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ATTORNEYS FOR PLAINTIFF,
NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC, Plaintiff, v. BNSF RAILWAY COMPANY, Defendant.	Case No._________________ **COMPLAINT** **[DEMAND FOR JURY TRIAL]**

Plaintiff Navajo Transitional Energy Company, LLC ("NTEC"), by and through its legal counsel, hereby respectfully submits this Complaint and Demand for Jury Trial and alleges as follows:

PARTIES

1. This dispute involves a claim that one of the nation's largest railroads, Defendant BNSF Railway Company ("BNSF"), elected to breach its contractual commitment to transport up to 5.5 million tons of NTEC's export coal in 2022. (BNSF and NTEC are collectively referred to herein as the "Parties").

2. Plaintiff NTEC was created by the Navajo Nation in 2013. It is a single-member limited liability company, organized under the laws of the Navajo Nation and the Navajo Nation is, itself, NTEC's sole shareholder. As such, it is an entity of the Navajo Nation. NTEC's corporate offices are located at 385 Interlocken Crescent, Suite 400, Broomfield, Colorado 80021.

3. Defendant BNSF is a Class I rail carrier. It is a Delaware corporation with its principal place of business at 2650 Lou Menk Drive, Fort Worth, Texas 76131. BNSF operates a rail network of 32,500 route miles in twenty-eight states and three Canadian provinces. BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which in turn is wholly-owned by Berkshire Hathaway, Inc.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (diversity) because: Plaintiff NTEC is an incorporated entity organized by the Navajo Nation, with its corporate offices in Colorado; Defendant BNSF is a citizen

of a different state; and the amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because: (i) the contract at issue in this proceeding pertains to the transportation of coal mined in this judicial district; (ii) BNSF resides, owns property, and provides rail transportation in and through this judicial district; and (iii) BNSF is subject to personal jurisdiction in this judicial district. The Spring Creek Mine is located in Big Horn County, part of the Billings Division of this Court.

6. Under 49 U.S.C. § 10709(c)(2), this Court is authorized to provide a remedy for a railroad's breach of a rail transportation agreement.

FACTS

A. The Navajo Nation and NTEC

7. The Navajo Nation is located on 27,000 square miles extending into the States of Utah, Arizona, and New Mexico.

8. The Navajo Nation created NTEC for the express purpose to "support and improve the economic, financial, tax, and revenue interests of the Navajo Nation and the Navajo People through management and development of the Navajo Nation's resources and new sources of energy, power, transmission, and attendant resources and facilities." NTEC's business includes the mining and sale of coal produced on the Navajo Nation and in Montana and Wyoming. NTEC presently

owns four coal mines. One of those mines, the Spring Creek Mine located in Big Horn County, Montana, is central to the present dispute.

9. NTEC provides roughly $50 million per year in direct economic support for the Navajo Nation. This funds approximately one-third of the Navajo Nation's $158 million annual General Fund. NTEC's operations also provide indirect support for the Navajo Nation in the form of wages, charitable donations and other contributions to the community. These additional forms of indirect support to the Navajo Nation amount to approximately $75 million per year.

10. In 2019, NTEC purchased substantially all of the assets of Cloud Peak Energy, Inc., a public company that had filed for bankruptcy protection. The primary assets included three coal mines located in the Powder River Basin of Wyoming and Montana: the Antelope Mine, the Spring Creek Mine, and the Cordero Rojo Mine. Each of those three mines produces substantial quantities of sub-bituminous coal. NTEC sells coal from Cordero Rojo and Antelope for domestic use. NTEC sells thermal coal from Spring Creek both for domestic use and for export to Japan and Korea. NTEC produces several million tons of coal per year for export sale.

B. <u>Export Coal from Spring Creek</u>

11. In 2008, the prior owner of the Spring Creek Mine, *i.e.*, Cloud Peak Energy, began selling coal for export via the Westshore Terminals facility at Roberts Bank, British Columbia, Canada. At Westshore, coal from Spring Creek is loaded

onto vessels for transportation to Asia (Japan and Korea). Westshore is located approximately 1,500 miles from Spring Creek via rail.

