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16 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT**
17 **OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

18 IN RE SRBA

19 Case no. 39576

Subcases: 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, 55-10300, 55-10300, 55-10301B, 55-10303B, 55-13451, 55-13846 and 55-13844¹

MOTION FOR ATTORNEYS' FEES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT FOR
ATTORNEY'S FEES UNDER IRCP
54(e)(1), I.C. § 12-121 AND THE EQUAL
ACCESS TO JUSTICE ACT (28 U.S.C. §
2412(d))

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21
22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 LU Ranching, Inc. ("LU") brings this Application pursuant to Idaho Rules of Civil
24 Procedure, Rule 54(e)(1), Idaho Code § 12-121 and 28 U.S.C. § 2412(d) of the Equal Access to
25 Justice Act, ("EAJA"), for an award of reasonable attorney's fees incurred in this action. Relief

26
27 ¹ In the Memorandum Decision and Order on Challenge and Order of Partial
28 Decrees, the Court split water right 55-10292B and thereby added water right 55-13846, and split
water right 55-10290B and thereby added water right 55-13844. The new subcases numbers are
added to the case caption, above.

1 under 54(e)(1) and § 12-121 is appropriate because LU Ranching is the prevailing party and the
2 United States' claims in this case were not substantially justified. Under the EAJA, fees should
3 be awarded because LU Ranching was the prevailing party, is qualified under § 2412 (d)(2)(B),
4 the amount of fees were incurred, are reasonable, necessary and properly itemized, and the
5 United States' claims were not substantially justified.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 LU is entitled to its attorneys fees in this case. Idaho Rule of Civil Procedure 54(e) and
9 the federal Equal Access to Justice Act (EAJA) provide independent grounds for awarding fees.
10 Under both, the inquiry is similar: Did the United States act unreasonably in contesting LU's
11 water rights? And the answer, in both cases, is the same: yes. LU has long held valid water
12 rights established under Idaho Law. The United States, ignoring over a hundred years of settled
13 law, chose to claim that LU could not have legally perfected these rights on public land.
14 Predictably, this court denied those claims, and re-affirmed the LU's valid water rights. Since
15 the outcome of the United States' legal arguments was self-evident from the beginning, it was
16 unreasonable to continue to dispute LU's water rights. The United States had superior
17 knowledge that LU and its predecessors-in-interest had appropriated and beneficially used the
18 water rights now decreed to LU for a substantial period of time and that there was a clear basis in
19 federal and Idaho law for LU's claims. Faced with the United States' unreasonable actions, LU
20 was forced to expend extraordinary amounts of time and money to defend water rights that the
21 United States should have acknowledged at the initiation of the SRBA.

22 **II. PROCEDURAL BACKGROUND**

23 This court has confirmed and adjudicated to LU water rights on federally administered
24 lands in Basin 55 that LU and its predecessors-in-interest have placed to beneficial use for over
25 100 years. However, LU Ranching obtained this result only after prolonged and unnecessary
26 litigation with the United States. Simply, the United States fought LU Ranching every step of the
27 way. The United States objected to LU Ranching's original claims. Thereafter, the United
28 States' disputed LU Ranching's rights through summary judgment proceedings, a first round of

1 alter or amend and later challenge proceedings before Judge Wood in 1999 and 2000, remand of
2 the case for trial, and a second round of alter or amend and challenge proceedings before Special
3 Master Cushman and this Court, the current Presiding Judge. Every step of the way, the United
4 States contested the very basis for LU Ranching's water rights.

5 Importantly, as this court recognized, this is not the first time that the United States has
6 litigated these issues or that these issues have been decided. This court has once again rejected
7 the United States' argument that a water user must hold a possessory interest in the land on
8 which the right is used in order to appropriate a water right. The court's opinion recognizes that
9 the owner of the land is not automatically entitled to a water right by virtue of the efforts of the
10 actual appropriator of water. And the Court rejected the United States' argument that LU's
11 predecessors were akin to "itinerant and nomadic grazers" and the argument that cattle drinking
12 water from a stream in common with the rest of the public does not satisfy the requirement of an
13 intent to appropriate water.

