

# Preparing For Your Deposition

Stuart Brashear



Improving Processes. Instilling Expertise.

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# WHAT DEPOSITION??



***12 January, 2003***

# The Plan....

- **What Is Today's business climate??**
- **Basic understanding of risk and blasting**
- **Impact of risk on blasting operations**
- **Causes of risk associated with blasting**
- **Types of blasting claims**
- **Importance of documentation**

## Lawsuit says quarry's work hurts homes

Homeowners concerned blasting is bringing down their property values

June 29, 2007

BY ZLATI MEYER

FREE PRESS STAFF WRITER

Inside the four-bedroom colonial on a winding suburban street she's called home since 1985, Caren Chezick reels off problems with her No. 1 asset.

The garage, built atop a slab, is tilting away from the house. The door wall of the family room is bowing. A large crack jags through the garage's ceiling plaster. Gaps mar the fireplace facade.

The culprit isn't poor upkeep; she blames one of the neighbors.

Chezick is one of three dozen Riverview homeowners suing the nearby Sibley Limestone Quarry and Detroit Edison, claiming that their quality of life has been ruined and their property values decreased due to a falling water table, noise, sulfur-smelling wastewater and blasting so powerful it's knocked pictures off walls. The suit filed in Wayne County Circuit Court last week seeks \$25,000 per household and injunction orders.

## MONDAY: LaFarge quarry ordered to cease blastings (5:36 p.m.)

**By Rick Forgione/forgioner@gnewspaper.com**

Lockport Union-Sun & Journal

The blasting at LaFarge stone quarry was silenced this morning after Town of Niagara officials served the business with an injunction ordering it to “cease and desist operations” detrimental to residents of the nearby Tuscarora Village mobile home community.

Signed by Town Building Inspector Charles E. Haseley, the order was delivered to LaFarge management at 10:30 a.m., Town Supervisor Steve Richards said.

“They were in violation of town law, so we closed them down,” he said.

The order claims the quarry is causing adverse effects on persons living in the vicinity by creating dust and other safety hazards. In addition, the noise and vibrations from the blasting have harmed the residents’ quality of life and has damaged portions of their homes, according to the order.

On Friday, a resident of Tuscarora Village suffered a concussion and a lower back sprain after falling in the shower while the quarry was blasting. She was treated at Mount St. Mary’s Hospital and is now recovering back at her home.

Wednesday, Oct. 29, 2008

## Neighbors: Blasting still a problem at quarry

### Truck noise is gone, but new woe 'feels like an earthquake'

by Erin Donaghue | Staff Writer

After a long history of battling with the noise of trucks coming to and from the Rockville Crushed Stone Quarry off Piney Meetinghouse Road in North Potomac, neighbors say that while truck noise has abated, blasting from the quarry remains an issue.

Neighbor Nina Sadjapour, who recently moved to the Potomac Glen neighborhood near the quarry from Northern California, says the blasts cause her home to shake — and likened it to a 3.2 on the Richter scale. "It really feels like an earthquake," Sadjapour said.

She said she wasn't aware there was a quarry nearby when she moved into the home, which she rents along with her husband and family.

"It really is a problem," said Preeti Kothari, who has lived near the quarry with her family for seven years. She echoed the concern that the blasts cause her home to shake. "It will scare you if you are home by yourself and don't know what it is... The first time it happened, I thought the roof would fall in."

Kothari, like other neighbors, raised concerns that the shaking could cause damage to the foundation of her home. According to neighbor Dan Tuten, who has in the past taken the lead for residents fed up with noise from the quarry, the heart of the problem is that residential neighborhoods were allowed to be built so close to an industrial zone.

"The ultimate bad guy, we decided, was the county planning department, which allowed development





## Blasting Suspended at Miller County Quarry

Sep, 11 2008

(Osage Beach, Missouri) -- A judge halts blasting at the Magruder Limestone Quarry in Miller County. Judge Kenneth Oswald put a stay on blasting at 3:30 Thursday afternoon until 1:00 p.m. Monday.

