



CALIFORNIA AND PACIFIC OFFICE

*protecting and restoring natural ecosystems and imperiled species through
science, education, policy, and environmental law*

May 25, 2005

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

Robert L. Reiter
General Manager and Chief Engineer
San Bernardino Valley Municipal Water District
1350 South "E" Street
POB 5906
San Bernardino, CA 92412-5906

Re: Water Right Applications A031165 and A031370 and Draft EIR for the Santa Ana River Water Right Applications for Supplemental Water Supply for San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County SCH #2002071062

Dear Mr. Reiter,

This letter is submitted on behalf of the Center for Biological Diversity ("Center") regarding the draft Environmental Impact Report ("DEIR") for the Santa Ana River Water Right Applications for Supplemental Water Supply for San Bernardino Valley Municipal Water District and Western Municipal Water District of Riverside County ("the project"). The Center is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 13,000 members throughout California and the western United States, including in San Bernardino and Riverside counties where the project is located.

I. INTRODUCTION.

The Center's comments herein are based on a review of the DEIR, the State Water Resources Control Board ("SWRCB") comment letter on the DEIR dated January 14, 2005 ("SWRCB Comment Letter 1"), the SWRCB letter to Mr. Aladjem dated March 14, 2005 ("SWRCB Comment Letter 2"), the protest to Application A031165 and A031170 filed by the United States Department of Agriculture, Forest Service ("USFS") dated March 7, 2003 ("FS

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Protest), and the protest filed by the California Department of Fish and Game dated November 5, 2002 ("DFG Protest). Attached hereto as Exhibits A, B, C & D. The Center's earlier comments on the DEIR submitted on January 11, 2005, ("Center Comment Letter 1") are incorporated herein by reference.

As the project proponents are aware, comments submitted before an EIR is certified are timely and must be considered by the lead agency. Pub. Res. Code § 21177(a),(b); *Galante Vineyards v. Monterey Peninsula Water Management District*, 60 Cal. App. 4th 1109, 1117-1121 (1997). Therefore, the Center hopes and expects that the San Bernardino Valley Municipal Water District ("Muni") and Western Municipal Water District of Riverside County ("Western") will give full consideration to all comments submitted regarding this project.

II. THE DEIR FAILS TO MEET THE REQUIREMENTS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

As detailed below, in the Center's previous comments, and in comments and protests submitted by others, the DEIR was inadequate in many ways. In response, the project proponents must add significant additional information to the EIR. When significant new information is added to an EIR, CEQA requires that the EIR be re-circulated. *See* Pub. Res. Code §21092.1; CEQA Guidelines §15088.5, 14 CCR §15088.5. In this instance, once the DEIR is revised in response to the significant issues raised in comments on the DEIR and protests, the DEIR must be re-circulated to the public for review and comment.

A. The DEIR Improperly Fails to Coordinate State and Federal Environmental Review and Project Approvals.

CEQA requires that:

Local agencies integrate the requirements of [CEQA] with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively.

Pub. Res. Code §21003. The CEQA Guidelines §15124(d)(1)(C), similarly provide that: "To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements." 14 CCR §15124(d)(1)(C). The DEIR provides no explanation for failing to coordinate the federal environmental review pursuant to NEPA with the CEQA process.

The CEQA Guidelines require that an EIR contain a list of permits and approvals required to implement the project and a "list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies." CEQA Guidelines §15124(d), 14 CCR §15124(d). The DEIR notes that additional permits, approvals and consultations will be needed in order for the project to be carried out. DEIR at 2-8 to 2-10. These include: several required approvals from the Army Corps of Engineers; permits, approvals and consultations from the Fish and Wildlife Service; and access agreements and permits from

the Forest Service. DEIR at 2-8 to 2-10. The DEIR acknowledges that the approvals from federal agencies will require environmental review pursuant to NEPA. DEIR at 2-10. Nonetheless, the DEIR provides no explanation why the federal environmental review is not running concurrently with the CEQA review as provided by CEQA §21003, Public Resources Code §21003. Indeed, without the federal approvals the project cannot go forward and the SWRCB cannot properly consider the pending applications to appropriate water.

