

how the Department ultimately addresses protecting roadless values would depend on a number of factors. Those included court decisions, public comments, and practical options for amending the current rule or using other administrative tools to implement inventoried roadless area protections.

During the public comment period for the first ANPR that closed on September 11, 2001, the Forest Service received over 726,000 responses. The responses represented two main points of view on natural resource management and perspectives on resource decisionmaking: (1) Emphasis on environmental protection and preservation, and support for making national decisions; and (2) emphasis on responsible active management, and support for local decisions made through the forest planning process. A 1,200 page summary of this public comment was prepared in May of 2002, and is available on the Forest Service internet site for Roadless Area Conservation at <http://www.roadless.fs.fed.us>.

#### *Relationship of Rulemaking Proposals to Alaska Litigation*

In January of 2001, the State of Alaska and six other parties filed a lawsuit against USDA contending that the roadless rule violated various statutes. On June 10, 2003, a settlement agreement was signed by the U.S. Department of Justice, the State of Alaska, and intervenor-plaintiffs to resolve and dismiss this litigation. This settlement agreement calls for the Federal Government to publish in the **Federal Register**, within 60 days: (1) A proposed temporary regulation that would exempt the Tongass National Forest from the application of the roadless rule until completion of the rulemaking process for any permanent amendments to the roadless rule; and (2) an advance notice of proposed rulemaking to exempt both the Tongass and the Chugach National Forests from the application of the roadless rule. This advance notice of proposed rulemaking, and a proposed rule published elsewhere in today's **Federal Register** to exempt the Tongass National Forest from the applicability of the roadless rule, fulfill these terms of the settlement agreement.

#### *A Unique Situation Exists in the State of Alaska*

In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA). In ANILCA, Congress found that the Act provided the proper balance between the protection of environmental values while providing

opportunity for the satisfaction of the economic and social needs of the people in Alaska. The Act set aside millions of acres in Alaska for the National Park Service, Forest Service, National Monuments, National Wildlife Refuges and Wilderness Areas.

If the Tongass and the Chugach National Forests are exempted from the roadless rule, the Forests would continue to be managed pursuant to the existing Forest Plans. Both the 1997 Revised Forest Plan (as readopted by the February 2003 Record of Decision) for the Tongass and the 2002 Revised Forest Plan for the Chugach were developed through fair and open planning processes, based on years of extensive public involvement and thorough scientific review, and provide full consideration of social, economic, and ecological values. The net effect of amending the roadless rule to exclude National Forest System lands in the State of Alaska would be to allow timber harvest in approximately 300,000 additional acres (approximately 3 percent) on the Tongass out of 9.34 million inventoried roadless acres, and possible access and development on 150,000 additional acres out of 5.4 million roadless acres on the Chugach. Timber harvest would be prohibited on approximately 95 percent of National Forest System lands in the State of Alaska under the existing forest plans, if both the Tongass and the Chugach National Forests were excluded from application of the prohibitions of the roadless rule.

#### **Public Comment Solicitation**

All interested parties are encouraged to express their views in response to this request for public comment on the following question:

Should any exemption from the applicability of the roadless rule to the Tongass National Forest be made permanent and also apply to the Chugach National Forest?

#### **Regulatory Findings**

This second advance notice of proposed rulemaking is being issued to report on public input received and to obtain public comment regarding the protection and management of inventoried roadless areas in the State of Alaska. Because the Department is not proposing any specific action at this time, there are no regulatory findings associated with this notice. Comments received will help the Department determine the extent and scope of any future rulemaking.

#### **Conclusion**

The Department of Agriculture is considering a permanent exemption for the Tongass and Chugach National Forests from the applicability of the roadless rule. Public input and comment received through this second advance notice of proposed rulemaking will help inform the Department's consideration of future rulemaking proposals.

Dated: June 30, 2003.

**Dale N. Bosworth,**  
*Chief.*

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## **DEPARTMENT OF AGRICULTURE**

### **Forest Service**

#### **36 CFR Part 294**

#### **RIN 0596-AC04**

#### **Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of proposed rulemaking; request for comment.

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**SUMMARY:** The Department of Agriculture, Forest Service is proposing to amend regulations concerning the Roadless Area Conservation Rule (hereinafter, referred to as the roadless rule) to exempt the Tongass National Forest (hereinafter, referred to as the Tongass) from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas until a final rule is promulgated as announced by the Forest Service on July 10, 2001, in an advance notice of proposed rulemaking.

