1 Final agency action regarding decision below:
2
3 REQHRG Date hearing requested
4
5 # IN THE OFFICE OF ADMINISTRATIVE HEARINGS
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PEEPLES, INC., Complainant, -v- ARIZONA STATE LAND DEPARTMENT, Respondent.	No. 01F-009-LAN **ORDER GRANTING ATTORNEYS' FEES AND COSTS**

Procedural History

1. On or about October 20, 2000, the Department issued to Peeples a Notice of Default and Denial of Plan of Operation that stated the following:

> Pursuant to A.R.S. 37-289, notice is given that the above referenced lease is in default due to the following lease violation(s):
> 1. State Mineral Lease conditions provide under Page 1, Paragraph 5 that the lessee "shall not use nor permit the use of said lands and premises for any other purpose than herein authorized." The Mineral lease conditions provide under Page 3, Paragraph 2 that the permit "is issued for such leasable minerals now owned by the State of Arizona." The tailings constitute a common variety mineral under A.R.S. §27-271 and are not subject to mining, processing, or disposal under mineral lease agreement 11-86475 and would be instead be subject to public auction under A.R.S. § 27-271.
> 2. State Mineral Lease conditions provide under Page 2, Paragraph 13 that "This lease is made and accepted subject to existing law and any laws hereinafter enacted, also to the regulations relative to such leases heretofore or hereafter prescribed by the lessor. Pursuant to Arizona Administrative Code R12-5-511 and Page 2, Paragraph 13 of the lease agreement, a sublease requires approval by the Commissioner. The document entitled "subcontract", dated May 11, 1992, is a sublease that has not been approved by the Commissioner.

3. State Mineral Lease conditions provide under Page 2, Paragraph 13 that "This lease is made and accepted subject to existing law and any laws hereinafter enacted, also to the regulations relative to such leases heretofore or hereafter prescribed by the lessor. The conditions prerequisite to testing addressed environmental concerns and were required in order to avoid regulatory violations. The unauthorized excavation without necessary permits, is a regulatory violation and, therefore, a violation of the lease.

4. State Mineral Lease conditions provide under Page 4, Paragraph 21 that the Lessee agrees that before initiating exploration, development, or mining operations on the leased premises, lessee shall submit to the Arizona State Land Department a plan outlining the proposed operations and the measures to be taken to reasonably protect the environment from adverse effects probable under the operations. Upon approval by the State Land Commissioner, the plan shall attach to and become a part of this lease, and the lessee may proceed with the operations proposed. The construction of footings and a steel framed canopy along with the placement of equipment beyond that required for testing, and the excavation of tailings ponds designed for mining all constitute development undertaken without approval of a plan of operation by the Land Commissioner, in violation of Page 4, paragraph 21 of the lease agreement.

See, October 20, 2000 Notice of Default and Denial of Plan of Operation. The Department advised Peeples that it had 45 days to cure the aforementioned defaults. Id.

2. On or about October 20, 2000, the Department also denied Peeples' 1992 Plan of Operation, 1996 Plan of Operation and 2000 Plan of Operation for the following reasons:

1. The plans of operation propose mining tailings which contain no economically recoverable mineral values and pursuant to A.R.S. §27-271 are common variety minerals not subject to disposal under Mineral Lease Agreement 11-86475 and state law. The plans of operation propose activities that do not comport with the law, and therefore, should not be approved. Additionally, it is not in the best interests of the Trust to approve the June 7, 2000, plan that indicates mineral values the Department is unable to confirm.

2. The operator identified in the plans of operation has exceeded the scope of authorized non-mining activities on the leased premises, failed to address environmental concerns on the property and is, therefore, an unacceptable operator. It is not in the best interests of the Trust to allow an operator onto the property who cannot be relied upon to conduct operations in conformance with the lease and agreed upon conditions.

3. The plans of operation are incomplete, being either unsigned or not signed by an authorized agent. The document entitled "Subcontract", dated May 11, 1992, is

insufficient to determine that the plans were submitted by the lessee or lessee's agent or that the plans would be implemented by the lessee or lessee's agent.

4. The plan incorporates unauthorized activities that are currently the subject of a lease default.

See, October 20, 2000 Notice of Default and Denial of Plan of Operation.

3. On January 18-19, March 14-16, 2001, a five day hearing was held in this matter regarding the October 20, 2000 Notice of Default and Denial of Plan of Operation issued by the Department. Attorney Jerry L. Haggard represented Peeples, Inc. ("Peeples"). Assistant Attorney General Theresa Craig represented the Arizona State Land Department ("Department").