For example, the Forest Service points out that seasonal storage of water behind Seven Oaks Dam will require the project proponents to obtain a special use permit from the Forest Service. FS Protest at 2. Without this permit, the project proponents will not have the right to store water within the San Bernardino National Forest and thus, it will be impossible to actually store the water that the proponents claim can be “conserved” behind the dam. To date, the project proponents have not filed an application for a special use permit. *But for* the issuance of a special use permit from the Forest Service, there is quite simply no water to appropriate. Without first obtaining approvals from the Forest Service, and completing the required NEPA review and FWS consultation, it is premature for the SWRCB to consider the applications to appropriate water. Thus, by failing to coordinate the required State and Federal approvals and the required CEQA and NEPA review, the project proponents have made it impossible for the SWRCB to properly review and consider the pending applications.

B. The DEIR Fails to Adequately Identify, Analyze, Avoid or Mitigate the Environmental Impacts Related to Seasonal Water Storage at the Seven Oaks Dam.

1. The DEIR improperly relies on an eight year old Feasibility Study EIR/EIS produced by the Corps that was not certified.

As the SWRCB points out, the DEIR fails to properly identify or analyze the environmental impacts related to seasonal water storage at the Seven Oaks Dam (“SOD”). SWRCB Comment Letter 2 at 2. On that basis, the SWRCB requested that the project proponents submit CEQA documentation addressing the biological impacts of the project related to seasonal water conservation at Seven Oaks Dam by June 1, 2005. SWRCB Comment Letter 2 at 2. The information requested by the SWRCB is significant new information that was not contained in the DEIR.

The DEIR contains the bare assertion that “[u]pstream from Seven Oaks Dam, impacts related to seasonal water conservation storage were evaluated USACE’s 1997 report, Seven Oaks Dam Water Conservation Feasibility Study Final EIS/EIR.” DEIR at 3.3-1. The only further discussion related to upstream impacts is a bare reference to the environmental impacts of the reservoir in the immediate vicinity of the dam that was analyzed for flood control purposes only as part of the Seven Oaks Dam approval process. *See* DEIR at 3.3-55. However, as the SWRCB points out, the DEIR’s reliance on the U.S. Army Corps of Engineers’ 1997, Seven Oaks Dam Water Conservation Feasibility Study Final EIS/EIR (“Feasibility Study EIS/EIR”) is improper. *See* SWRCB Comment Letter 2 at 2. The Feasibility Study EIS/EIR was not properly

incorporated by reference nor can the project proponents rely on it as a first “tier” environmental document.

The DEIR did not properly incorporate the Feasibility Study EIS/EIR by reference. First, the DEIR failed to provide a summary or a description of the information relied on from the Feasibility Study EIR/EIS and failed to analyze whether any information in the document needs to be updated eight years after it was produced. CEQA Guidelines §15150(b), 14 CCR §15150(b). Second, the Feasibility Study EIS/EIR is not generally available to the public. See CEQA Guidelines §15150(a), 14 CCR §15150(a). Third, it is inappropriate to rely on incorporation by reference for *analysis* of impacts to biological resources and other impacts. CEQA Guidelines §15150(f), 14 CCR §15150(f).

Moreover, the Feasibility Study EIS/EIR cannot be relied on by the project proponents because it was not a first-tier CEQA document and was not certified as such by either of the project proponents. CEQA Guidelines §15152, 14 CCR § 15152. Indeed, according to the Seven Oaks Dam Water Control Manual no record of decision was signed by the Corps for this document. See U.S. Army Corps of Engineers, September 2003, Water Control Manual Seven Oaks Dam and Reservoir (“Water Control Manual”) at 8-8. There was also no FWS section 7 consultation for the Feasibility Study EIR/EIS and no biological opinion was issued by FWS taking into account the impacts to rare, threatened, and endangered species resulting from seasonal storage of water behind the Seven Oaks Dam. Most importantly, the DEIR fails to demonstrate that the Feasibility Study EIR/EIS adequately identified or analyzed all of the potential environmental impacts of storing water behind the dam (including the biological impacts and the cumulative impacts), analyzed alternatives that would avoid those impacts, or identified and adopted specific enforceable mitigation measures to minimize impacts as required by CEQA. CEQA Guidelines §15152(f)(3), 14 CCR §15152(f)(3).