12. BNSF is the only rail carrier capable of providing single-line, direct coal transportation service from the Spring Creek Mine to Westshore, and BNSF has provided all of the coal transportation service from Spring Creek to Westshore since the export shipments began.

13. When NTEC acquired the Cloud Peak assets out of bankruptcy in 2019, the Cloud Peak estate owed over $6.15 million to BNSF in delinquent invoices (and interest) for the shipment of coal under then-existing contracts. NTEC could have properly rejected these contracts in the bankruptcy proceeding as well as the outstanding debt owed to BNSF. However, NTEC wished to preserve a mutually beneficial commercial relationship with BNSF and elected to honor these obligations and paid BNSF the outstanding debt owed by Cloud Peak. Accordingly, NTEC became a party to (among others) a January 9, 2018 coal transportation agreement between Cloud Peak and BNSF, as amended on March 29, 2018 ("BNSF-C-12828"). BNSF-C-12828 governs the transportation of coal from Spring Creek to the Westshore Terminal for sale to a single customer in Japan (*i.e.*, JERA Trading Pte Ltd. or "JERA").

14. NTEC has since entered into other contracts with coal purchasers in Asia. NTEC likewise entered into other rail transportation contracts with BNSF,

including a contract denominated as Certificate BNSF 90068-0095 (the "2021 Contract"). The 2021 Contract did not include any stated maximum transportation volume.

15. The 2021 Contract originally applied only to rail service occurring during the first six months of 2021. By amendment dated June 21, 2021, however, the Parties agreed to extend the term of the 2021 Contract to cover all of calendar year 2021. The 2021 Contract expired on December 31, 2021.

16. In 2021, NTEC shipped an aggregate total of 5.1 million tons of Spring Creek export coal via BNSF to Westshore (under BNSF-C-12828 and the 2021 Contract). That total equates to an average of 28.4 BNSF trains per month for the year. During the latter half of 2021, BNSF transported an even higher volume of Spring Creek trains to Westshore, averaging 29.7 trains per month (or roughly one train per day), which – if annualized – would translate to 5.39 million tons.

C. <u>The 2022 Contract</u>

17. On August 17, 2021, NTEC contacted BNSF to initiate negotiations regarding a contract to replace the expiring 2021 Contract. In particular, on NTEC's Vice President, Sales & Marketing, Mr. Matt Babcock, emailed BNSF's Ms. Jessie McCabe, Director Coal Marketing, and requested that the Parties "kick off discussions for the 2022 rail agreement for [Spring Creek] exports to Westshore." Mr. Babcock explained NTEC's willingness to cooperate with BNSF regarding the

term of any new agreement: "[Y]ou've mentioned that you may want to put something in place for longer term, *especially due to the higher volumes we expect to ship next year*."

18. In his note, Mr. Babcock reiterated that NTEC was targeting 5.5 million tons under the new contract for 2022. Mr. Babcock also specifically stressed NTEC's anticipated volumes for 2022: "I also wanted to make sure you all have a sense of the magnitude that we're expecting next year. We're not expecting 2022 to be a huge increase from 2021 *but volume should be up by about 1 million short tons*."

19. BNSF did not object in any manner to this requested 2022 volume. Instead, when sending its first draft of a replacement contract to NTEC on October 22, 2021 (in response to Mr. Babcock's August 17 email), BNSF included NTEC's requested 5.5 million ton maximum volume without comment: "The maximum annual volume is 5,500,000 short tons."

20. In December 2021, NTEC and BNSF executed the agreement presently at issue. The Parties denominated this agreement as "Coal Unit Train Commitment Certificate Number BNSF 90068-0099" (hereinafter "2022 Contract"). The 2022 Contract covers the transportation of coal between the Spring Creek Mine and the Westshore Terminal throughout 2022.

21. In the 2022 Contract, NTEC committed to the exclusive use of BNSF to ship all its Spring Creek export coal to Westshore.

22. BNSF, in turn, committed to "provide transportation" to NTEC for up to 5.5 million tons of NTEC's 2022 export coal shipments. BNSF historically had provided all railcars and all other equipment, personnel, and facilities used to transport NTEC's coal.

