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SENT ELECTRONICALLY ONLY

By Way Of: James_Hodson@gov.nt.ca

RE: ABORIGINAL CONSULTATION: APPROVAL OF THE WILDLIFE MANAGEMENT AND MONITORING PLAN FOR PHASE 1 OF THE CANADIAN ZINC PRAIRIE CREEK ALL-SEASON ROAD PROJECT

Acho Dene Koe First Nation writes in response to the referral received via email on November 2, 2021 (the “Letter”) regarding a Wildlife Management and Monitoring Plan related to the Prairie Creek all-season access road. This generalized and generic referral letter initiates a flawed and faulty consultation process. In our view, the Crown cannot and should not proceed with issuing a decision with respect to Wildlife Management and Monitoring Plan absent full and meaningful consultation and accommodation of Acho Dene Koe First Nation’s interests.

Acho Dene Koe First Nation’s Treaty and Aboriginal Rights

Acho Dene Koe First Nation’s traditional territory and waters span three jurisdictions: British Columbia, the Yukon Territory and the Northwest Territories. Our main community is currently settled in Fort Liard, north of the British Columbia-Northwest Territories border, but our members continue to use and occupy our Traditional Territory as a whole. As our ancestors did, we hunt, trap, fish and gather for food, social, cultural and trading purposes throughout our Traditional Territory.

In 1922, our ancestors adhered to Treaty 11, and these rights are constitutionally protected pursuant to section 35(1) of the *Constitution Act, 1982*. Among other things, Treaty 11 protects our right to pursue our usual vocations of hunting, trapping and fishing. When signing Treaty 11, our ancestors were assured that this liberty would not be taken away or curtailed.¹ As such, we have treaty-protected rights to pursue our usual vocations of hunting, trapping and fishing, to continue our traditional ways of life and to earn a livelihood in accordance with our traditional practices, to continue our traditional patterns of activity and occupation and to exercise these rights, without interference. Any erosion of our ability to hunt, trap and fish or way of life would be a serious infringement of our Treaty 11 rights.

¹ *Yahey v British Columbia*, 2021 BCSC 1287, para. 509 (Note: the purpose of the Treaty 8 and 11 are similar.).

In addition to our constitutionally-recognized Treaty rights, we assert Aboriginal rights, including title, throughout our Traditional Territory.^{2 3} Aboriginal rights include priority use rights to resources (e.g. fish, wildlife, trees, traditional medicines and foods). Aboriginal title confers the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations.⁴ Aboriginal rights, which include title, are constitutionally protected legal rights, pursuant to section 35(1) of the *Constitution Act, 1982*.

Our rights, and our Traditional territory, are affected by the proposed decision. As set out below, the Crown has not properly initiated this process, let alone adequately discharged its duty to consult and accommodate Acho Dene Koe First Nation's interests.

Crown's Duty to Consult

It is trite law that the protection provided for in section 35 of the *Constitution Act, 1982*, means that the Crown has a constitutional duty to consult with, and where appropriate, to accommodate First Nations' prior to taking any action that might affect their asserted rights and title. This duty is grounded in the Honour of the Crown and the need to achieve reconciliation with First Nations.⁵

Where the Crown has "knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it", the Crown has a duty to consult with the First Nation.⁶

Prior to the establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.⁷

In the case of established treaty rights, there is no need to analyze strength of claim *per se*, since treaty rights are already established and hence the claim is necessarily strong. That said, the Crown is nevertheless required to analyze or gain a full understanding of the nature and scope of the treaty rights at issue, since absent a fulsome understanding of these rights, it is not possible to determine the required level of consultation relative to the impacts. The presence of established Treaty rights means that the consultation is presumptively at the higher end of the spectrum.⁸

Development and resource exploitation have already significantly impacted and infringed our Treaty and Aboriginal rights and title past, and any new developments will infringe our rights in a compounding manner.⁹ An infringement cannot be justified, without meaningful consultation and accommodation, which may include compensation.

² *Re: Paulette's Application*, [1973] 6 W.W.R. 97 (N.W.T.) [*Re: Paulette's Application*].

³ *Sambaa K'e Dene First Nation v. Duncan*, 2012 FC 204.

⁴ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 88.

⁵ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16, 25, 32 to 33, [2004] 3 SCR 511 [Haida]

⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 35.

⁷ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 88.

⁸ *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345, para. 72.

⁹ *Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2019 ABCA 14 para. 56; *Yahey v British Columbia*, 2021 BCSC 1287, para. 520.