2. The DEIR improperly ignores project impacts within the San Bernardino National Forest

As the Forest Service points out, the project would inundate lands within the San Bernardino National Forest and result in “a larger pool for a longer period of time” than use of the SOD for flood control alone. FS Protest at 4. The DEIR fails to adequately address direct and indirect impacts within the forest related to water storage or to evaluate consistency with the San Bernardino National Forest LMRP. FS Protest at 4, 4-6 (list of potential impacts). The potential upstream impacts identified by the Forest Service include, but are not limited to, impacts due to: increased size and duration of the lake resulting in exotic fish, frogs, and other species being established and moving upstream; increased fishing and other uses by humans and the resulting wildlife disturbance; impacts to upstream habitat including spawning gravels; establishment of riparian vegetation along the storage pool; acceleration of sediment, erosion, and bank sloughing from the shoreline due to saturation of the soil with longer periods of standing water; and establishment of exotic weeds due to fluctuating water levels. FS Protest at 4-5.

Oddly, the only mention of these impacts in the DEIR is in the cumulative impacts section regarding the Santa Ana River upstream of the Seven Oaks Dam. *See* DEIR at 6-20 to 6-21. The DEIR's perfunctory discussion fails to meet the requirements of CEQA, that the direct, indirect and cumulative impacts be identified, analyzed, avoided or mitigated in the DEIR. Moreover, as discussed above, to date, the project proponents have not filed an application for a special use permit from the Forest Service or prepared federal environmental review documents for the project as required by NEPA.

3. The DEIR improperly fails to describe or analyze the direct, indirect and cumulative impacts to biological resources.

The DEIR's cumulative impacts analysis states that "nearly all of the loss or modification of biological resources [within the Seven Oaks Dam and reservoir area] have been previously mitigated as part of the Seven Oaks Dam project." DEIR at 6-32. However, the DEIR improperly ignores the fact that many of the mitigation measures required for construction of the Seven Oaks Dam remain unfulfilled. It is critical that the DEIR accurately identify the current status of the biological resources taking into account only the actual mitigation that has occurred, because the proposed project will have additional impacts on many of the same biological resources as those impacted by the construction and operation of the Seven Oaks Dam for flood control purposes. As noted above, at the time that the Seven Oaks Dam was constructed, there was no ESA section 7 consultation with FWS regarding the impacts to rare, threatened, and endangered species from seasonal storage of water behind Seven Oaks Dam. The biological opinion issued by the FWS for the Seven Oaks Dam in December 2002 ("SOD BO 2002") only evaluates flood control operation of the Dam. *See* SOD BO 2002. The only non-flood control related water storage authorized at the Seven Oaks Dam is for mitigation measures to benefit the Santa Ana Woolly Star Preserve Area ("WSPA"). The Corps operations manual provides that water within the pool behind the dam may be "held longer so that additional head will be available for releases greater than what is schedule[d] in the water control plan." Water Control Manual at 7-05(h).

To date, the Corps has not yet implemented the proposed flood-related mitigation measures outlined in the SOD BO 2002 for the Woolly Star Preserve Area, although the Woolly Star population continues to decline within the Preserve. *See* "Santa Ana River Woolly Star Report of Biological Studies For the Preserve Management Program, Years 4 through 9," April 2004 at 17-18 (indicating overall decline in number of plants at all sites from 1996 to 2003). Indeed, the recent winter, 2004- 2005, is the first time since the construction of the Seven Oaks Dam that there has been sufficient rainfall to test the flood control functions of the dam and the Corps has determined that no water will be stored behind the dam this year (not even the amounts that might be used for mitigation for the WSPA) because the dam requires repairs. The DEIR's assumption that the mitigation measures have been fulfilled is erroneous and thus, the cumulative impacts analysis is flawed. Moreover, the failure to analyze the additional direct, indirect, and cumulative impacts of *this* project on biological resources in is improper.