4. This case involved eight contested issues. On May 14, 2001, the undersigned Administrative Law Judge issued a Recommended Decision in this matter. The undersigned Administrative Law Judge ruled in Peeples' favor on seven of the eight contested issues. On June 25, 2001, the Office of Administrative Hearings certified the Recommended Decision as the final administrative decision of the Department pursuant to A.R.S. §41-1092.08(D).

5. On July 5, 2001, the Commissioner ordered, on his own motion: (1) that the above-entitled matter be reheard or reviewed; (2) that he receive a complete copy of the Recommended Decision; and (3) that the parties brief whether the certified decision should be amended on a particular legal issue. *See*, July 5, 2001 State Land Commissioner's Order of Rehearing or Review.

6. On July 23, 2001, Peeples filed in Superior Court a Complaint for Judicial Review of Administrative Decisions. Peeples appealed (1) the July 5, 2001 State Land Commissioner's Order of Rehearing or Review ("Order") and (2) the undersigned Administrative Law Judge's May 14, 2001 Recommended Decision ("Recommended Decision") regarding the eighth issue that the undersigned Administrative Law Judge ruled in favor of the Department.

7. On July 23, 2001, Peeples submitted to the Office of Administrative Hearings ("OAH") a Petition for Recovery of Fees and Other Expenses pertaining to the Recommended Decision. On August 15, 2001, Peeples also submitted a Petition for Recovery of Fees and Other Expenses pertaining to the Order.

8. On August 20, 2001, the Department submitted to OAH a Response in the matter pertaining to the Recommended Decision. On August 30, 2001, the Department submitted a Response in the matter pertaining to the Order. On September 10 and 19, 2001, Peeples submitted Replies to the Department's Responses.

9. On November 7, 2001, the undersigned Administrative Law Judge declined to rule on Peeples' Petitions for Recovery of Fees and Other Expenses until a final decision was rendered on Peeples' Complaint for Judicial Review of Administrative Decisions.

10. On December 24, 2002, the Arizona Court of Appeals rendered an opinion in favor of Peeples. *See*, *Peeples, Inc. v. Arizona State Land Department*, 389 Ariz.Adv.Rep. 40 (App. 2002). The Department did not appeal to the Arizona Supreme Court. Accordingly, Peeples prevailed on all eight contested issues in this matter.

11. On January 17, 2003, Peeples submitted a Supplement to its Petition for Recovery of Fees and Other Expenses ("Supplement to Petition"). On January 29, 2003, the Department filed a Response. On February 28, 2003, Peeples filed a Reply.

12. On March 20, 2003, the Superior Court awarded attorneys' fees and costs to Peeples in the amount of $47,181.87 which were incurred in Superior Court. However, the Superior Court determined that it did "not have jurisdiction toward fees and expenses for the Office of Administrative Hearings proceedings."

Court of Appeals' Opinion

13. In *Peeples, Inc. v. Arizona State Land Department*, 389 Ariz.Adv.Rep. 40 (App. 2002), the Court of Appeals was presented with the following issue:

Did the Department arbitrarily, capriciously, and contrary to law

disapprove of Peeples' plans of operation and prohibit Peeples from extracting leasable minerals from the leased land?

14. The Court of Appeals stated:

> Once a mineral lease is issued, there is no statutory source that authorizes the Department to disapprove plans of operation based on leasable minerals being contained in other substances, or based on the Department's opinion that a lessee cannot make a profit from its mining operation. The relevant statutes in effect when the Lease was issued (A.R.S. §§ 27-231(A), 27-233) and the statute presently in effect (A.R.S. §27-254) provide for only one occasion when the Department determines whether the state lands to be leased contain a "valuable mineral deposit." That occasion is *before* a mineral lease is issued. A.R.S. § 27-254. Similarly, the regulations only provide for submission of mineral value information to the Department and the Department's evaluation thereof *prior* to issuance of the lease. A.A.C. R12-5-1905.

15. The Court of Appeals further stated:

> After the Department has issued a lease, there is *no* authority in the mineral leasing statutes or regulations (or in the Lease itself) for the Department to re-test the land during the term of the lease and redefine the minerals as valuable or common variety, or for the Department to otherwise terminate the lease due to its determination of profitability. Rather, the statutes provide that "every mineral lease of state lands shall be for a term of twenty years" and during that time, the lease "shall confer [upon the lessee] the right . . . to extract and ship minerals from the leased land . . . ." A.R.S. § 27-235(B),(C)(1); *see also* A.A.C. R12-5-1805(B)(1).