In seeking public comment on this proposal to amend the roadless rule, the agency is fulfilling part of the Department's obligations under the June 10, 2003 settlement agreement for *State of Alaska v. USDA*, while maintaining the ecological values of inventoried roadless areas in the Tongass National Forest.

In *State of Alaska v. USDA*, the State of Alaska and other plaintiffs alleged that the roadless rule violated a number of federal statutes, including the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Passed overwhelmingly by Congress in 1980, ANILCA sets aside millions of acres in Alaska for the National Park Service, Forest Service, National Monuments, National Wildlife Refuges, and Wilderness Areas with the

understanding that sufficient protection and balance would be ensured between protected areas and multiple-use managed areas, and that there would be no more administrative land withdrawals. The Alaska lawsuit alleged that USDA violated ANILCA by applying the requirements of the roadless rule to Alaska's national forests. USDA settled the lawsuit by agreeing to publish this proposed rule to temporarily exempt the Tongass from the application of the roadless rule, and to publish the separate advance notice of proposed rulemaking (located elsewhere in the same part of today's **Federal Register**) requesting comment on whether to exempt permanently the Tongass and the Chugach National Forests in Alaska from the application of the roadless rule.

Under the settlement, the vast majority of Alaska National Forests will remain off limits to development. Timber harvest will be prohibited on more than 95 percent of Alaska National Forests as required under existing forest plans. Exempting the Tongass National Forest from the application of the roadless rule would make approximately 300,000 roadless acres available for forest management—slightly more than 3 percent of the 9.3 million roadless acres in the Tongass, or 0.5 percent of the total roadless acres nationwide. Exempting the Chugach National Forest from the application of the roadless rule would permit road access on approximately 150,000 acres—less than 3 percent of the forest's 5.4 million roadless acres, or 0.3 percent of the total roadless acres nationwide. The proposals under the settlement would preserve all old-growth reserves, riparian buffers, beach fringe buffers, roadless areas, and other protections contained in the forest plans. The roadless rule would also continue to apply to the 43.7 million roadless acres in national forests outside of Alaska.

Public comment is invited and will be considered in the development of the final rule.

**DATES:** Comments must be postmarked by August 14, 2003.

**ADDRESSES:** Send written comments to: Roadless TNF, Content Analysis Team, USDA Forest Service, P.O. Box 22810, Salt Lake City, UT 84122; by electronic mail to [roadlesstnf@fs.fed.us](mailto:roadlesstnf@fs.fed.us); or by facsimile to (801) 880-2808. If you intend to submit comments in batched e-mails from the same server, please be aware that electronic security safeguards on Forest Service and Department of Agriculture computer systems intended to prevent commercial spamming may limit batched e-mail access. The Forest

Service is interested in receiving all comments on this proposed rule, however, so please call (801) 517-1020 to facilitate transfer of comments in batched e-mail messages. Please note that all comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The agency cannot confirm receipt of comments. Individuals wishing to inspect the comments should call Jody Sutton at (801) 517-1023 to schedule an appointment.

**FOR FURTHER INFORMATION CONTACT:** In Washington, DC contact: Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA, (202) 205-1019; and in Juneau, Alaska contact: Jan Lerum, Regional Planner, Forest Service, USDA, (907) 586-8796.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background and Litigation History**

On January 12, 2001, the Department published a final rule entitled "Special Areas; Roadless Area Conservation" (66 FR 3244) ("the roadless rule"). The roadless rule was a discretionary rule that fundamentally changed the Forest Service's longstanding approach to management of inventoried roadless areas by establishing nationwide prohibitions generally limiting, with some exceptions, timber harvest, road construction, and reconstruction within inventoried roadless areas in national forests. A draft environmental impact statement (DEIS) (May 2000) and final environmental impact statement (FEIS) (November 2000) were prepared and included consideration of alternatives that specifically exempted the Tongass National Forest from the roadless rule's prohibitions. As described in the FEIS, the roadless rule was predicted to cause substantial social and economic hardship in communities throughout Southeast Alaska (FEIS Vol. 1, 3-202, 3-326 to 3-350, 3-371 to 3-392). Nonetheless, the final rule extended the rule's prohibitions to the Tongass National Forest.

The roadless rule has been subject to a number of lawsuits in Federal district courts in Idaho, Utah, North Dakota, Wyoming, Alaska, and the District of Columbia. In one of these lawsuits, the District Court of Idaho issued a nationwide preliminary injunction prohibiting implementation of the roadless rule. The preliminary injunction decision was reversed and remanded by a panel of the Ninth Circuit Court of Appeals. The Ninth Circuit held that the Forest Service's preparation of the environmental impact statement for the

roadless rule was in conformance with the general statutory requirements of the National Environmental Policy Act.