Acho Dene Koe First Nation expects and intends to enter full meaningful consultation with government prior to any decision that has the potential to infringe our Treaty or Aboriginal rights. The importance of protecting our Treaty and Aboriginal rights, and of preserving natural resources, cannot be overstated.

Relationship between Crown Consultation and Regulatory Proceedings

The Crown's initiation of consultation arises in the context of an existing regulatory proceeding. The Letter states that the Crown is seeking "your views on whether any of the proposed actions to be undertaken by CZN in the Wildlife Management and Monitoring Plan has the potential to adversely impact your asserted or established Aboriginal and/or treaty rights". The Letter also states that the "draft WWMP for the project has undergone several reviews and updates throughout the environmental assessment (EA) and post-EA regulatory phase conducted by the Mackenzie Valley Land and Water Board (MVLWB) and Parks Canada".

The environmental assessment (EA1415-01) and post-EA regulatory processes conducted to date are flawed, as they have failed to acknowledge Acho Dene Koe First Nation rights and interests are impacted by this project. The simple acknowledgement that a portion of the All Season road traverses Acho Dene Koe First Nation Traditional territory is absent from the Wildlife Management and Monitoring Plan, and several other management plans supporting this project. The Crown should not rely on a materially flawed report.¹⁰

Given the omission of consideration for Acho Dene Koe First Nation interests, Acho Dene Koe First Nation seeks clarification from the Crown with respect to the consultation process and how the Crown intends to ensure full and meaningful consultation (and accommodation) of Acho Dene Koe First Nation's Aboriginal and Treaty right *prior* to rendering a decision with respect to the Wildlife Management and Monitoring Plan.

Where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying on. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.¹¹ What the consultation process with respect to the Wildlife Management and Monitoring Plan will involve, at this stage, is simply not clear to Acho Dene Koe First Nation.

Irrespective of the process by which consultation is undertaken, Crown always holds the ultimate responsibility for ensuring consultation is adequate.¹² Any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstrance following an adversarial process.¹³

To assist in ensuring that adequate Crown consultation occurs before a decision is made, Acho Dene Koe First Nation respectfully sets out our preliminary concerns but wishes to emphasize that the onus is on the Crown to ensure full and meaningful consultation, and accommodation occurs prior to issuing a decision.

¹⁰ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (CanLII), [2019] 2 FCR 3,

¹¹ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 23.

¹² *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 22.

¹³ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 24.

Acho Dene Koe First Nation's Concerns with the Crown's Flawed Initiation of the Crown Consultation Process

The Crown initiated consultation with respect to the approval of the Wildlife Management and Monitoring Plan for Phase 1 of the All-Season Road Project through the Letter to the "Distribution List". While a generic and generalized approach to consultation may be efficient from the Crown's perspective, it is inconsistent with legal principles established decades ago.

Aboriginal and Treaty rights are highly fact specific and section 35(1) rights must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning.¹⁴ The courts have been clear that consultation, and any infringement of a right or justification of an infringement must be defined in the "specific factual context of each case."¹⁵ Accordingly, the Crown should to consult with Acho Dene Koe First Nation on case-by-case basis; not through the generic "one-size fits all" letter to Acho Dene Koe First Nation and three other Chiefs.

Acho Dene Koe First Nation's interests, rights and potential infringements are distinct from Nahæâ Dehé Dene Band, Łíídlıı Kúę First Nation and the Dehcho Nations. The Crown's generic approach to consultation means that it has not assessed Acho Dene Koe First Nation's individual circumstances, the strength of our claim, the potential degree of infringement of our rights and an appropriate level of consultation with us.¹⁶ By lumping Acho Dene Koe First Nation in a generalized group with other First Nations, the Crown fails to consider the impact of the Wildlife Management and Monitoring Plan on our rights and to determine the required level of consultation relative to the impacts.¹⁷ This is a faulty initiation of the consultation process.

The Crown's duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.¹⁸ The Government of Northwest Territories' Department of Environment and Natural Resources and Mackenzie Valley Land and Water Board would have informed Canadian Zinc that a Wildlife Management and Monitoring Plan would be required more than four years ago. Given the delays in the Crown's initiation of the consultation process with us, Acho Dene Koe First Nation wants to ensure that this process is not now rushed, that timelines will not be unilaterally imposed on Acho Dene Koe First Nation and that the process for consultation and accommodation is robust and meaningful. We seek assurance from the Crown that full and meaningful consultation (and accommodation) with us will occur.