16. The Court of Appeals further stated:

> . . . Rather, as noted, the *only* time the mineral leasing statutes authorize the Department to evaluate mineral character or mineral value is *before* the lease is issued. A.R.S. § 27-254. There is no other juncture, whether during the pendency of a lease or in conjunction with a general mining plan, that the statutes authorize the Department to make such a determination. An administrative agency may not carry out enforcement actions that are not authorized by the express provisions of its enabling statutes. *Arizona State Bd. of Regents ex rel. Arizona State University v. Arizona State Personnel Bd.*, 195 Ariz. 173, 175, 985 P.2d 1032, P9, 985 P.2d 1032, 1034 (1999) ("Administrative agencies have no common law

or inherent powers-- their powers are limited by their enabling legislation.").

17. The Court of Appeals further stated:

> That being so, there was no basis for the Department to disapprove the new mining plan as the plan was consistent with the terms of the Lease and applicable law.

18. The Court of Appeals further stated:

> Such monitoring of an Arizona mineral lease is unnecessary as state mineral leases are for a limited term and lessees may not acquire title to the land. Therefore, there is no reason to examine the profitability of a mineral discovery during the term of an Arizona mineral lease.

19. The Court of Appeals further stated:

> The Department has failed to demonstrate that it had authority to reevaluate the value of the mineral deposit mid-lease or to prevent Peeples from reworking the tailings to obtain leasable minerals discarded during the initial processing. Moreover, nothing in the mineral leasing laws allows the Department to terminate a lease or disapprove a plan of operation on the ground that it appears unprofitable. Such a provision would potentially wreak havoc with mineral leases given that mineral prices can fluctuate widely over time and, during a downturn in prices, companies sometimes operate at a loss.
>
> Mining companies make large investments in equipment and technology to extract minerals from leased land. If the Department were able to reevaluate the minerals and rescind leases or suspend mining operations on the basis that mining was unprofitable, it would effectively nullify these leases and may eliminate any incentive to mine on state land. Finding no statutory or regulatory authority, we conclude that the Department arbitrarily, capriciously and contrary to law disapproved of Peeples' plans of operation and prohibited Peeples from extracting leasable minerals from the leased land.

20. The Court of Appeals concluded:

> Lessees under state mineral leases have the right to mine and extract valuable minerals from leased land during the term of the lease. The relevant statutes and regulations, as well as the Lease at issue, give Peeples this right. The criteria for approval of general mining plans of operation do not give the Department authority to reevaluate the mineral character of leases for economic reasons. Accordingly, we reverse the judgment of the superior court

affirming the Department's decision and remand this case for entry of judgment in favor of Peeples.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has the authority to rule on an application for attorneys' fees and costs.[1] In order to "ensure fair and open regulation by state agencies, a person . . . [i]s eligible for reimbursement of the person's costs and fees if the person prevails against any agency in an administrative hearing as provided in section 41-1007."[2]

2. An "administrative law judge shall award fees and other costs to any prevailing party in a contested case or an appealable agency action brought pursuant to any state administrative hearing authority." A.R.S. §41-1007(A). For purposes of A.R.S. §41-1007(A), a person is considered to be a prevailing party only if both:

"1. The agency's position was not substantially justified.

2. The person prevails as to the most significant issue or set of issues..." [3]

The two requisites of A.R.S. § 41-1007(A) must be satisfied before an application for attorneys' fees and costs can be approved in an administrative proceeding.[4]

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[1] A.R.S. § 41-1007(A).
[2] A.R.S. § 41-1001(A)(2).
[3] A.R.S. § 41-1007(A). Prior to the Court of Appeals' above-referenced decision, it was unclear if Peeples had prevailed "as to the most significant issue". However, Peeples has now satisfied the second prong of the test because Peeples prevailed on all eight contested hearing issues.
[4] Assuming that the two pronged test is satisfied, the undersigned Administrative Law Judge concludes that the requested attorneys' fees (i.e., hourly rate x billed hours) are reasonable because of: (1) the complexity of this case and (2) the experience and reputation of Mr. Haggard. A.R.S. §41-1007(D); *see, Kadish v. Arizona State Land Department*, 177 Ariz. 322, 332, 868 P.2d. 335 (App. 1993) (finding $200.00 per hour reasonable). However, the undersigned Administrative Law Judge concludes that the requested expert witness fees are inappropriate. Mr. Shah's assay reports were highly suspicious and unreliable. *See*, May 14, 2001 Recommended Decision, Findings of Fact #54 thru #60. Accordingly, $9,750.10 should be deducted from Peeples' requested fees and costs.