23. At no time during the Parties' negotiations did BNSF ever advise NTEC it could not or would not be able to commit the rail equipment and facilities necessary to move up to 5.5 million tons of NTEC's 2022 export coal. Nor at any time during negotiations did BNSF advise NTEC of its belief (subsequently expressed) that the 2022 Contract did not obligate BNSF in any way to ship any particular quantity of coal, at any particular time, or on any particular schedule.

24. Each train operating under the 2022 Contract transports a total of approximately 15,125 tons. Transportation of the 5.5-million ton annual volume requires approximately thirty train movements per month.

25. In reliance on BNSF's commitment to transport NTEC's 2022 coal volumes, NTEC secured agreements with export coal purchasers in Japan and Korea. That coal would originate at Spring Creek, would be transported from Spring Creek to Westshore via BNSF (in BNSF railcars), and then would be loaded into ocean vessels at Westshore for ultimate delivery to its overseas purchaser.

26. In addition to executing such contracts for the sale of export coal in 2022, NTEC anticipated and planned for additional spot export coal sales throughout 2022 to meet the significant demand for the product.

D. BNSF's Transportation Under the 2022 Contract

27. From January through November 2022, BNSF transported an aggregate average of only 18 trains per month from Spring Creek to Westshore for NTEC (*i.e.*, 10.4 trains per month below BNSF's 28.4-train monthly aggregate average for NTEC Westshore shipments in 2021 and 11.7 trains per month below BNSF's 29.7-train monthly average for NTEC for the second half of 2021). A 10.4-train per month reduction in transportation service to NTEC prevents approximately 157,000 tons of coal from reaching the Westshore Terminal (and NTEC's customers) each month. In addition, BNSF's 2022 service to NTEC became substantially more erratic than under predecessor arrangements with 15 or more days between trains versus an average of about one train per day in 2021.

28. During April and May 2022, NTEC sought assurances from BNSF that it would meet its transportation obligations under the 2022 Contract. At a meeting in Ft. Worth, Texas on April 21, 2022, BNSF's Mr. Todd B. Carter (BNSF's former Vice President, Coal and Petroleum Products) indicated to NTEC personnel (Matthew Babcock, Tres Tipton, and Rick Ziegler) that BNSF rail service would not improve until the Fourth Quarter of 2022 at the earliest.

29. During a May 5, 2022 meeting, BNSF's Todd Carter and Jessie McCabe informed NTEC's Mr. Babcock, for the first time, that BNSF did not feel any obligation to deliver tons under the 2022 Contract and also explained that NTEC would receive only nine trains, in the aggregate, in June.

30. At that same May 5, 2022 meeting, BNSF also informed NTEC that BNSF would transport only 3.1 million tons of NTEC's coal during 2022.

31. Following the May 5, 2022 meeting, NTEC's Matt Babcock emailed BNSF's Executive Vice President and Chief Commercial Officer Stevan Bobb. Babcock stated that:

> it was explained to me [during a call from Mr. Carter and Ms. McCabe on May 5, 2022] that BNSF does not feel an obligation to deliver tons under our annual certificate [the 2022 Contract] BNSF-90068-0099. It was expressed that only 3.1 million short tons of rail service would be made available to NTEC this year despite having planned to ship approximately 5.0+ million together. NTEC is already sold to 4.6 million tons for 2022 (approximately 500,000 tons less than what we shipped together last year). The reduction in BNSF's commitment to serve our customers in Asia will have a severe impact on our commercial relationships and NTEC's 2022 financial performance. I have asked Jessie and Todd to revisit the volume estimate and hope that we can get 2022 volume closer to 4.5 million tons. We need BNSF's support.

BNSF did not directly respond to this email.

32. On May 19, 2022, BNSF's Jessie McCabe (Director, Coal Marketing) advised NTEC's Jason Plett (Manager Logistics) that BNSF would only transport

nine, fifteen, and seventeen export coal trains per month for NTEC in June, July, and August, respectively, for a total of 41 trains for those three months, which was less than half the approximately 90 trains NTEC required during the period. Upon information and belief, each of those figures pertained to aggregate transportation under both the 2022 Contract and BNSF-C-12828. BNSF ultimately provided 42 trains during the June though August time period.