In addition to our concerns with respect to the faulty initiation of the consultation process, as described below, Acho Dene Koe First Nation has a multitude of concerns relating to the Wildlife Management and Monitoring Plan and its impacts and infringements of Acho Dene Koe First Nation's Treaty and Aboriginal rights.

¹⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 130.

¹⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Gladstone*, [1996] 2 S.C.R. 723 para. 65.

¹⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, Para. 44.

¹⁷ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 20.

¹⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, para. 35.; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997 CanLII 2719 \(BC SC\)](#), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71

Proposed Construction of the Pioneer Winter Road

Canadian Zinc Corporation (CanZinc) has applied for a licence of occupation in association with the construction of a temporary winter road connecting the Prairie Creek Mine to NWT Highway 7 known as the Pioneer Winter road (Phase 1). Once constructed, this temporary winter road will support the development of a permanent All Season Road (Phase 2).

CanZinc in regulatory filings in support of Authorizations MV2014F0013¹⁹ and PC2014F0013 have outlined the significant construction equipment and infrastructure required for this project. This includes the use of temporary generators, lighting systems, explosives, air support, and a wide range of conventional construction equipment. Portions of the All Season Road (Phase 1 and Phase 2) will require right of way clearing, cutting, stripping and grubbing, and filling activities, all of which will contribute to significant localized noise, vibration, and light disturbance. Upon completion of construction activities, the All Season Road Phase 1 and Phase 2, in addition to the existing Prairie Creek winter road, will result in three cleared linear corridors approximately 170 km in length. These corridors will have impacts on the land for generations to come.

Legacy Impacts of the Original Prairie Creek Winter Road and Lack of Consultation or Assessment

The Pioneer Winter Road is proposed to follow the general route of an existing winter road utilizing its alignment to minimize the greenfield footprint of the Pioneer Winter Road. This road was constructed in the 1980s and was built in a time before adequate Indigenous consultation and consideration for impacts on what are now Section 35 Aboriginal and Treaty rights as described by the *Constitution Act*. Additionally, impact assessment, including any environmental or cultural assessment, if conducted at the time, would not meet minimum contemporary standards. While the existing road is a legacy of a different time in Crown-Indigenous relations, it is the Crown's responsibility, in the spirit of reconciliation, to correct historic wrongs and ensure consultation on the currently proposed project is full, meaningful and considers all potential impacts on Acho Dene Koe First Nation rights and interests.

Impacts of the Proposed Pioneer Winter Road Project on Acho Dene Koe First Nation Rights and Interests

CanZinc highlights several focuses for Effects Monitoring, which includes monitoring effects due to traffic levels, effects from/on wildlife harvesting, effects on Northern Mountain Caribou mortality and seasonal use and distribution along the Pioneer Winter Road, and effects on Boreal Caribou mortality. While we agree that these are important measures to monitor, the effects of the project extend far beyond the localized boundaries of the Pioneer Winter Road and All Season Road footprints. Construction and operation of the Pioneer Winter Road and All Season Road will greatly increase the amount of traffic along the NWT Highway 7/ BC Highway 77 corridor through both the Northwest Territories and British Columbia portion of Acho Dene Koe First Nation Territory, and passing by our main community of Fort Liard.

This highway corridor is an essential transit corridor for Acho Dene Koe First Nation members and provides access to cabins, hunting and trapping areas and river access points, located adjacent to the highway. The increased noise, vibration, dust and light associated with increase traffic, especially transport trucks and heavy hauling equipment, is expected to result

¹⁹ Canadian Zinc Corporation. 2019. Post-EA Information Package Including Update Project Description All Season Road to Prairie Creek Mine.
<https://registry.mvlwb.ca/Documents/MV2014F0013/MV2014F0013%20-%20CZN%20-%20App%201-3%20Draft%20Road%20Construction%20Mngt%20Plan%20-%20Feb20-19.pdf>

in significant wildlife disturbance along the Highway 7/77 corridor. Additionally, the increase in traffic along the Highway 7/77 corridor as a result of this project, will increase the risk of direct wildlife mortality due to collision. Acho Dene Koe First Nation will experience direct and material impacts to section 35 rights and other interests as a result of increased traffic due to the construction of the Pioneer Winter Road and All Season Road.

