The movement to make the wearing of fur seem "vulgar and symbolic of someone who is tasteless, uncaring, and uneducated" has been quite successful. As far as the Animal Rights leaders are concerned, they oppose any exploitation of animals, no matter how humanely the animals are raised and slaughtered.

In contrast, I take a different view. I want to see pain and suffering minimized. But I think it would be a dull world with no pets, domestic animals, and for that matter most game and fur animals, which survive today only because they are wanted. I think it is wonderful that so many wanted animals are born, live a healthy life (animals born in captivity are not aware of what it's like in the cruel world), and usually live longer than the average age of their wild counterparts. If living wild is so great, maybe we should let our tame and captive animals experience the rigors of nature, such as food shortages, diseases, weather extremes, fighting, and cannibalism.

In summary, is it not better for an animal to have lived a good life even if it is going to die prematurely but humanely? In modified environments, people must assist nature by being predators, since all species must have a high rate of premature mortality, even if we must inflict some pain to insure that the "species population" has a good quality of life. The necessary pain and suffering inflicted by people, however, should be minimized and regulated. Even though nature can be considered a battlefield, with the most bizarre forms of cruelty occurring daily, we have a moral obligation to manage nature as best we can once we have altered it, and to do it as humanely as possible.

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The Wilderness Problem in Idaho: Is S. 371 - The Idaho Forest Management Act of 1989 - The Solution?

by Matthew J. Smith

INTRODUCTION

On November 1, 1989, the Senate Committee on Energy and Natural Resources favorably reported Senate Bill 371 (S. 371), the *Idaho Forest Management Act of 1989,* to the Senate floor. This bill, sponsored by Senator James McClure of Idaho, seeks to resolve a long-standing dispute between conservationists and developers over 9.3 million acres of roadless U.S. Forest Service land in Idaho. Conservationists want Congress to add almost half of this land to the National Wilderness Preservation System. Developers want almost all of the land released for multiple-use management. S. 371 attempts to strike a compromise between these opposing sides. Unfortunately, the bill contains several highly controversial provisions that ultimately make it a poor solution to the wilderness problem in Idaho.

1985 - Donna J. Barr

THE ROOTS OF THE WILDERNESS PROBLEM

As early as 1924, the U.S. Forest Service began to set aside portions of its land for wilderness preservation. By 1964, when Congress passed the *Wilderness Act,* Pub. L. No. 88-577, 78 Stat. 890 (16 U.S.C. §§ 1132-1136 (1988)), the Forest Service had designated 9.1 million acres nationally as "wilderness," "wild," or "canoe" areas. The Wilderness Act required the Forest Service to preserve and protect these and subsequent wilderness areas "in

their natural condition." These original wilderness areas formed the foundation for the National Wilderness Preservation System (NWPS). The Wilderness Act also required the Secretary of Agriculture to review 5.4 million acres of Forest Service land previously designated as "primitive" areas for inclusion in the NWPS. The Wilderness Act required the Forest Service to protect these primitive areas from development until reviewed. Those areas not then designated as wilderness areas would become eligible for development at that time. The Wilderness Act made no provision, however, for over 60 million acres of roadless Forest Service land that the Forest Service itself had not previously expressly set aside for preservation.

To forestall conflict over future development of these roadless lands, the Forest Service undertook a nationwide study in 1971 to determine which of these lands were suitable to preserve as wilderness. On the basis of this study, the first Roadless Area Review and Evaluation (RARE I), the Forest Service selected 12.3 million acres for further study and released the remaining 50 million acres for development.

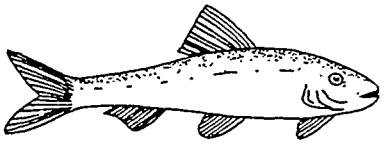
Conservation groups immediately sought an injunction against development of the released lands. *Sierra Club v. Butz,* 3 Envtl. L. Rep. (Envtl. L. Inst.) 20072 (Aug. 29, 1972). The groups claimed that RARE I violated the *National Environmental Policy Act* (42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1982 & Supp. V 1987)) (NEPA) because the study insufficiently evaluated the environmental impact of development on the released roadless areas. When the district court granted the injunction in October, the Forest Service agreed to undertake environmental impact studies that would meet NEPA standards before developing any of the released areas. Consequently, in December, 1972, the case was dismissed.