14 This Application is timely made under IRCP 54(d)(1)(F)(5) because it was brought within
15 14 days of the entry of judgment on January 3, 2005. The request for attorney's fees under the
16 EAJA may be brought any time within 30 days after judgment, and this is also proper.
17 *McDonald v. Schweiker*, 726 F.2d 311, 315 (7th Cir. 1983).

18 19 III. ARGUMENT

20 21 A. United States Has Waived Its Sovereign Immunity Both Under McCarran 22 Amendment and Equal Access To Justice Act for Award of Attorneys' Fees.

23 The United States Congress has, through the McCarran Amendment, waived sovereign
24 immunity for it to be joined as a party to any water rights adjudication. *See* 43 U.S.C. § 666.
25 Thus, the United States has in this case submitted itself to the jurisdiction of the state court in
26 Idaho as any individual or entity might for the purpose of having its water rights adjudicated. *See*
27 I.C. § 42-1404 ("Private Actions For Adjudication of Water Rights"). The United States is
28 subject to the inherent and statutory authority of the state court under these circumstances. *See*

1 *California v. U.S.*, 438 U.S. 645, 665. The McCarran Amendment, however, does not allow an
2 award of costs against the United States. 43 U.S.C. § 666.

3 Moreover, the United States has waived sovereign immunity for the award of attorneys'
4 fees on behalf of a private litigant under the Equal Access to Justice Act ("EAJA"). 28 U.S.C. §
5 2412. Under the EAJA, the United States must reimburse any private litigant its attorneys' fees
6 if the litigant prevails against the United States and the court finds that the United States is not
7 substantially justified in its position in the litigation. *Id.* The private litigant need not prevail on
8 all issues in order to recover its fees. *See Southern Oregon Citizens Against Toxic Sprays, Inc. v.*
9 *Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983).

10
11 **B. LU is the Prevailing Party and the United States' was Unreasonable in
pursuing this case, entitling LU to Attorneys Fees under Idaho law.**

12 Under Idaho law, the judge may award "reasonable attorney's fees" to the prevailing
13 party. I.C. § 12-121 ("In any civil action, the judge may award reasonable attorney's fees to the
14 prevailing party.") Whether a party was the "prevailing party" is a question for the trial judge's
15 sound discretion. I.R.C.P. 54(d)(1)(B). Fees will be justified if the judge finds "that the case was
16 brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P.
17 54(e)(1). Whether the ultimate award is justified is also trusted to the court's discretion. *Shettel*
18 *v. Bamesberger*, 130 Idaho 217, 221 938 P.2d 1255, 1259 (1997).

19
20 To determine who is the prevailing party, the court must examine "the final result
21 obtained in relation to the relief sought, whether there were multiple claims or issues and the
22 extent to which either party prevailed on each separate issue or claim." *Id.* So long as the court
23 grants the core relief that the party requires, the party need not prevail on all issues. *See Needs v.*
24 *State*, 118 Idaho 207, 208-09, 795 P.2d 912, 913-14 (Ct. App. 1990).

1 Fees are “appropriate only when the Court, in its discretion, ‘is left with the abiding belief
2 that the action was pursued, defended, or brought frivolously, unreasonably, or without
3 foundation.” *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 524, 20
4 P.3d 702, 708 (2001) (quoting *Owner-Operator Ind. Drivers Assoc. v. Idaho Public Util.*
5 *Comm’n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994). For example, when the owner of an
6 easement fails to acknowledge the obvious rights of the servient landowner, suing the landowner
7 for not allowing those false rights, it was proper to award fees:

9 The record in this case shows that Conley maintained throughout that the easement
10 accorded him *carte blanche* to make such changes in the existing road as he saw fit. The
11 district court concluded that Conley's position was so plainly fallacious and violative of
the rights of the servient landowners that an award of fees to the respondents as the
prevailing parties in the action was justified.