3. There are no Arizona cases pertinent as to the meaning of the phrase "substantially justified" contained in A.R.S. § 41-1007(A)(1). In *Pierce, Secretary of Housing and Urban Development v. Underwood*,[5] the United States Supreme Court dealt with a request for attorneys' fees approved pursuant to the federal Equal Access to Justice Act (5 U.S.C. § 504) whose provisions for recovery of attorneys' fees from federal agencies include a "substantially justified" showing. The Court's lengthy discussion and holding regarding the meaning of "substantially justified" follows:

> "Before proceeding to consider whether the trial court abused its discretion in this case, we have one more abstract legal issue to resolve: the meaning of the phrase 'substantially justified' in 28 U. S. C. § 2412(d)(1)(A). The Court of Appeals, following Ninth Circuit precedent, held that the Government's position was 'substantially justified' if it 'had a reasonable basis both in law and in fact.' [Citation omitted.] The source of that formulation is a Committee Report prepared at the time of the original enactment of the [Equal Access to Justice Act], which commented that '[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact.' [Citation omitted.] In this petition, the Government urges us to hold that 'substantially justified' means that its litigating position must have had 'some substance and a fair possibility of success.' [Citation omitted.] Respondents, on the other hand, contend that the phrase imports something more than 'a simple reasonableness standard,' [citation omitted] - though they are somewhat vague as to precisely *what* more, other than 'a high standard,' and 'a strong showing,' [citation omitted].
>
> In addressing this issue, we make clear at the outset that we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it - whether that be 'reasonable basis in both law and fact' or anything else. 'Substantially justified' is the test the statute prescribes, and the issue should be framed in those terms. That being said, there is nevertheless an obvious need to elaborate upon the meaning of the phrase. The broad range of interpretations described above is attributable to the fact that the word 'substantial' can have two quite different - indeed, almost contrary - connotations. On the one hand, it can mean '[c]onsiderable in amount, value, or the like; large,' Webster's New International Dictionary 2514 (2d ed. 1945) - as, for example, in the statement, 'He won the election by a substantial majority.' On the other hand, it can mean '[t]hat is such in substance or in the main,' *ibid*. - as, for example, in the statement, 'What he said was substantially true.' Depending upon which connotation one selects, 'substantially justified' is susceptible of interpretations ranging from the Government's to the respondents'.

[5] 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (Scalia, J.).

We are not, however, dealing with a field of law that provides no guidance in this matter. Judicial review of agency action...regularly proceeds under the rubric of 'substantial evidence' set forth in the Administrative Procedure Act, 5 U. S. C. § 706(2)(E). That phrase does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' [Citation omitted.] In an area related to the present case in another way, the test for avoiding the imposition of attorney's fees for resisting discovery in district court is whether the resistance was 'substantially justified,' Fed. Rules Civ. Proc. 37(a)(4) and (b)(2)(E). To our knowledge, that has never been described as meaning 'justified to a high degree,' but rather has been said to be satisfied if there is a 'genuine dispute,' [citations omitted], or 'if reasonable people could differ as to [the appropriateness of the contested action],' [citations omitted].

We are of the view, therefore, that as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main' - that is, justified to a degree that could satisfy a reasonable person. That is no different from the 'reasonable basis both in law and fact' formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue. [Citations omitted.]"[6]

I. Plans of Operation

a. Exceeded Scope - Environmental Issues

4. Having reviewed the above-referenced July 23, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.

b. Subcontract

5. Having reviewed the above-referenced July 23, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.

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[6] *Pierce*, *supra*, 487 U.S. at 563-565 (Brennan, Marshall and Blackmun, JJ., concurred separately in this part of the opinion). *See also*, BLACK'S LAW DICTIONARY 1429 (6th ed. 1990) (defining "*substantially justified*").

c. Unauthorized Activities

6. Having reviewed the above-referenced July 23, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.

II. Default of Mineral Lease

a. Subcontract

7. Having reviewed the above-referenced July 23, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.

b. Environmental Issues

8. Having reviewed the above-referenced July 23, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.

c. Structures and Equipment

9. Having reviewed the above-referenced July 23, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.

III. Common Variety Issue

10. A.R.S. §12-348(A)(2) states in part:

> . . . a court shall award fees and other expenses to any party other than this state . . . which prevails by an adjudication on the merits in any of the following: . . . A court proceeding to review a state agency decision pursuant to chapter 7, article 6 of this title or any

other statute authorizing judicial review of agency decisions.

A.R.S. §12-348(A)(2)(footnote omitted).

11. "Fees and other expenses" means:

> . . . in the case of an action to review an agency decision pursuant to subsection A, paragraph 2 of this section, all fees and other expenses that are incurred in the contested case proceedings in which the decision was rendered.

A.R.S. §12-348(I)(1).