At first, the Forest Service decided to perform the promised environmental impact studies as part of its normal forest management planning program. However, when this process proved too slow, the Forest Service decided to perform a second nationwide study of its roadless lands (RARE II) beginning in 1977. By making a more detailed evaluation than it had in RARE I, the Forest Service hoped to resolve permanently the conflict over its roadless lands.

After two years of study, the Forest Service published the RARE II Final Environmental Statement (FES) in January, 1979. In this statement, the Forest Service recommended 15 million acres for addition to the NWPS, 10.8 million acres for further study, and 36.1 million acres for development. In April, President Carter submitted these recommendations, with minor changes, to Congress. Congress then began to draft its legislation.

However, in July, 1979, the State of California sued the Forest Service to prevent development of areas in California recommended for release in the RARE II FES. In January, 1980, the district court granted the requested injunction against development on the grounds that, once again, the Forest Service had failed to comply with NEPA standards. *California v. Bergland,* 483 F. Supp. 465 (E.D. Cal. 1980). In 1982 the Ninth Circuit Court of Appeal upheld the district court's ruling. *California v. Block,* 690 F. 2d 753 (9th Cir. 1982). Though the ruling affected only roadless areas in California, it effectively invalidated the entire RARE II study by leaving the Forest Service vulnerable to similar injunctions across the nation.

As it had in 1972, the Forest Service again faced the task of performing an entirely new survey of its roadless lands. This time the Forest Service decided against a nationwide study. Instead, it decided to rely on its forest management planning process. *The Forest and Rangeland Renewable Resources Planning Act of 1974* (16 U.S.C. §§ 1601-1614 (1988)), as modified by the *National Forest Management Act of 1976*, Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended in scattered sections of 16 U.S.C.), required the Forest Service to create individual forest management plans for each national forest by 1985 and to revise the plans every 10 to 15 years. Under these statutes, each plan had to include an environmental impact study. In making these studies, the Forest Service was required to consider all



possible uses, including wilderness designations. Therefore, the Forest Service proposed to rely on these plans, currently under initial development, to study the wilderness option for its roadless areas.

Congress did not want to wait until 1985, however. With President Carter's recommendations in hand, Congress was determined to resolve the problem of the Forest Service roadless areas based on RARE II. At first, some members of Congress wanted to end the controversy quickly by passing a nationwide wilderness bill. However, they soon realized that only a state-by-state approach would succeed. Under this approach, each state's delegation would craft a wilderness bill for that state based on RARE II. Each bill would include a statement that the RARE II FES was sufficient under NEPA standards and would not be subject to further judicial review ("sufficiency" language). Each bill would also stipulate that any roadless area evaluated in RARE II, but not designated by the bill as wilderness, would be released for multiple-use management upon the bill's passage ("release" language).

Unfortunately, an obstacle to the passage of these RARE II wilderness bills soon arose. Developers feared that lands released under a RARE II bill would only become tied up again when the Forest Service completed its first generation of individual forest plans. Consequently, the developers wanted language in the bills that would prohibit the Forest Service from ever considering the wilderness designation option once a RARE II bill had been passed. Conservationists opposed this "hard" release language, preferring no release language at all. A newly-elected Republican Senate sided with the developers, while the House favored the conservationists.

For three years, RARE II wilderness bills died in committee, victims of the stalemate over release language. Then, in May 1984, the two sides compromised. Under this compromise, the Forest Service would not be required to consider the wilderness designation option when performing its first generation of forest plans. Additionally, the Forest Service would not have to preserve any released roadless land for wilderness consideration during its revision of the plans every 10 or 15 years. However, in making these revisions, the Forest Service would be required, once again, to consider the wilderness designation option for those previously released areas not yet developed. As a result of this compromise, RARE II bills from eighteen states passed Congress in 1984, adding 8.6 million acres of wilderness to the NWPS. The RARE II controversy appeared to be over.

THE FIGHT OVER IDAHO'S RARE II LEGISLATION

In Idaho, however, the RARE II controversy was just heating up in 1984. Developers and conservationists had been fighting over roadless Forest Service land in Idaho since the Wilderness Act's passage in 1964. By 1984, Idaho's share of the NWPS totalled nearly 3.9 million acres, an amount second only to Alaska's share. Yet Idaho still possessed approximately 9.3 million acres of unprotected roadless Forest Service land. The timber and mining industries wanted this land for resource development. Conservationists wanted it for more wilderness preservation.