12 *Conley v. Whittlesey*, 133 Idaho 265, 274, 985 P.2d 1127, 1136 (1999). If there is no legitimate
13 issue of fact, and the legal claims asserted are unreasonable, fees will be appropriate. *See Nampa*
14 *& Meridian*, 135 Idaho at 525, 20 P.3d at 709. When settled law clearly precludes a legal claim,
15 it is unreasonable and frivolous to pursue that claim. *See Needs*, 118 Idaho at 208-09, 795 P.2d
16 at 913-14.

18 Here, The United States’ claims were not wholly related to factual disputes – instead, the
19 issues that this Court resolved were primarily legal. *See id.* The issues the court resolved in
20 LU’s favor were whether it is even possible to establish a water right on federally administered
21 land and, if so, whether the right can be appurtenant to base property and thereby transferred to
22 new owners, preserving the original priority date. Each of these claims presents a settled
23 question of law, and it was unreasonable for the United States to force LU Ranching to incur fees
24 defending them. The United States claimed that it had *carte blanche* to alter or deny any rights
25 on the so-called public domain, even going so far as to ignore controlling law. *See Conley v.*
26 *Whittlesey*, 133 Idaho at 274, 985 P.2d at 1136. LU Ranching filed its claim with the state of
27
28

1 Idaho to affirm its water rights, not engage in a protracted legal struggle with the United States
2 over long settled legal issues. This is exactly the kind of conduct that § 12-121 and IRCP 54(e)
3 apply to. LU is entitled to its fees under Idaho law.

4 **C. Even If Idaho Law Does Not Apply, This Court Has Jurisdiction to Award**
5 **Attorneys' Fees and Expenses to LU Ranching Under the EAJA.**

6 Federal law provides for an independent basis to I.C. § 12-121 for an award of attorneys'
7 fees in the EAJA, a law intended to provide attorneys fees in all actions involving the United
8 States, in all courts:

9 [A] court shall award to a prevailing party other than the United
10 States fees and other expenses . . . incurred by that party
11 in any civil action . . . including proceedings for judicial
12 review of agency action, brought by or against the
United States in *any court having jurisdiction of that*
action. . . ."

13 28 U.S.C. § 2412 (d)(1)(A) (emphasis added).

14 The phrase "any court" means "a person or group of persons whose task is to
15 hear and submit a decision on cases at law." *O'Connor v. United States Dept. of*
16 *Energy*, 942 F. 2d 771, 773-74 (10th Cir. 1991). In *O'Connor*, the court found the
17 language of the statute unambiguous and rejected the contention that "any court"
18 referred only to federal or constitutional courts. *Id.* Had Congress intended to limit §
19 2412(d)(1)(A)'s applicability to specific courts, the Court reasoned, it would have
20 made this limitation clear in the statute. *Id.* However, Congress did not so limit the
21 reach of the statute as evidenced by the unequivocal term "any court." This broad
22 jurisdictional construction is consistent with the EAJA's purpose to encourage
23 individuals to challenge adverse government action despite high litigation costs. *Id.*
24 at 774.

25 The EAJA applies to any prevailing party, whether defendant or plaintiff, in
26 litigation against the government. *Lauritzen v. Lehman*, 736 F.2d 550, 558 (9th Cir.
27 1984) In *Lauritzen*, a servicewoman brought action against the Navy alleging she was
28

1 threatened with discharge after making certain ostensibly confidential statements to a
2 Navy psychiatrist. In reviewing the District Court's award of attorney's fees to the
3 servicewoman under the EAJA, the Court reviewed the legislative history of §
4 2412(d)(1)(A) and found that Congress's intent was for § 2412(d) to act as the
5 "general statutory exception for awards against the United States." *Id.* at 557.

6 Here, LU is among the class of litigants § 2412(d) is designed to protect. The
7 United States has needlessly prolonged LU's attempt to confirm its water rights by
8 raising legal claims that were not substantially justified. Based on the independent
9 waiver of sovereign immunity under the McCarran Amendment, the federal
10 government appeared as a party in a state judicial proceeding.