33. On May 24, 2022, Mr. Babcock and Mr. Vern Lund, NTEC's Chief Executive Officer, travelled to Fort Worth, Texas to meet with BNSF. BNSF representatives did not provide any assurances to NTEC that BNSF was willing to restore NTEC service to transport NTEC's anticipated 2022 coal volumes, or even anything close to those volumes.

34. Thereafter, BNSF's CEO, Katie Famer, told the President of the Navajo Nation that "we acknowledge that BNSF has not met NTEC's requested volume of coal shipments this year . . . ." ("Farmer Letter").

35. BNSF further stated, however, that its service problems extended to "our broad customer base," and that NTEC was not alone in its concerns.

36. In April 2022, the federal agency with responsibility for regulation of railroads, the Surface Transportation Board ("STB"), instituted a proceeding to consider solutions to what the STB described as the railroads', including BNSF's, largely self-inflicted capacity shortages. In discussing this capacity issue and related

service impacts, the STB expressed its concerns that the railroads are more concerned with generating maximum profits for their owners and shareholders than with providing adequate service to their customers. *See* STB April 7, 2022 Press Release and Statement of STB Chairman Martin Oberman ("During my time on the Board, I have raised concerns about the primacy Class I railroads have placed on lowering their operating ratios and satisfying their shareholders even at the cost of their customers. Part of that strategy has involved cutting their work force to the bare bones in order to reduce costs. Over the last 6 years, the Class Is collectively have reduced their work force by 29% – that is about 45,000 employees cut from the payrolls. In my view, all of this has directly contributed to where we are today – rail users experiencing serious deteriorations in rail service because, on too many parts of their networks, the railroads simply do not have a sufficient number of employees."). Upon information and belief, BNSF's failure to meet its contractual obligations to NTEC reflects a similar prioritization of maximum profits over customer needs.

37. Upon information and belief, BNSF's broad service failures did not, in fact, extend to its transportation of export coal from Powder River Basin origins to Westshore. Instead, through August of 2022, BNSF *increased* the total number of coal trains for all coal shippers that it moved to that terminal relative to BNSF's 2021 monthly averages for that same portion of the year. (A strike disrupted coal train

unloading at Westshore in September and October of 2022.) And while BNSF transported more coal trains to Westshore for other export coal producers in 2022 than it had transported in 2021, BNSF dramatically reduced the number of movements that it made to transport NTEC's export coal in 2022. As a direct consequence of BNSF's discriminatory actions, NTEC volumes to Westshore declined to levels well below NTEC's historic volume levels, while at the same time, the overall number of coal trains BNSF delivered to Westshore increased.

38. As stated, BNSF's total coal deliveries on this route for all coal shippers actually increased year-on-year. This is demonstrated by the fact, upon information and belief, BNSF moved an average of 70 total coal trains per month to Westshore during January through August of 2021. From January through August of 2022, BNSF moved even more coal trains to Westshore per month:

	2021	**2022**
January	73	62
February	58	68
March	78	74
April	67	76
May	47	78
June	74	70
July	86	69
August	78	73
Total	**561**	**570**
Average	*70.1*	*71.3*

39. Upon information and belief, BNSF transported a total of 561 export trains to Westshore in the first eight months of 2021. From January through August

of 2022, BNSF transported a total of 570 export trains to Westshore. In other words, BNSF *elected* not to move NTEC's coal to Westshore even as BNSF's year-over-year train count to the port increased substantially.

40. Upon information and belief, BNSF also entered into new contracts for 2022 with shippers that were not transporting export coal bound for Westshore in 2021. By its own actions, BNSF further jeopardized its ability to meet its contractual obligations to NTEC under the 2022 Contract.

41. In the Farmer Letter, BNSF's CEO claimed that the 2022 Contract does not impose any transportation obligation upon BNSF. BNSF's CEO's claim that the 2022 Contract allows it to transport any volume of coal it chooses, or even no volume of coal if it chooses, ignores BNSF's commitment to transport NTEC's export coal volumes up to the maximum volume.