12. Based on a review of A.R.S. §12-348(A)(2) and A.R.S. §12-348(I)(1), it appears that the Superior Court is required to award attorneys' fees and other expenses on the common variety issue that was appealed to the Superior Court. This includes fees and expenses "incurred in the contested case proceedings in which the decision was rendered." A.R.S. §12-348(I)(1). However, on March 20, 2003, the Superior Court determined that it did "not have jurisdiction toward fees and expenses for the Office of Administrative Hearings proceedings." Based on the foregoing, the undersigned Administrative Law Judge shall rule on this issue pursuant to A.R.S. §41-1007(A).

a. Plans of Operation

13. Upon review of the above quoted passages in *Peeples, Inc. v. Arizona State Land Department*, it would appear that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation (regarding the common variety issue) was not substantially justified. However, the undersigned Administrative Law Judge must apply the standard set forth in *Pierce, Secretary of Housing and Urban Development v. Underwood.* Under the *Pierce* standard, in order to avoid the imposition of an award of fees and costs, the Department's position must be justified to a degree that could satisfy a reasonable person. Having reviewed the January 17, 2003 Supplement to Petition, the Department's Response and Peeples' Reply, the undersigned Administrative Law Judge

concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was substantially justified[7] (albeit incorrect) regarding the common variety issue that ultimately was appealed to the Court of Appeals.

b. Default of Mineral Lease

14. Peeples did not appeal the common variety issue pertaining to the default of the Mineral Lease. Having reviewed the July 23, 2001 Petition, Supplement to Petition, the Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its October 20, 2000 Notice of Default and Denial of Plan of Operation was not substantially justified.[8] Simply put, it may have been reasonable for the Department to deny the plans of operation based on its position that the tailings constituted waste or common variety mineral. However, it was not reasonable for the Department to cancel the Mineral Lease because the Department believed that the tailings constituted waste or common variety mineral. The leased property at issue has a proven history of producing valuable minerals.

IV. July 5, 2001 Order

15. Having reviewed the above-referenced August 15, 2001 Petition, Supplement to Petition, Responses and Replies, the undersigned Administrative Law Judge concludes that the Department's position as set forth in its July 5, 2001 Order was not substantially justified.[9] On May 14, 2001, the undersigned Administrative Law Judge issued a Recommended Decision in this matter. On May 14, 2001, the Office of Administrative Hearings transmitted the Recommended Decision to the Department. Pursuant to A.R.S. §41-1092.08, the Department had 30 days to accept, reject or modify the

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[7] *See*, May 14, 2001 Recommended Decision, Conclusions of Law #9 thru #12.

[8] With regard to the common variety issue, it is not possible to determine what fees and costs were incurred regarding the default of the mineral lease as opposed to the denial of the plans of operation. Accordingly, the undersigned Administrative Law Judge concludes that Peeples is entitled to one half of the fees and costs incurred on the common variety issue. Peeples must calculate this amount.

[9] It appears that the July 5, 2001 Order was based largely on the Department's belief that it had not received page 29 of the May 14, 2001 Recommended Decision. However, this was an erroneous belief. More importantly, it was an erroneous belief that easily could have been rectified within 30 days of the transmittal of the May 14, 2001 Recommended Decision.

Recommended Decision. The Department did not accept, reject or modify the Recommended Decision within 30 days of transmittal. Accordingly, on June 25, 2001, the Recommended Decision became a certified final administrative decision. Based on the foregoing, the Department did not have the authority to issue the July 5, 2001 Order. The undersigned Administrative Law Judge concludes that Peeples prevailed on this issue and is entitled to the requested attorneys' fees and costs arising from the July 5, 2001 Order in the amount of $8,374.50.

ORDER

Based upon the foregoing, IT IS ORDERED that the Arizona State Land Department pay the following attorneys' fees and costs:

1. Total fees and costs arising from the July 5, 2001 State Land Commissioner's Order of Rehearing or Review, in the amount of $8,374.50; and

2. Total fees for the time to prepare the February 28, 2003 Reply in the amount of $3,542.00; and

3. Total fees and costs arising from the Commissioner's October 20, 2000 Notice of Default and Denial of Plan of Operation, in the amount of $111,313.20, minus one half of the fees and costs incurred on the common variety issue[10], minus the requested expert witness fees for Mr. Shah in the amount of $9,750.10.

Done this day, April 16, 2003.

Casey J. Newcomb
Administrative Law Judge

Copy mailed this ___ day of
April, 2003, to:

Mark Winkleman, Director
State Land Department
ATTN: Roz Sedillo
1616 West Adams
Phoenix, AZ 85007

[10] Peeples must calculate this amount.

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By ___________________________