11 Congress did not intend to limit the federal government's liability under the
12 EAJA to certain tribunals or fora. *See Lauritzen*, 736 F.2d at 558. Rather, the
13 legislative intent of the EAJA is to compensate private litigants involved in litigation
14 with the United States where the United States' position was not substantially
15 justified. The United States thus cannot argue that this Court lacks jurisdiction to
16 award LU fees under the EAJA. Whether the government engaged in its conduct in
17 state or federal court is not relevant. The intent of the EAJA is to protect private
18 litigants from costly litigation involving the federal government, which would
19 otherwise deter challenges: "The EAJA was enacted to ensure people would not be
20 deterred from seeking review of, or defending against, unreasonable governmental
21 action because of the expense involved in pursuing their rights." *Pettyjohn v. Shalala*,
22 23 F.3d 1572, 1575 (10th Cir. 1994). This Court has jurisdiction to award attorney's
23 fees to LU under § 2412(d) of the EAJA.

24
25 **D. LU is Entitled To A Mandatory Award of Attorney's Fees and**
26 **Expenses under § 2412(d).**

27 LU is entitled to an award of attorney's fees and expenses under § 2412(d):
28

1 “Except as otherwise specifically provided by statute, a
2 court shall award to a prevailing party other than the United
3 States fees and other expenses, in addition to any costs
4 awarded pursuant to subsection (a), incurred by that party in
5 any civil action (other than cases sounding in tort),
6 including proceedings for judicial review of agency action,
7 brought by or against the United States in any court having
8 jurisdiction of that action, unless the court finds that the
9 position of the United States was substantially justified or
10 that special circumstances make an award unjust.”

11 **1. LU is the Prevailing Party.**

12 Although the EAJA does not define “prevailing party” for an award of
13 attorney’s fees, a party granted judgment on the merits is a “prevailing party.”
14 *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human*
15 *Resources*, 532 U.S. 598, 600-01 (2001). A party need not prevail on *all* issues to be
16 a prevailing party under the EAJA. *Southern Oregon Citizens Against Toxic Sprays,*
17 *Inc. v. Clark*, 720 F. 2d 1475, 1481 (9th Cir. 1983). A party qualifies as a prevailing
18 party under the EAJA when the relief granted modifies the other party’s behavior in a
19 way that directly benefits the party seeking relief. *F.J. Vollmer Co. v. Magaw*, 102 F.
20 3d 591, 594 (D.C. Cir. 1996).

21 LU is a prevailing party under the EAJA because it prevailed on all of its
22 water rights claims in the adjudication before this Court. LU had simply tried to
23 confirm its long held water rights. The United States objected to the water rights
24 outright, and claimed that if they existed, the priority date was not the date the water
25 was first used, but instead the date that LU ranching was incorporated. This Court
26 rejected the United States’ arguments, and found that not only was LU entitled to its
27 water rights on federally administered lands, but also that the priority dates were
28 much earlier than asserted by the United States. While LU need not prevail on *all*
issues to recover under the EAJA, LU did prevail on the two most significant issues
litigated in the case. The United States’ arguments were rejected, making LU the
prevailing party.

1 Moreover, a party qualifies as a prevailing party under the EAJA when the
2 relief granted modifies the other party's behavior in a way that directly benefits the
3 party seeking relief. Put another way, a party prevails where the actual relief on the
4 merits materially alters the legal relationship between the parties by modifying the
5 government's behavior in a manner beneficial to the private litigant. *F.J. Vollmer Co.*
6 *v. Magaw*, 102 F. 3d 591, 594 (D.C. Cir. 1996).

7 Here, this Court's decision affirming LU's water rights altered the legal
8 relationship of the parties by adjudicating water rights that the United States falsely
9 alleged could not have been established. By successfully defending the (long
10 established) ability to establish water rights on federally administered lands, LU
11 achieved the goal of ensuring the legal basis for the water rights. The court's ruling,
12 affirming these rights, modified the United States' behavior and benefited LU
13 Ranching by preventing the United States from prohibiting LU's use of its water
14 rights.