These impacts are likely to be experienced by our members as reduced hunting and trapping success in areas of our traditional territory overlapping and adjacent to the highway corridor and proposed Pioneer Winter Road and All Season Road routes. Both perceived and actual reduction in environmental quality, will alter how Acho Dene Koe First Nation members exercise rights and traditional activities in the area. At a minimum, effects monitoring must be expanded to include an assessment of impacts due to traffic disturbance and collision along the Highway 7/77 corridor, as well as the hunting and trapping success of Acho Dene Koe First Nation members. Beyond this, a full coordination assessment should occur to examine both anticipated and realized impacts to Acho Dene Koe First Nation rights and interests. Ultimately, the Project has been contemplated separately and in isolation from other plans and regional planning initiatives. As a result, Acho Dene Koe First Nation has not currently informed about how the Project will contribute to the cumulative infringement of its Treaty rights in the region.

The Proposed Check Point Infringes Acho Dene Koe First Nation's Treaty and Aboriginal Rights

CanZinc notes in Section 7.4.2 Access, and Traffic that "*A checkpoint screening and monitoring station will be implemented to deter unauthorized use of the PWR. The station will be staffed by representatives of the NDDB to help deter non-mine road traffic (i.e., recreational vehicles) from using the road. The checkpoint and screening station for the PWR will be located at the PWR-Nahanni Butte road junction.*" The proposed location of this checkpoint falls within Acho Dene Koe First Nation Traditional and asserted territory. Acho Dene Koe First Nation has not been engaged or consulted on the location of this checkpoint. While we understand the need to ensure public safety near an active construction site, the presence of security measures such as this will dissuade Acho Dene Koe First Nation members from using lands and waters near the project, out of fear of perceived or realized conflict. Further, this checkpoint represents both a significant regional deterrent to accessing Acho Dene Koe First Nations lands via the Nahanni Butte Road and more importantly a threat to Acho Dene Koe First Nation's sovereignty. A security checkpoint that prevents Acho Dene Koe First Nation members from accessing their lands, and is staffed by non-Acho Dene Koe First Nation members is unacceptable. The presence of security staff on or near Acho Dene Koe First Nation Territory represents a material infringement on Acho Dene Koe First Nations members' preferred manner of exercising Aboriginal Rights, limiting access to important sites of cultural significance.

CanZinc further note in section 7.4.2 Road, Access, and Traffic Procedure that "*Signs will be posted advising road users that the land is the traditional land of the Nahãê Dehé Dene Band, and a request that the road not be used and that no hunting should occur.*" Signage of this nature does not accurately characterize the entirety of the Pioneer Winter Road and All Season Road route, which traverses lands that are recognized by the Northwest Territories and Canada as Acho Dene Koe First Nation Traditional and asserted territory. Any assertion of territory made by from Nahãê Dehé Dene Band must fall outside of Acho Dene Koe First Nation Traditional and asserted territory, or explicitly recognized areas of overlapping Territorial claims.

Lack of Meaningful Engagement and Consideration of Acho Dene Koe First Nation Traditional Knowledge, Concerns, and Interests in Environmental and Wildlife Oversight

Dene Monitors represent an essential portion of the Wildlife Management and Monitoring Plan. As presented in this plan, Dene Monitors are to play a critical role in being responsible for implementing the Wildlife Management and Monitoring Plan, including project commitments, regulatory requirements, and importantly, permit conditions, mitigation measures, and monitoring programs. We agree that Indigenous-led monitoring is critical to the successful incorporation of Indigenous Knowledge. However, although the Pioneer Winter Road and All Season Road will traverse Acho Dene Koe First Nation territory, the Proponent does not acknowledge this and as a result, our members have been excluded from being able to participate as Dene Monitors even within our own territory. This is a significant oversight by the Crown and the Proponent. It violates Acho Dene Koe First Nation's right to manage our lands, while also depriving all parties of obtaining important knowledge about our territory. Acho Dene Koe First Nation's Traditional Knowledge is a valuable source of environmental information, which has developed over centuries of observations of the environment. Incorporating Acho Dene Koe First Nation's Traditional Knowledge into Wildlife Management and Monitoring improves the reliability and accuracy of such an assessment.

“Part B of the Project’s water licences contain two conditions related to the incorporation of Dene Knowledge into submissions required by the Mackenzie Valley Land and Water Board (MVLWB). One condition requires that CZN make every reasonable effort to consider and incorporate any Dene Knowledge made available to it. The second requires CZN to specifically identify any Dene Knowledge recommendations made and to describe how they were incorporated into each submission. In this section of the plan, we describe CZN’s approach to meeting these licence conditions. Note that the approach described was developed collaboratively by the ROC, which is made up of representatives of the NDDB, the LKFN, and CZN.”