President Carter's 1979 RARE II recommendations to Congress suggested wilderness status for 1.3 million of the 9.3 million acres available. Yet in March, 1984, when an Idaho RARE II bill finally appeared in the Senate, the bill designated only 526,064 acres as wilderness. This small designation proved what Idaho conservationists already knew: that the Idaho congressional delegation, headed by Senator James McClure, strongly favored development. As chairman of the Senate Committee on Energy and Natural Resources since 1980, Senator McClure had backed the developers' demand for "hard" release language in the RARE II bills. Since all the wilderness bills had to pass through his committee, Senator McClure's refusal to pass bills without "hard" release language led to the stalemate over RARE II legislation. It was not until May 1, 1984, when his own RARE II bill was ready to leave the committee, that Senator McClure finally agreed to the compromise language that ended the RARE II stalemate. Consequently, on May 2, 1984, the Senate Energy and Natural Resources Committee favorably reported Senator McClure's bill, the Idaho Forest Management Act of 1984, to the Senate floor.

Within a week, Idaho Governor John Evans arrived in Washington. He asked Congressman John Sieberling of Ohio, chairman of the House Subcommittee on Public Lands, to review the adequacy of the wilderness designations in Senator McClure's bill. Governor Evans also invited Congressman Sieberling and Congressmen Jim Moody of Wisconsin and Peter Kostmayer of Pennsylvania to visit Idaho in the summer of 1984. During that visit, Congressmen Moody and Kostmayer agreed to sponsor their own Idaho RARE II

wilderness bill on behalf of Idaho conservationists. On August 1, Congressmen Moody and Kostmayer introduced into the House the *Idaho Wilderness Act of 1984*, which proposed 3.4 million acres of Forest Service land for wilderness designation.

Due to the dispute over the amount of designated wilderness, the 98th Congress ended in November, 1984, without any further action on either Idaho wilderness bill. Although Senator McClure's compromise on the release language had led to the passage of RARE II bills for eighteen states, Idaho was not one of them.

The House's Idaho Wilderness Act reappeared in both the 99th and 100th Congresses, substantially unchanged except for an increase in wilderness designations to 3.9 million acres. Both times, the bill expired without any action being taken.

Senator McClure introduced a new version of the *Idaho Forest Management Act* in the 100th Congress; a version that he and Idaho Governor Cecil Andrus, the successor to John Evans, engineered. As a concession to conservationists, the bill designated 1.4 million acres as wilderness. As a concession to developers, the bill designated 611,000 acres as special management areas, which opened them for development. Though Senator McClure claimed the bill was "a reasonable, workable compromise" (134 CONG. REC. S757 (daily ed. Feb. 16, 1988) (statement of Sen. McClure)), neither side agreed. Consequently, the 100th Congress ended in November, 1988, without final committee action on the bill. Once again, Congress had failed to find a solution to Idaho's wilderness problem.

S. 371: SENATOR MCCLURE'S NEWEST SOLUTION

Senator McClure introduced his newest version of the Idaho Forest Management Act to the 101st Congress on February 7, 1989. After hearings in July and mark-up in September, the Senate Committee on Energy and Natural Resources favorably reported the bill, with amendments, to the Senate floor where it now awaits further action. This bill, S. 371, is essentially the same legislation that Senator McClure introduced in 1988. Even after the Senate Energy Committee amended the bill, it still contains several controversial provisions, including: (1) the amount of designated wilderness, (2) the creation of special management areas, (3) the denial of federal reserved water rights, and (4) the method of determining wilderness boundaries. Examination of these provisions reveals that S. 371 is a poor solution to the Idaho wilderness problem.

A. Amount of Wilderness

The 1989 version of the Idaho Forest Management Act would add approximately 1.4 million acres to the NWPS. S. 371, 101st Cong., 1st Sess. § 102 (1989). Although this acreage is nearly three times the amount offered by the 1984 version of the bill, conservationists still want more. Thus, conservationists have once again enlisted the help of Congressman Kostmayer, who reintroduced his Idaho Wilderness Act to the House on May 3, 1989. This bill would designate almost 4 million acres of wilderness. H.R. 2213, 101st Cong., 1st Sess. § 3 (1989).