15 **2. LU Ranching is an Eligible Party Under 28 U.S.C. §**
16 **2412(d)(2)(B)**

17 LU Ranching is eligible for attorney's fees under 28 U.S.C. §2412(d)(2)(B).
18 As set forth in the Declaration of Tim Lowry, President of LU Ranching, Inc., LU had
19 a net worth that did not exceed \$7,000,000 at the time this case began. 28 U.S.C. §
20 2412(d)(2)(B).

21
22 **3. The Position of the United States In Connection With This**
23 **Litigation Is Not Substantially Justified.**

24 A fee award is mandated under § 2412(d), and the Court cannot refuse fees
25 under § 2412(d), where the court finds that the government's position was not
26 substantially justified or that special circumstances making an award unjust did not
27 exist. *Newmark v. Principi*, 283 Fed. 3d 172, 177 (3rd Cir. 2002). Although the
28 moving party must *allege* that the United States' position was not substantially

1 justified, this is not part of the burden of proof, and will not be addressed in detail as
2 part of this Application. *Love v. Reilly*, 924 Fed. 2d 1492, 1495 (9th Cir. 1991).
3 Rather, the burden is on the *government* to show that its position was substantially
4 justified. *Garcia v. Bowen*, 702 F. Supp. 409, 410 (S.D.N.Y. 1988). Moreover, the
5 EAJA mandates that the government bears the burden of showing that its position *at*
6 *every stage of the proceedings* was justified. *FDIC v. Addison Airport of Texas, Inc.*,
7 733 F. Supp. 1121, 1125 (N.D. Tex 1990).

8 Here, the United States, at each stage of the litigation, was not substantially
9 justified in its arguments. The United States engaged in a five-year long effort contest
10 LU's water rights based on facially faulty legal claims. It pursued these claims before
11 the Special Master and before this court. It is now up to the United States to justify
12 its positions.

13 **4. An Award of Attorney's Fees At Market Rates Is Proper.**

14 Although § 2412(d) of the EAJA by its terms caps the attorney's hourly rate at
15 \$125.00, the trial court may increase the fees to market rate by the cost of living or if
16 special factors exists. "Special factor" has been defined as distinctive knowledge or
17 specialized skill needful for the litigation in question. *Pierce v. Underwood*, 487 U.S.
18 552, 572 (1988). The Ninth Circuit has created the following three requirements,
19 which if met, will support an increase in fees to a market rate: (1) the attorney must
20 possess distinctive knowledge and skills developed through a practice specialty; (2)
21 those distinctive skills must be needed in the litigation; and (3) those skills must not
22 be available elsewhere at the statutory rate. *Love v. Reilly* 924 Fed.2d 1492, 1496 (9th
23 Cir. 1991).

24 For example, environmental litigation is a specialty requiring distinctive
25 knowledge, as defined by the EAJA. *Animal Lovers Volunteer Ass'n, Inc. v.*
26 *Carlucci*, 867 F.2d 1224, 1226 (9th Cir. 1989); *National Wildlife Federation v.*
27 *Federal Energy Regulatory Commission*, 870 F.2d 543, 547 (9th Cir. 1989). In
28

1 *National Wildlife Federation*, a higher attorney's fee was warranted under the EAJA
2 because the Federation successfully demonstrated that its attorney specialized in
3 environmental law with a special devotion in "hydro-power regulation and public land
4 forestry." *Id.* at 547.

5 This Court must consider evidence as to the market rate of what other
6 attorneys with the same specialty charge. Under the EAJA, courts have upheld
7 specialty rates as high as \$350.00 as appropriate for an environmental attorney who
8 possessed unique expertise in environmental law and litigation. *Humane Society of*
9 *the United States v. Bush*, 159 F. Supp. 2d 707, 712 (Ct. of Int'l Tr. 2001).

10 Here, LU needed highly specialized legal representation to protect their rights
11 and assert their position. The water rights adjudication before the SRBA and the
12 subsequent appeal before this Court involved complex federal and state legal issues.
13 The legal basis for LU's claims is rooted in a 140 year history of the settlement of the
14 west, and required a specialized knowledge and experience to litigate. Both legally
15 and factually, this case required specialized legal expertise.