42. Through November 30, 2022, BNSF had moved a total of only 2.99 million tons of NTEC coal to Westshore (including tons moving under the 2022 Contract and tons moving under Contract BNSF-C-12828), which was well short of the pace necessary to transport NTEC's full requirements for the year.

43. BNSF's failure to provide NTEC transportation service has imposed – and each day continues to impose – crippling financial hardships upon NTEC amounting to many tens of millions of dollars. BNSF's failure to transport coal has prevented NTEC from realizing the reasonably expected benefits of the 2022

Contract – namely the transportation of its 2022 export coal volumes up to 5.5 million tons. BNSF's actions have directly prevented NTEC from selling its full 2022 volume of 5.5 million tons of coal and BNSF has directly prevented NTEC from meeting its delivery obligations for the 4.6 million tons of coal that NTEC has already committed to sell. As of the date of filing, BNSF's refusal to deliver NTEC's coal to Westshore has resulted in lost revenue of over $150 million, not including spot sales that NTEC declined to make recognizing that BNSF was not meeting its contractual commitments.

44. BNSF's failures to transport coal also caused NTEC to incur substantial vessel-related demurrage charges at the Westshore terminal due to the inability to load ocean-going vessels in a timely manner. Multiple trains of coal are required to fill a given ocean-going vessel at Westshore with a target of five days' wait time from vessel-arrival to departure. When sufficient numbers of BNSF trains do not arrive at Westshore within a pre-defined time period for loading a given vessel, then the shipping company will impose demurrage charges that NTEC must bear. As a result of BNSF's failure to provide regular service, vessels loaded by NTEC in 2022 required as much as thirty days or more to load, even though other shippers currently are able to load those same types of vessels in fewer than ten days. The average wait time for vessels loading NTEC coal through the beginning of August 2022 was 41.8 days. That figure is significantly higher than 2021 levels.

45. As a result of BNSF's failures to transport NTEC's export coal, NTEC incurred demurrage charges of more than $15 million in 2022.

46. To attempt to mitigate future potential demurrage charges, NTEC has declared force majeure under its export coal sales contracts.

47. In addition to this direct financial hardship, BNSF's poor service has harmed – and is continuing to harm – NTEC's reputation in the market for the sale of export coal. BNSF's service has left NTEC unable to fulfill its contractual obligations to its customers, but NTEC's competitors (who enjoy more frequent BNSF service over the same route) have extra export coal available to sell at Westshore on the spot market. The harm to NTEC is real and substantially limits NTEC's ability to generate revenues that are necessary to its continued ability to provide support for the Navajo Nation.

48. Beginning in August 2022, BNSF and NTEC engaged in discussions regarding a contract to govern post-2022 service from Spring Creek to Westshore. During those discussions, BNSF insisted upon the inclusion of onerous contractual terms that were unacceptable to NTEC, including the insertion of a provision calling for the broad waiver of all 2022 claims that had not been included in any drafts prior to BNSF's last and final offer to NTEC. BNSF and NTEC therefore were unable to reach agreement on a contract to govern post-2022 rail transportation service. NTEC

will purchase transportation service from BNSF on a "common-carrier" basis in 2023. *See* 49 U.S.C. § 11101; *cf.* 49 U.S.C. § 10709.

CLAIMS

COUNT I

Breach of Contract

49. NTEC hereby realleges and incorporates by reference paragraphs 1-48 of this Complaint.

50. In December 2021, the Parties entered into the 2022 Contract.

51. The 2022 Contract – as executed by NTEC and BNSF on December 1, 2021 – is a valid and enforceable contract for the transportation of coal by BNSF from NTEC's Spring Creek, Montana mine to the Westshore Terminals.

52. By executing the 2022 Contract, NTEC accepted BNSF's offer to transport up to 5.5 million tons of the coal to be shipped from NTEC's Spring Creek Mine to Westshore, where that coal is transloaded into ocean vessels for export.

53. BNSF's obligation to transport NTEC's 2022 export coal volumes is subject to a maximum of 5.5 million tons.

54. BNSF agreed to transport all of NTEC's tendered volumes up to the 5.5 million ton maximum.

55. BNSF also agreed to provide railcars, equipment, and other facilities, necessary to transport NTEC's export volumes, subject only to the 5.5-million ton annual maximum.