With almost 4 million acres of wilderness already, Idaho trails only Alaska and California in the amount of land contributed to the NWPS. The new wilderness areas proposed by conservationists in the Idaho Wilderness Act would double Idaho's share of wilderness, withholding 40 percent of the state's Forest Service land from the timber industry. Naturally, the timber industry fears that losing this much of its resource base would lead to mill closures and high unemployment.

Senator McClure's bill would prevent access to only 25 percent of the national forest land in Idaho. However, the timber industry fears losing even this lesser amount. Ironically, as conservationists point out, the Forest Service has traditionally lost revenues with its timber sales in Idaho because of the high cost of building roads in Idaho's rugged national forests. The roads are built for the primary purpose of giving the timber companies access to the trees. A bill that would deny the timber industry access to more roadless land would cut the government's losses; losses that effectively subsidize the timber industry.

Ultimately there is no right answer to the question of how much wilderness should be preserved, because it is a question of conflicting values. For Idaho, however, Senator McClure's proposal of 1.4 million acres is not unreasonable as a pragmatic answer to that particular question. Senator McClure reached this figure after extensive meetings with Governor Andrus and many Idaho citizens. He has moved from his traditional pro-development position, reflected in the 1984 bill's recommended 526,064 acres, toward a middle ground. In contrast, conservationists have only increased their demands. Moreover, the Forest Service itself has recommended nearly the same amount of wilderness as

Senator McClure, 1.3 million acres, in its individual forest plans for Idaho, of which all but one are complete. Although Senator McClure's bill would not end the wilderness controversy, because the Forest Service can still reconsider the wilderness option in revising its forest plans, the bill would provide some degree of stability. Thus, with no other compromise on the table, S. 371 provides the best answer yet to the question, "how much wilderness?"

B. Special Management Areas

If S. 371 stopped with the designation of 1.4 million acres of wilderness, the bill would deserve to become law. Unfortunately, the bill includes more controversial provisions. The first of these provisions creates eight special management areas covering approximately 607,760 acres of roadless Forest Service land. S. 371, 101st Cong., 1st Sess. § 103 (1989). The bill requires that the Forest Service manage these areas according to prescriptions that include mandated timber harvesting and land reservations solely for motor vehicle use. Although similar prescriptions for these areas already exist in the individual forest plans, having these prescriptions written into the law would permit developers to circumvent public appeals of the forest plans and avoid the delays caused by the appeals.

For example, when the Forest Service normally proposes development of a previously undeveloped area, the public may challenge the proposal by administrative and judicial appeals. All development is halted while the appeal is pending. If a RARE II wilderness bill, containing standard release and sufficiency language, previously released the area for development, then the public cannot challenge that the Forest Service failed to adequately study the wilderness designation option for that area. Still, other grounds for appeal remain available. However, if Congress mandates the proposed development by law, any normal public appeal would be impossible. Thus, the special management prescriptions in S. 371 would prevent the delay in development caused by public appeal of similar provisions in the forest management plans.

These prescriptions in S. 371 would also prevent the Forest Service from using its discretion in managing the special management areas of the Idaho national forests. Under the special management prescriptions, even if the areas' needs and conditions changed, only another Congressional act could alter the prescribed development.

In defense of the special management areas in S. 371, developers argue that these prescriptions actually restrict the Forest Service less than the prescription for wilderness areas. However, this argument is not quite accurate; whereas the prescription for wilderness areas is a simple one (the Forest Service essentially must leave the land alone), the prescriptions for the special management areas would require substantial development. The possible effects of this development are unknown. Moreover, in implementing such development under S. 371, the Forest Service would not be allowed to make any discretionary changes in the event that development produced unwanted effects on the land.

Conservationists object to the special management areas in S. 371 because these designations might set a dangerous precedent for future wilderness bills. Effectively, the creation of special management areas provides a "hard" release for 600,000 acres of roadless land. By mandating development, S. 371 would prevent the Forest Service from considering the wilderness designation option for these lands in any revision of its forest plans. This "hard" release violates the spirit of the

1984 compromise that resulted in the passage of so many RARE II wilderness bills. Yet on its face, S. 371 purports to provide the same "soft" release that each of those bills provided. This basic dishonesty makes S. 371 a poor solution to the Idaho wilderness problem.

