that the elements and conditions of the change in appropriation right are in substantial accordance with the reduction or modification of the provisional permit.

(10) If a change in appropriation right is not completed as approved by the department or legislature or if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied with, or if the elements of the change in appropriation right are not in substantial accordance with the elements of the existing water right in the final decree, or with the reduction or modification of the provisional permit pursuant to 85-2-313, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change in appropriation right approval.

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(11) The original of a change in appropriation right approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(12) A person holding an issued permit or change in appropriation right approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change in appropriation right pursuant to this section.

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

(14) The department may adopt rules to implement the provisions of this section.

(15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:

(i) the appropriation right is for:

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(A) ground water outside the boundaries of a controlled ground water area; or

(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the rule establishing the controlled ground water area do not restrict a change in appropriation right;

(ii) the change in appropriation right is to replace an existing well and the existing well will no longer be used;

(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:

(A) 450 gallons a minute for a municipal well; or

(B) 35 gallons a minute and 10 acre-feet a year for all other wells;

(iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and

(v) a timely, correct and complete notice of replacement well is submitted to the department as provided in subsection (15) (b).

(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the

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appropriator shall file a notice of replacement well with the department on a form provided by the department.

(ii) (A) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (15) (a) have been met and the notice is correct and complete.

(B) If the replacement well is located on national forest system lands, the notice is not correct and complete under this subsection (15) until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the replacement well.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

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(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

(A) cease appropriation of water from the replacement well pending approval by the department; and

(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.

(e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).

(16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:

(i) withdraws water from the same ground water source as the original well; and

(ii) is required by a state or federal agency.

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(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.

(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion. If the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the redundant water supply well.

(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets the requirements of this subsection (16).

(17) The department shall accept and process an application for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320 and this section and to benefit the fishery resource pursuant to 85-2-436 and this section.

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(18) (a) An appropriator may change an appropriation right for a replacement point of diversion without the prior approval of the department if:

(i) the existing point of diversion is inoperable due to natural causes or deteriorated infrastructure;

(ii) there are no other changes to the water right;

(iii) the capacity of the diversion is not increased;

(iv) there are no points of diversion or intervening water rights between the existing point of diversion and the replacement point of diversion or the appropriator obtains written waivers from all intervening water right holders;

(v) the replacement point of diversion is on the same surface water source and is located as close as reasonably practicable to the existing point of diversion;

(vi) the replacement point of diversion replaces an existing point of diversion and the existing point of diversion will no longer be used;

(vii) the appropriator can show that the existing point of diversion has been used in the 10 years prior to the notice for change of appropriation right for a replacement point of diversion;

(viii) the appropriator can show the change will not increase access to water availability, change the method of

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irrigation, if applicable, or increase the amount of water diverted, used, or consumed; and

(ix) a timely, correct and complete notice of replacement point of diversion is submitted to the department as provided in subsection (18) (b).

(b) (i) Within 60 days after completion of a replacement point of diversion, the appropriator shall file a notice of replacement point of diversion with the department on a form provided by the department.

(ii) The department shall review the notice of replacement point of diversion and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (18) (a) have been met and the notice is correct and complete. The department may inspect the diversion to confirm that the criteria under subsection (18) (a) have been met. If the department issues an authorization of a change in an appropriation right for a replacement point of diversion, the department shall prepare a notice of the authorization and provide notice of the authorization in the same manner as required in 85-2-307 for applications.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement point of diversion has been

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filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement point of diversion within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iv) If a notice of replacement point of diversion is not filed and completed within the time allowed or if the department determines the criteria under subsection (18) (a) have not been met, the appropriator shall:

(A) cease appropriation of water from the replacement point of diversion pending approval by the department; and

(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

(c) The provisions of this subsection (18) do not apply to an appropriation right abandoned under 85-2-404.

(d) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (18) (a).

(e) (i) An appropriator may file a correct and complete objection with the department alleging that the change in appropriation right for a replacement point of

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diversion will adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under Title 85, chapter 2, part 3.

(ii) If the department determines after a contested case hearing between the appropriator and the objector that the rights of other appropriators have been or will be adversely affected, it may revoke the change or make the change subject to terms, conditions, restrictions, or limitations necessary to protect the rights of other appropriators.

(iii) The burden of proof to prove lack of adverse effect at the hearing is on the appropriator changing the point of diversion."

{*Internal References to 85-2-402:*

3-7-224	75-5-410	85-2-308	85-2-309
85-2-310	85-2-314	85-2-316	85-2-320
85-2-336	85-2-368	85-2-403	85-2-407
85-2-408	85-2-419	85-2-420	85-2-427
85-2-436	85-2-602	85-2-708	85-20-1001
85-20-1401	85-20-1501	85-20-1901}	

NEW SECTION. **Section 4. Notifications to tribal governments.** The secretary of state shall send a copy of [this act] to each federally recognized tribal government in Montana.

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