56. While negotiating the 2022 Contract, NTEC made BNSF aware that NTEC's volumes for the 2022 contract year would reach the 5.5-million-ton annual maximum. At no time during the negotiations did BNSF ever suggest to NTEC that it lacked the capacity (whether expressed in terms of railcars, locomotives, track or any other metric) to transport those volumes. At no time during negotiations did BNSF assert that the 2022 Contract would not obligate it in any way to carry any particular quantity of coal.

57. NTEC reasonably relied upon BNSF's commitment transport up to 5.5 million tons of export coal in 2022, and NTEC had a reasonable expectation that BNSF would provide all the equipment and resources necessary to transport NTEC's volumes.

58. NTEC complied with all of its obligations under the 2022 Contract.

59. Throughout 2022, BNSF failed: (1) to transport coal in accordance with BNSF's contractual obligations; and (2) to provide the necessary equipment for such transportation.

60. BNSF's 2022 service also was increasingly erratic, thereby further delaying the loading of vessels at Westshore and causing NTEC to incur substantial

demurrage damages for delayed ship-loading of tons that should have been transported under the 2022 Contract.

61. BNSF's actions also threatened NTEC's contractual relationships with its export coal purchasers, forcing NTEC to declare force majeure and to lose revenue under those existing sales contracts.

62. BNSF's failure to comply with its transportation obligations, including the failure to provide all necessary equipment, labor, and facilities, deprived NTEC of reasonably expected benefits NTEC bargained for in entering the 2022 Contract.

63. BNSF failed to act in good faith in performing its obligations under the 2022 Contract and to make all reasonable efforts to meet its contractual obligations to NTEC during 2022.

64. Although BNSF drastically reduced NTEC's trains to Westshore during 2022, on information and belief, BNSF actually increased its 2022 transportation of coal trains to Westshore on behalf of its other transportation customers.

65. As of the filing of this Complaint, BNSF's breaches of its transportation obligations NTEC's coal under the 2022 Contract caused tens of millions of dollars' worth of harm to NTEC.

66. By each of the above failures, BNSF breached the transportation, equipment, and good-faith obligations contained in the 2022 Contract.

67. As a direct and proximate consequence of the above failures, NTEC suffered direct and actual harm and damages.

68. NTEC seeks monetary damages for the substantial harm that BNSF's transportation and equipment failures caused.

COUNT II

Breach of the Implied Covenant of Good Faith and Fair Dealing

69. NTEC re-alleges the allegations set forth in Paragraphs 1-68 above and incorporates the same herein by reference.

70. Under the 2022 Contract, BNSF had some measure of discretion as to how to provide the transportation service, equipment, and other facilities that it promised to provide.

71. The 2022 Contract contains an implied covenant of good faith and fair dealing. The covenant is a mutual promise that the parties will deal with each other in good faith and not attempt to deprive the other party of the benefits of the contract through dishonesty or abuse of discretion in performance.

72. BNSF had sufficient resources in 2022 to transport NTEC's coal and to provide all necessary equipment, facilities and other resources necessary to provide that transportation service.

73. BNSF chose, instead, to allocate its transportation resources in 2022 in a manner that favored other shippers, including other and new export coal customers to Westshore, at the expense of NTEC.

74. BNSF's choices to limit NTEC's transportation – and to limit its supply of equipment to NTEC service – constitute breaches of BNSF's duty of good faith and fair dealing.

75. As a direct and proximate consequence of BNSF's lack of good faith in its performance of its obligations under the 2022 Contract, NTEC has suffered, and is continuing to suffer, direct and actual harm and damages.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(a), Plaintiff requests trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

1. For the entry of judgment in favor of Plaintiff and against Defendant on all claims pled herein;

2. For an award of all compensatory damages for all the harm associated with BNSF's ongoing breach of contract and its ongoing breach of the duty of good faith and fair dealing;

3. For the award of allowable costs, and

4. For any other relief that this Court deems proper and just.

DATED this 19th day of December, 2022.

CRIST, KROGH, ALKE & NORD, PLLC

By: /s/ *John G. Crist*

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