Acho Dene Koe First Nation has not been afforded an adequate opportunity to conduct a Traditional Knowledge and Land Use Study as it relates to this project. Capacity funding provided to Acho Dene Koe First Nation has been insufficient to allow adequate engagement in the regulatory process, as well as commissioning analysis on transport impacts to wildlife or the collection of Traditional Knowledge. Capacity support for First Nations' participation overall is marginal and raises concerns about whether these regulatory or consultation processes are fair and reasonable. As a result, Traditional or Dene Knowledge reflecting Acho Dene Koe First Nation experience, values and concerns is not reflected in the Wildlife Management and Monitoring Plan, nor other project plans for the Pioneer Winter Road or All Season Road. Acho Dene Koe First Nation objects to the lack of inclusion of Traditional Knowledge representing Acho Dene Koe First Nation interests and use of the land. A portion of the Winter road and All Season Road traverse Acho Dene Koe First Nation Traditional territory. As a result, CanZinc's incorporation of Dene Knowledge, cannot be considered satisfactory or complete without meaningful consideration and inclusion of Acho Dene Koe First Nation Traditional Knowledge. CanZinc must provide adequate supports- including adjusting their aggressive timeline for this project, to Acho Dene Koe First Nation to collect and incorporate Traditional Knowledge as it relates to the All Season Road project.

The Proponent outlines that annual results collected through the Wildlife Management and Monitoring Plan, will be presented to local Indigenous groups during one of the proposed Road Oversight Committee meetings. The goal of this presentation will be to solicit feedback on the effectiveness of mitigation measures and suggest modifications to mitigation and monitoring plans. Further, the plan outlines adaptive management approaches outlined in the Wildlife

Management and Monitoring Plan utilize a combination of “science” and/or “Dene Knowledge”. A portion of the Pioneer Winter Road and prospective All Season Road (Phase 2) traverse through Acho Dene Koe First Nation territory. Acho Dene Koe First Nation has not been afforded adequate opportunity to collect Dene or Traditional Knowledge, and as a result, Knowledge representing Acho Dene Koe First Nation’s interests and concerns is not represented in project planning or adaptive management. Additionally, as Acho Dene Koe First Nation does not have representation in the Road Oversight Committee, it has not been afforded adequate opportunity to raise concerns related to the effectiveness of Wildlife Management and Monitoring Plan measures in protecting wildlife and areas of significance for Acho Dene Koe First Nation.

The Proponent has been repeatedly instructed by the Mackenzie Valley Land and Water Board to engage meaningfully with Acho Dene Koe First Nation, with regards to recognizing impacts to our rights and interests as it relates to the Pioneer Winter Road and All Season Road. Acho Dene Koe First Nation has been hampered in its capacity to conduct a Traditional Knowledge and Land Use Study related to this project as a result of insufficient capacity support provided by the Proponent as well as logistical challenges brought on by travel restrictions and public health concerns of the continuing COVID-19 pandemic.

Acho Dene Koe First Nation has provided CanZinc with a proposal for a Traditional Knowledge and Land Use study, as well as a framework approach for contributing to cultural heritage protection monitoring and oversight, as part of a Cultural Heritage and Environmental Monitoring working group. This working group could be implemented either in parallel to, or incorporated within, the terms of reference for the Road Oversight Committee, to address Acho Dene Koe First Nation concerns and identify mitigation solutions related to the All Season Road, for implementation in project plans. To date, CanZinc has not responded to this proposal.

If you have any questions concerning our response, I would ask that you email our Lands Office at lands@adkfirstnation.ca

Thank you.

Yours truly,
ACHO DENE KOE FIRST NATION
Signed on behalf of Sub Chief Brenda Berreault

Boyd Clark

Boyd Clark
Advisor/Acting Band Manager

Cc.

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Honourable Caroline Cochrane, M.L.A. Premier of the Northwest Territories
Honourable Shane Thompson, M.L.A., Minister (Environment and Natural Resources)
Shaleen Woodward, Principal Secretary (Executive and Indigenous Affairs)
Martin Goldney, Secretary to Cabinet/Deputy Minister (Executive and Indigenous Affairs)
Dr. Erin Kelly, Deputy Minister (Environment and Natural Resources)
Shawn McCann, Deputy Secretary Indigenous and Intergovernmental Affairs (Executive and Indigenous Affairs)

Dr. Brett Elkin, Assistant Deputy Minister, Operations (Environment and Natural Resources)
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