16 The attorneys representing LU Ranching throughout this case possessed the
17 distinctive knowledge and skills developed through the specialty practice of water
18 rights adjudications in the Western states, especially where rights are being asserted
19 on federally administered lands. These distinctive legal skills were crucial to the
20 litigation and were crucial to LU's success. Representation of this caliber is not
21 available, and was not available, at the statutory rate.

22 The Declaration of Alan Schroeder, gives an accurate picture of representative
23 market rates for the legal services provided here. Specifically, the Schroeder
24 Declaration states that \$250.00 per hour is within the market rate in in cases such as
25 this, and that even higher rates may be reasonable under certain circumstances. (*See*
26 *Schroeder Declaration*). Mr. Schroeder is a practitioner of water rights law in Idaho
27 and has practiced in this area for a significant period.
28

1 In addition, the Declaration of Elizabeth Ewens shows that defending LU
2 Ranching from the government's claims required specialized skill and expertise. As
3 the Declaration details, Ms. Ewens, Mr. Craig A. Pridgen, Mr. Michael J. Van Zandt
4 and the other attorneys that worked on this case, have the experience and expertise
5 necessary for this complex litigation and employed it successfully in rebuffing the
6 government's claims. (*See* Declaration of Elizabeth P. Ewens). As Exhibit "A" and
7 "B" to the Ewens Declaration shows, the attorney billing rates charged ranged from
8 \$125 for an associate to \$325 for a partner. For the most of the litigation, including
9 trial (i.e. prior to January 2003), rates for the most experienced partners were no
10 higher than \$275 per hour. The attorney's fees incurred by LU Ranching in the
11 amount of \$270,629.75 were reasonable and necessary to the litigation and LU
12 Ranching should be compensated for these fees. (*See* Declaration of Elizabeth P.
13 Ewens, and Exhibits thereto).

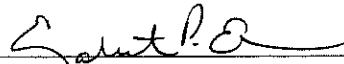
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3 **III. CONCLUSION**

4 Applicants respectfully request that the Court award LU Ranching proper
5 attorney's fees incurred in defending this unnecessary case. This Court has
6 jurisdiction to award the fees, LU Ranching is the prevailing party, LU Ranching is
7 eligible for the fees, and the United States was not substantially justified in its
8 position in the litigation. Applicants are entitled to fees at rates consistent with
9 market rates for similar legal representation in the region.

10 Respectfully submitted,

11 Dated: January 17, 2005

12 MCQUAID BEDFORD & VAN ZANDT LLP

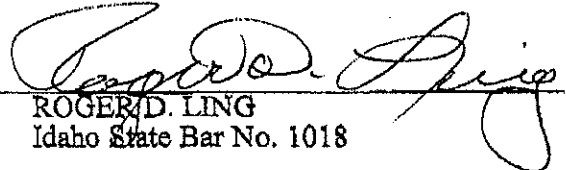
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1 Dated this ____ day of January, 2005.

2 LING, ROBINSON & WALKER

3
4 By: 

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1 **CERTIFICATE OF SERVICE**

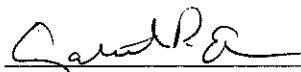
2 I certify that on January 14, 2005, I served a true and correct copy of foregoing LU
3 **RANCHING CO.S' NOTICE OF MOTION AND MOTION FOR**
4 **ATTORNEYS' FEES; MEMORANDUM OF POINTS AND AUTHORITIES IN**
5 **SUPPORT FOR ATTORNEY'S FEES UNDER IRCP 54(e)(1), I.C. § 12-121**
6 **AND THE EQUAL ACCESS TO JUSTICE ACT (28 U.S.C. § 2412(d))** upon the
following individuals by placing the document in the United States Mail, postage
paid, and addressed as follows:

7 U.S. Department of Justice
8 General Litigation Section
9 Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

10 Larry Brown
11 Attorney, U.S. Dept. of Justice
12 General Litigation Section
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14 Chief, Natural Resources Division
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