C. Reserved Water Rights

Another controversial provision in S. 371 is one that denies federal reserved water rights to the new wilderness and special management areas. S. 371, 101st Cong., 1st Sess. § 302 (1989). While this provision would probably have little effect on the Idaho wilderness areas, it would set a dangerous precedent for future wilderness bills.

Under the water law of the western states, water rights are allocated primarily according to the doctrine of prior appropriation, by which earlier water users are given priority over later, junior users. Under the doctrine of federal reserved water rights, when the federal government withdraws land from the public domain for a special purpose, the government impliedly reserves sufficient water rights to support the purpose of the withdrawal. *United States v. Winters,* 207 U.S. 564 (1908). Thus, the government's rank in the priority system is determined by the date of the withdrawal of land from the public domain. The government's reserved water rights may remain unquantified until the water rights of users junior to the federal government may remain uncertain until the government decides to exercise its rights.

In *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985), the district court ruled that federal reserved water rights exist in wilderness areas where the government has not expressly denied them. Thus, by the act of creating a wilderness area, the federal government reserves sufficient water rights to maintain the wilderness character of the area. This ruling has resulted in a stalemate over further wilderness bills in Colorado. Water users oppose relinquishing unquantified water rights to the federal government, while conservationists oppose denying all water rights to the wilderness areas. This stalemate has yet to be resolved, though a Colorado wilderness bill containing compromise language is now before the Senate Energy Committee.

In Idaho, the reservation of unquantified water rights for new wilderness areas would have little impact. Since these areas lie primarily at the top of the watersheds, where the streams and rivers originate, no upstream users exist. Thus, even if the government did reserve unquantified water rights for these areas, such a reservation would not affect any junior user upstream. And since any water reserved for a wilderness area is for instream flow purposes only (no diversion occurs in a wilderness area), the government's reservation of unquantified water rights would not affect any downstream users either.

Similarly, the denial of federal reserved water rights in the Idaho wilderness areas would have little impact. Since no upstream users exist, no one can appropriate the water prior to its passage through the wilderness. And since wilderness water is for instream flow only, the water remains available for downstream users. Thus, for purposes of the Idaho wilderness problem, S. 371 could either claim or deny federal reserved water rights with equal effect.

However, by affirmatively denying federal reserved water rights, S. 371 sets a dangerous precedent for other wilderness bills. This precedent poses no problem for wilderness areas that similarly lie at the top of watersheds. However, it poses a major problem for downstream wilderness areas. Without water rights, the government could not prevent upstream users from diverting water to the detriment of a wilderness area. In a drought year, such diversions could easily leave the wilderness area with no water at all. Thus, the denial of federal reserved water rights could prove disastrous.

Since water rights are not really a problem in the Idaho wilderness areas created by S. 371, the provocative water rights provision does not belong in the bill. Therefore, as long as the provision remains, S. 371 should not become law.