In another lawsuit, the State of Alaska and six other parties alleged that the roadless rule violated the Administrative Procedure Act, National Forest Management Act, National Environmental Policy Act, Alaska National Interest Lands Conservation Act, Tongass Timber Reform Act and other laws. In the June 10, 2003, settlement of that lawsuit, the Department committed to publishing a proposed rule with request for comment that would exempt the Tongass National Forest from application of the roadless rule. The Department made no representations regarding the content or substance of any final rule that may result.

If the Tongass National Forest is exempted from the prohibitions in the roadless rule, the Forest would continue to be managed pursuant to the 1997 Tongass Forest Plan with non-significant amendments, as readopted in the February 2003 Record of Decision (2003 Plan) issued in response to the district court's remand of the 1997 Plan in *Sierra Club v. Rey*, (D. Alaska). Both documents were developed through fair and open planning processes, based on years of extensive public involvement and thorough scientific review. The 2003 Tongass Forest Plan provides a full consideration of social, economic, and ecological values in Southeast Alaska. This rulemaking does not propose to reduce any of the old-growth reserves, riparian buffers, beach fringe buffers, or other standards and guidelines of the 2003 Tongass Forest Plan or, in any way, impact the protections afforded by the plan.

##### **Congress Has Given Specific Direction To Protect the National Interest in Alaska Public Lands**

Congress has provided specific direction to protect the national interest in the public lands in Alaska. The Alaska National Interest Lands Conservation Act (ANILCA) of 1980 (16 U.S.C. 3210) established vast areas of conservation system units, including more than 50 percent of the combined acreage of all designated wilderness areas in the Nation. Congress further found that the Act provides sufficient protection for the national interest in the scenic, natural, cultural, and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.

In 1990, Congress provided additional management direction to reflect national interests in Alaska by passing the Tongass Timber Reform Act. The Tongass Timber Reform Act amended ANILCA by directing the Secretary of Agriculture, subject to certain limitations, to seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber and (2) meets the market demand for timber for each planning cycle.

The Department will consider whether the proposed rule better implements the national interests proclaimed by Congress for the Tongass National Forest.

#### **Most Southeast Alaska Communities Are Significantly Impacted by the Roadless Rule**

There are thirty two communities within the boundary of the Tongass National Forest. Most Southeast Alaska communities lack road and utility connections to other communities and to the mainland systems. Because most Southeast Alaska communities are surrounded on land by inventoried roadless areas of the Tongass National Forest, the roadless rule significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for granted. If the proposed rule is adopted, communities in Southeast Alaska would be able to propose road and utility connections across national forest system land that will benefit their communities. Any such community proposal would then be evaluated on its own merits.

In addition, the preponderance of federal land in Southeast Alaska results in communities being more dependent upon Tongass National Forest lands and having fewer alternative lands to generate jobs and economic activity. The communities of Southeast Alaska are particularly affected by the roadless rule prohibitions. The FEIS estimated that approximately 900 jobs could be lost in Southeast Alaska due to the application of the roadless rule.

#### **Roadless Areas Are Common, Not Rare, on the Tongass National Forest**

The 16.8 million acre Tongass National Forest in Southeast Alaska is approximately 90 percent roadless and undeveloped. The vast majority of the 9.34 million acres of inventoried roadless areas and their associated values in the Tongass are already either protected through Congressional designation or through the Tongass Forest Plan.

Congress has designated 39 percent of the Tongass as Wilderness, National Monument, or other special designations which prohibit commercial timber harvest and road construction, with certain limited exceptions. An additional 39 percent of the Tongass is managed under the Forest Plan to maintain natural settings where commercial timber harvest and road construction are not allowed. About 4 percent of the Tongass is designated suitable for commercial timber harvest, with about half of that area contained within inventoried roadless areas. The remaining 18 percent of the Forest is managed for various multiple uses. The Tongass Forest Plan provides high levels of resource protection, and has been designed to assure ecological sustainability over time while allowing some development to occur that supports communities dependent on the management of National Forest System lands in Southeast Alaska.

In addition, the State of Alaska as a whole has an extensive network of protected areas. Alaska has the greatest amount of land and the highest percentage of its land base in conservation reserves of any state. Federal lands comprise 59 percent of the state and 40 percent of federal lands in Alaska are in conservation system units.

#### **Different Approaches Considered for the Tongass National Forest**

The unique situation of the Tongass National Forest has been recognized throughout the Forest Service's process for examining prohibitions in inventoried roadless areas. The process for developing the roadless rule included different options for the Tongass in each stage of the promulgation of the rule and each stage of the environmental impact statement.