Although construction of the dam was completed more than five years ago, and the SOD BO 2002 anticipated completion of a comprehensive Multi-Species Habitat Management Plan

("MSHMP") within 2 years of the issuance of the BO, no comprehensive species management plan has yet been developed or implemented that includes the required mitigation for the Seven Oaks Dam's impacts to the endangered San Bernardino Kangaroo Rat ("SBKR"). For rare, threatened, and endangered species, delayed and deferred mitigation measures often increase a project's impacts and, thus, fail to minimize impacts as they were intended. While the DEIR acknowledges that the MSHMP is "still in the early planning stages," DEIR at 3.5-9, the DEIR completely fails to identify and analyze the direct, indirect, and cumulative impacts to the species that have resulted from this delay and which may be further exacerbated by the proposed project. The DEIR also identifies but fails to properly analyze the impacts from activities that will likely be facilitated by the development of the MSHMP including ground disturbance from development of additional recharge basins, sand and gravel mining, and road expansions and alterations that in turn may cause additional impacts to biological and other resources in the area. DEIR at 6-3. Because the cumulative impacts analysis begins from an erroneous baseline, its analysis is fundamentally flawed.

As noted above, the DEIR erroneously assumes that the required mitigation for the SOD construction has already been completed, this mistaken assumption also renders the DEIR's discussion of additional mitigation measures for impacts to the Santa Ana River inadequate. See DEIR at 6-35, MM BIO-9 and BIO-10. Indeed, the proposed mitigation measures closely parallel those that were required in the SOD BO 2002 but have not yet been carried out to improve and restore habitat for the SBKR and the Santa Ana River Woolly Star. Thus, there is no basis for the DEIR's assumption that such measures will be effective or sufficient.

The DEIR must analyze the condition of the rare, threatened, and endangered *as they currently exist* it cannot simply assume that these resources have benefited from as yet unfulfilled mitigation measures. As the Department of Fish and Game ("DFG") noted, the project proponents must "quantify the loss of resources that have occurred, and that will occur, as a result of the diversion amounts and timing set forth in the application." DFG Protest at 4. By improperly identifying the baseline condition of the biological resources, the DEIR fails to meet the requirements of CEQA and the new mitigation measures it identifies cannot fairly be presumed to mitigate the impacts of the project on these resources.

Moreover, the DEIR fails to provide a comprehensive assessment of in-stream needs and proposals for by pass flows. See DFG Protest at 4. DFG specifically requested that the project proponents provide "[a] habitat-based stream needs assessment that incorporates habitat, species, and life history criteria specific to the Santa Ana River, the tributaries and downstream reaches," and "[a] specific proposal to provide minimum bypass flows for maintenance of aquatic habitat, fish, and wildlife resources including, but not limited to, Santa Ana sucker, Santa Ana speckled dace, arroyo chub, arroyo toad, western spadefoot toad, least Bell's vireo, southwestern willow flycatcher and southwestern pond turtle. The starting point for determining the minimum bypass flow should be the estimated unimpaired February median flow at the points of diversion." DFG Protest at 4. Because the DEIR fails to provide the required information, it fails to comply with CEQA.

4. The DEIR must be revised to include new information regarding the poor water quality of flood water stored and released from Seven Oaks Dam.

The DEIR must be supplemented or revised and reissued to account for the new information regarding the quality of the water that is held behind the dam for flood control. As the project proponents are well aware, the water that was released from Seven Oaks Dam this spring was of very poor quality – containing large amounts of silt and sand. Indeed, several local agencies have called for the Corps to conduct a multi-million dollar study into the causes of the poor water quality and ways to improve the water quality. Until that study is completed, it will remain unclear whether or not the proposed project is even feasible and the project proponents' applications are, thus, premature.

C. The Water Availability Analysis and Project Description in the DEIR are Inadequate.

The DEIR's analysis of the surface hydrology and water availability is inadequate. These inadequacies include, but are not limited to the following: using an incorrect baseline; underestimating the amount of water that may be needed for species conservation, restoration and recovery; ignoring other in-stream beneficial uses; underestimating the need to release water for flood control purposes; underestimating the uncertainty of water storage in any given year; and on these bases, overestimating the amount of water available for appropriation.