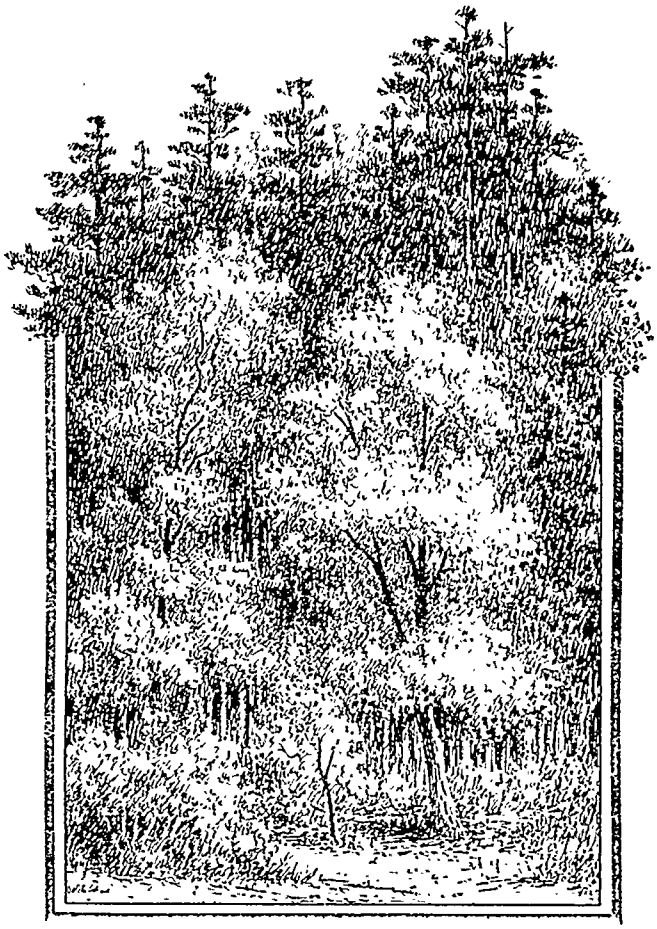
D. Boundary Determinations

Perhaps the most controversial provision in S. 371 pertains to boundary determinations in the wilderness areas. S. 371, 101st Cong., 1st Sess. § 312 (1989). The applicable provision of S. 371 threatens the integrity of not only the Idaho wilderness areas created by the bill, but also the integrity of the entire wilderness designation process. For the first time since passage of the Wilderness Act in 1964, the power to alter wilderness area boundaries would not belong solely to Congress.

S. 371 provides for a complicated process by which the Secretary of Agriculture may alter wilderness area boundaries to exclude roads. At first, this provision seems insignificant, as the wilderness areas designated by S. 371 supposedly will come from "roadless" Forest Service land. However, Forest Service lands designated as "roadless" often contain small roads or trails. Proposed wilderness areas in the past sometimes included similar roads. Normally, where a road existed in a recommended wilderness area, Congress simply altered the area's boundary to exclude the road prior to approving the wilderness designation. Alternatively, Congress would order the road closed and leave the boundary unaltered.

S. 371 mandates that the Secretary of Agriculture is responsible for the final boundary determination. S. 371 would give the Secretary of Agriculture two years to identify roads within the wilderness areas designated by the bill. The Secretary would then determine which roads to close and which to leave open. The public would have at least five years to appeal these decisions. At the end of the appeals process, the Secretary would redraw the boundaries of the wilderness area to exclude the roads left open. This process would leave the final boundaries of the Idaho wilderness areas in limbo for at least seven years.

This provision of S. 371 goes against the entire purpose and history of the Wilderness Act of 1964. Congress passed the Wilderness Act so that wilderness areas previously protected only by administrative regulations would be protected instead by statute. The Wilderness Act intended that only an act of Congress could modify or adjust the boundaries of a wilderness area. Yet S. 371 would allow the Secretary of Agriculture to redraw the boundaries set by Congress, thus delegating to the executive branch powers explicitly reserved to the legislative branch by the Wilderness Act. By weakening Congress' power over wilderness designations, S. 371 would threaten the integrity of the entire wilderness system.



Though S. 371 promises to set aside 1.4 million acres of wilderness area, the boundary provision renders this figure uncertain. Any number of acres could be lost to the Secretary of Agriculture's decisions in the seven years following the bill's passage. The wilderness remaining after those seven years might bear little resemblance to the areas supposedly set aside by Congress. If future wilderness bills contain similar provisions, Congress would no longer have the last word on what land should be preserved as wilderness.

This boundary provision would not seem so surprising in a hastily drawn bill presented as a quick fix to a new wilderness dispute. However, in a bill aimed at resolving the decade-old Idaho wilderness problem, this provision seems especially ill-considered. Senator McClure and the Idaho delegation have had ten years to study the "roadless" areas in their state. If they have not yet discovered all of the significant roads in those areas, they probably never will. This provision simply adds to the list of reasons why S. 371 is a poor solution to the Idaho wilderness problem.

CONCLUSION

Though Senator McClure has claimed that S.

371 is "the only possible legislative solution to Idaho's wilderness question" (135 CONG. REC. S1257 (daily ed. Feb. 7, 1989) (statement of Sen. McClure)), the bill contains a number of controversial provisions that render it a very poor solution. Unless Congress eliminates these provisions prior to passing the bill, S. 371 should not become law.

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