In February 1999, the agency exempted the Tongass and other forests with recently revised forest plans from an interim rule prohibiting new road construction. The October 1999 Notice of Intent to prepare an environmental impact statement for the roadless rule specifically requested comment on whether or not the rule should apply to the Tongass National Forest in light of the recent revision of the Tongass Forest Plan and the ongoing economic transition of communities and the timber program in Southeast Alaska. The May 2000 DEIS for the roadless rule proposed to postpone making a decision for the Tongass until April 2004, in association with the 5-year review of the Tongass Forest Plan.

The preferred alternative was altered in the November 2000 FEIS to include

prohibitions on timber harvest, as well as road construction and reconstruction on the Tongass, effective April 2004. The FEIS recognized that the economic and social impacts of including the Tongass in the roadless rule's prohibitions could be of considerable consequence in communities where the forest products industry is a significant component of local economies. The FEIS also noted that if the Tongass was exempt from the roadless rule prohibitions, loss of habitat and species abundance would not pose an unacceptable risk to diversity across the forest.

The final January 12, 2001 roadless rule directed an immediate prohibition on timber harvest, road construction, and reconstruction in roadless areas, except for projects that already had a notice of availability of a draft environmental impact statement published in the **Federal Register**.

#### **Litigation Settlement**

In January 2001, the State of Alaska filed a lawsuit against the United States Department of Agriculture contending the roadless rule violated the Administrative Procedure Act, National Forest Management Act, National Environmental Policy Act, Alaska National Interest Lands Conservation Act, Tongass Timber Reform Act and other laws.

In fulfillment of one of its obligations under the settlement agreement for *State of Alaska v. USDA*, and after consideration of the circumstances surrounding the development and promulgation of the roadless rule relative to the Tongass and the implications of implementing the rule, the Department is seeking public comment on this proposal to amend the roadless rule. This proposed rule has been developed in light of the factors and issues described in this preamble, including serious concerns about the previously disclosed economic and social hardships the application of the rule's prohibitions would cause in communities throughout Southeast Alaska.

#### **Conclusion**

For the reasons identified in this preamble, the Department is proposing to amend paragraph (d) of § 294.14 of the Roadless Area Conservation Rule to exempt the Tongass National Forest from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas until the Department promulgates a revised final roadless area conservation rule as announced in the

July 10, 2001, advance notice of proposed rulemaking (66 FR 35918).

### Regulatory Certifications

#### *Regulatory Impact*

This proposed rule has been reviewed under USDA procedures and Executive Order (E.O.) 12866, Regulatory Planning and Review, and designated as significant by the Office of Management and Budget (OMB). OMB has reviewed this proposed rule since it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

A cost-benefit analysis has been conducted on the impact of this proposed rule and incorporates by reference the detailed regulatory impact analysis prepared for the January 12, 2001, roadless rule, which included the Tongass Exempt Alternative. Much of this analysis was discussed and disclosed in the FEIS for the roadless rule. A review of the data and information from the original analysis and the information disclosed in the FEIS found that it is still relevant, pertinent, and sufficient in regards to exempting the Tongass from the application of the roadless rule. The Department has concluded that no new information exists today that would significantly alter the results of the original analysis.

Moreover, this proposed rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial and final regulatory flexibility analysis was conducted on the proposed and final roadless area conservation rule, which included the effects associated with the Tongass National Forest. An initial small entities flexibility assessment for this proposed rule has been made and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by SBREFA. This proposed rule will not impose record keeping requirements; will not affect small entities' competitive position in relation to large entities; and will not affect small entities' cash flow, liquidity, or ability to remain in the market.

#### *Environmental Impact*

The Department prepared a Draft EIS (May 2000) and Final EIS (November 2000) in association with promulgation of the roadless area conservation rule. The DEIS and FEIS examined in detail sets of Tongass-specific alternatives. In

the DEIS the Department proposed the Tongass Deferred Alternative, which would not have applied the rule's prohibitions to the Tongass National Forest but would have required that the agency make a determination as part of the five-year plan review whether to prohibit road construction in unroaded portions of inventoried roadless areas, and would have directed that an evaluation of whether and how to protect roadless characteristics, in the context of multiple use management, be conducted during the next Tongass Forest Plan revision. In the FEIS, the Department identified the Tongass "Not Exempt" as the Preferred Alternative, which would have treated the Tongass National Forest the same as all other national forests, but delayed implementation of the rule's prohibitions until April 2004. This delay would have served as a social and economic mitigation measure by providing a transition period for communities most affected by changes in management of inventoried roadless areas in the Tongass. In the final rule published on January 12, 2001, however, the Department selected the Tongass "Not Exempt" alternative which immediately applied the rule's prohibitions to inventoried roadless areas on the Tongass, but allowed road construction, reconstruction, and the cutting, sale, and removal of timber from inventoried roadless areas where a notice of availability for a draft environmental impact statement for such activities was published in the **Federal Register** prior to January 12, 2001.