Flood control is, and will remain, the primary purpose of the Seven Oaks Dam. Whether or not the SOD can be used to store water in any given year will be entirely dependent on the timing of winter storms and predictions regarding future storms. Thus, the availability of the SOD for water storage storage will vary widely in different years, and the amount of water that may be stored in any given year is completely speculative. The DEIR recognizes that the water available in even an *average* year is far less than the 200,000 afy of water the applicants seek and estimates a range of availability of additional water from 11,000 afy to 28,000 afy. Appx. A at 4.2-5. However, the DEIR completely fails to take into account dry years, consecutive dry years, or to account for seasonal variability and the uncertainty that storage will be available in any year due to flood control needs. Ignoring these factors, the project proponents have applied to appropriate the maximum amount of water that could possibly be made available on a cumulative basis. As SWRCB requested, an adequate water availability analysis must consider the amount of water available for appropriation based on median water year flows or long-term averages that take into account the frequency of dry years. SWRCB Comment 1 at 7-8; SWRCB Comment 2 at 1-2. The DEIR must be revised using a correct median or long-term average baseline and taking into account the uncertainties of storage that are created by the use of the SOD for flood control.

Although the DEIR acknowledges that stored water must first be made available for mitigation measures that were imposed to mitigate impacts of the construction SOD, it assumes that only 1,000 cfs of water will be used over two days for these purposes in any given six month

period. DEIR Appx. A at A-4-9. Because FWS has not yet determined the amount of water that will be required for mitigation from construction of the SOD — mitigation that is intended to simulate flood conditions for several rare, threatened, and endangered species in the Santa Ana Wash Area — any estimate of how much water will be needed for the environmental habitat release is entirely speculative. The project itself may also require additional mitigation measures for impacts to many of the same species that have already suffered as a result of construction of the SOD and from other projects in the area. Further, as SWRCB pointed out, additional water may be required to support other in-stream beneficial uses for recreation and wildlife including fisheries and other riparian needs. SWRCB Comment 1 at 8; *see also* DFG Protest at 4. None of these other water uses were properly taken into account in the DEIR and, thus, the water availability assessment is essentially flawed. It is entirely inappropriate for the SWRCB to approve appropriations for the *maximum* speculative amount of water that may be available in very wet years and after an as yet unknown amount of water has been dedicated to mitigation measures for rare, threatened, and endangered species and for beneficial in-stream uses.

The DEIR also fails to properly identify and analyze the project's proposed use of stored SAR water for export/exchange. Under this proposal, high quality SAR water will be exported from the area via the State Water Project ("SWP"). At a later time, other water, of unknown quality, may be imported and used for distribution or recharged. The DEIR fails to identify impacts that may occur from the end-use of the exported water (which will likely be growth inducing and may impact water and air quality and biological resources), as well as the impacts to water quality in the SAR region from recharge and/or distribution of imported water. As the Court of Appeal recently stated, the SWRCB cannot properly determine the amount of water required for a specific beneficial use without knowing the actual, intended use or uses of the water to be appropriated. *Central Delta Water Agency v. SWRCB*, 124 Cal. App. 4th 245, 264 (2004). The Court expressly rejected specifying the service area generally as the area served by the SWP noting that "the Board has done little more than say the water should be used in California." *Id.* at 263. The Court also found that CEQA review based on inadequate project information regarding the end user of the appropriated water was inadequate. *Id.* at 271-272.

Because the project proponents have failed to properly identify and analyze the amount of water available for appropriation and failed to properly identify the end user of the water that they seek to appropriate, the project description is inadequate and the DEIR based upon it is fundamentally flawed.

D. The Alternatives Analysis in the DEIR Is Inadequate.

The DEIR provides an inadequate description and analysis of the Enhanced Conservation Alternative (Alternative 2), and over emphasizes the difficulties of implementing conservation measures in the Muni service area and the potential impacts to water quality and biological resources due to reduced wastewater flows. *See* DEIR at 5-13 to 16.