In February 2003, in compliance with the district court's order in *Sierra Club v. Rey* (D. Alaska), the Forest Service issued a Record of Decision (ROD) and a Supplemental Environmental Impact Statement (SEIS) to the 1997 Revised Tongass Forest Plan that examined the site-specific wilderness and non-wilderness values of the inventoried roadless areas on the Forest as part of the forest planning process. The February 2003 ROD readopted the 1997 Tongass Forest Plan with non-significant amendments as the current forest plan. Congress has prohibited administrative or judicial review of the February 2003 ROD. Section 335 of the 2003 Omnibus Appropriations Act provides that the ROD for the 2003 SEIS for the 1997 Tongass Land Management Plan shall not be reviewed under any Forest Service administrative appeal process, and its adequacy shall not be subject to judicial review by any court in the United States.

Because the 2000 FEIS for the final roadless area conservation rule

considered exempting the Tongass National Forest as a detailed alternative, the decision to issue this proposed amendment is expected to be based on the FEIS, unless the Department finds that there are significant new circumstances or information relevant to environmental concerns and bearing on this alternative or its impacts that would warrant additional environmental impact analysis. A final determination will be made before adoption of the final rule. The FEIS is available in the document archives section of the Roadless Area Conservation internet site at <http://www.roadless.fs.fed.us>.

#### *No Takings Implications*

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12360, and it has been determined that the proposed rule will not pose the risk of a taking of a Constitutionally-protected private property, as the rule is limited to exempting temporarily the applicability of the roadless area conservation rule to the Tongass National Forest.

#### *Energy Effects*

This proposed rule has been analyzed under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this proposed rule does not constitute a significant energy action as defined in the Executive order.

#### *Civil Justice Reform*

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Department has not identified any State or local laws or regulations that are in conflict with this action or that would impede full implementation of this rule. Nevertheless, in the event that such a conflict was to be identified, the proposed rule, if implemented, would preempt the State or local laws or regulations found to be in conflict. However, in that case, (1) no retroactive effect would be given to this proposed rule; and (2) the Department would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

#### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this proposed rule on State, local and tribal governments and the private sector. This proposed rule does not

compel the expenditure of \$100 million or more by any State, local, or tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

*Federalism and Consultation and Coordination With Indian Tribal Governments*

The Department has considered this proposed rule under the requirements of Executive Order 13132, Federalism. The agency has made a preliminary assessment that the rule conforms with the federalism principles set out in this Executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Based on comments received on this proposed rule, the Department will consider if any additional consultation will be needed with State and local governments prior to adopting a final rule.

Moreover, this proposed rule does not have tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. However, Forest Service line officers in the field have been asked

to make contact with Tribes to ensure awareness of this proposed rule and conduct government-to-government dialog.

*Controlling Paperwork Burdens on the Public*

This proposed rule does not contain any record keeping, reporting requirements, or other information collection requirements as defined in 5 CFR part 1320, and therefore imposes no paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

*Government Paperwork Elimination Act Compliance*

The Forest Service is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

**List of Subjects in 36 CFR Part 294**

National Forests, Navigation (air), Recreation and recreation areas, Wilderness areas.

Therefore, for the reasons set forth in the preamble, the Department of

Agriculture proposes to amend part 294 of title 36 of the Code of Federal Regulations as follows:

**PART 294—SPECIAL AREAS**

**Subpart B—Protection of Inventoried Roadless Areas**

1. The authority citation for subpart B continues to read as follows:

**Authority:** 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

2. Revise paragraph (d) of § 294.14 to read as follows:

**§ 294.14 Scope and applicability.**

\* \* \* \* \*

(d) Until the USDA promulgates a revised final roadless area conservation rule [to which the agency originally sought public comments in the July 10, 2001, advance notice of proposed rulemaking (66 FR 35918)], this subpart does not apply to road construction, reconstruction, or the cutting, sale, or removal of timber in inventoried roadless areas in the Tongass National Forest.

\* \* \* \* \*

Dated: July 2, 2003.

**Joel D. Holtrop,**

*Acting Chief.*

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