The DEIR attempts to justify the project's increased impacts on biological resources in the upper Santa Ana Wash Area and the lack of water conservation measures in the Muni service area by reference to the threatened Santa Ana sucker. DEIR at 5-14 to 15. Due to the over-

appropriation of the Santa Ana River which leaves essential Santa Ana sucker habitat in the Santa Ana River mainstem through the Santa Ana Wash Area dry much of the year, the Santa Ana sucker's range has been reduced to areas of the Santa Ana River with year-round wastewater flows from treatment plants. The DEIR's attempt to justify the lack of comprehensive water conservation measures in the Muni service area and the project's proposed additional appropriations from the Santa Ana River by claiming that conservation measures may adversely impact the sucker is both cynical and absurd. The sucker has been reduced to surviving on wastewater flows because of over-appropriation of the Santa Ana River, it makes no sense to justify appropriation of additional water, and failure to conserve, by reference to the sucker. Because the DEIR's description and analysis of the Enhanced Conservation Alternative is inadequate the DEIR fails to meet the requirements of CEQA.

Further, the DEIR improperly fails to provide a reasonable range of alternatives. The DEIR provides three alternatives and the no project alternative. There is no effort to include any water conservation measures in the project itself or in Alternative 1 or 3 even though water conservation measures in the Muni service area could easily be included in the project as well as in any of the project alternatives. Because including water conservation measures in the Muni service area would minimize or avoid the environmental impacts of the project, water conservation measures should be evaluated as mitigation measures for the project, and in each of the alternatives, and where feasible, must be adopted as mitigation measures for the project.

The project proponents' failure to identify the Enhanced Conservation Alternative as the preferred Alternative is unsupportable. The additional water appropriations sought would significantly impact environmental resources in an already heavily impacted area. Moreover, the failure to implement comprehensive water conservation efforts within the Muni service area to date or to include *any* water conservation measures in the project description, as mitigation measures, or in either of the other alternatives, calls into question whether Muni's existing water appropriations are being put to beneficial use.

The waters of the state of California are a public trust resource subject to Constitution Article X, §2, in which it is

....declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that *the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.* The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and *such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.*"

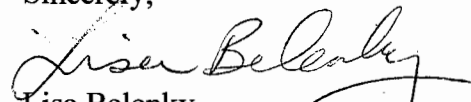
Cal. Const. Art. X, §2 (emphasis added). The SWRCB is charged with ensuring that all water appropriations are put to beneficial use and not wasted. While the domestic use of water is a

beneficial use, the waste of water is not. Muni's bald assertion that it cannot impact the implementation of water conservation measures because it is a water wholesaler, does not provide adequate justification for failing to identify and analyze conservation measures as mitigation for the projects impacts and as the preferred alternative. Even a water wholesaler must assure that the water it appropriates is put to beneficial use and not wasted by the end users. The lack of comprehensive conservation efforts within the Muni service area is untenable and the SWRCB is unlikely to grant Muni additional water appropriations in such circumstances.

III. CONCLUSION.

In light of the issues raised by the Center in these comments and our previous comments, as well as the issues raised in other comments on the DEIR and protests, it is clear that the DEIR is inadequate and must be revised and re-circulated before the pending water appropriations applications can be heard by the SWRCB. We look forward to reviewing the revised DEIR. If you have any questions regarding these comments please feel free to contact me at (415) 436-9683 ext. 307.

Sincerely,


Lisa Belenky
Center for Biological Diversity

List of Exhibits:

Exhibit A:

State Water Resources Control Board, Division of Water Rights ("SWRCB") comment letter on the DEIR dated January 14, 2005 ("SWRCB Comment Letter 1"),

Exhibit B:

SWRCB letter to Mr. Aladjem dated March 14, 2005 ("SWRCB Comment Letter 2")

Exhibit C:

Protest to Application A031165 and A031170 filed by the United States Department of Agriculture, Forest Service ("USFS") dated March 7, 2003.

Exhibit D:

Protest filed by the California Department of Fish and Game dated November 5, 2002 ("DFG Protest")

CC:

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