Oswald presided over an appeal hearing where the Joint Sewer Board of Osage Beach and Lake Ozark and the Concerned Citizens of Camden and Miller Counties appealed a decision by the Department of Natural Resources Land Reclamation Commission allowing a quarry on 50 acres on Woodriver Road.

For Concerned Citizens member Mike Atkisson, the stay on blasting is a small victory in a long battle.

"Finally, someone listened that was non-biased to the situation and actually looked at the facts and how the rules and regulations are, that that's all we were asking for was just a fair look at things and make sure that the process is done properly," Atkisson said.

Judge Oswald ruled that the quarry opponents should not have been saddled with the burden of proof in the case against the quarry, and that Magruder Limestone should have had the task of proving that its quarry operations would not harm the sewer plant and two force main sewer lines that pass through the quarry property.

Joint Sewer Board Attorney Steve Mauer says the DNR Land Reclamation Commission should have caught the burden of proof issue.

"We raised this point. We told them, it was clearly presented to them that the hearing officer's analysis and his proposed order was wrong on the burden of proof, that we didn't have that burden and his report was written wrong. Now, they never fixed it-they ignored us on that argument," Mauer said.

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## Court turns to Wikipedia over quarry blasting issue

Sep, 16 2008

- Magruder Quarry Blasting Halted
- A judge lowers the boom on a rock quarry in Miller County today.

(Osage Beach, Missouri) -- Judge Kenneth Oswald halted blasting at the Magruder Limestone Quarry on Woodriver Road until he reviews two appeals in the quarry permit case, a process that could take months.

After spending just over an hour Monday afternoon reviewing the Department of Natural Resources Land Reclamation Commission's ruling that allows Magruder Limestone to quarry on 50 acres of property, Oswald acknowledged that the stay will harm Magruder Limestone Company.

"However, when weighing that prospect against the other likelihood, including the fact that the public interest, which goes far beyond the public represented by the petitioners herein, weighs in favor of a stay due to the potential for catastrophic contamination of the waters of the Osage River," Oswald said.

Prior to the ruling, Magruder Limestone Attorney Richard Brownlee told Judge Oswald he would seek a formal hearing to have the stay on blasting overturned if the judge extended it. Attorneys stated that the company stands to lose an estimated \$1.2 million by not being able to operate its new quarry. Magruder Limestone is the contracted rock provider for the Highway 54 Expressway project.

Oswald will review arguments, testimony, and evidence collected in a formal hearing process, and will issue his ruling on the appeal cases when he is finished with the review.

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# Beware of Local Blasting

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## Journal Article



### Blasting: Another environmental woe

Journal	Environmental Geology
Publisher	Springer Berlin / Heidelberg
ISSN	0943-0105 (Print) 1432-0495 (Online)
Issue	Volume 13, Number 2 / March, 1989
DOI	10.1007/BF01664697
Pages	129-135
Subject Collection	Earth and Environmental Science
SpringerLink Date	Monday, May 16, 2005



### Continental Scientific Drilling

Harms, Ulrich, Koeberl, Christian, Zoback, Mark D.

### Thomas A. Simpson<sup>1</sup>

(1) Department of Mineral Engineering, The University of Alabama, 35486 Tuscaloosa, Alabama, USA

**Abstract** The much increased use of explosives to move and extract rock masses in construction and mining over the past two decades has resulted in a plethora of complaints from the general public in areas of close proximity to public facilities, communication, and transportation systems. Air blasts and ground vibrations caused by explosive detonation can have desultory and damaging effects to public and private property, impose adverse effects on underground mining operations, and change the course of flow or effect the availability of surface and groundwater.

# Impact to Bottom Line

- **Blasting Issues Are Costly!!**

- ✓ **Litigation (legal costs, consulting costs, time loss/focus by personnel, actual damage awards)**
- ✓ **Regulatory restrictions**
  - Shot size (volume discounts, pit down time)
  - Hole diameter (drilling costs, volume discounts)
  - Reduced vibration limits (pit efficiency, legal costs, injunctions/shutdowns)
  - Reduced overpressure limits (pit efficiency, legal costs, injunctions)
- ✓ **Barriers to future mining**
  - Greensite
  - Permit renewal
  - Expansion

# Let's Talk About Risk

- **Risk**

- ✓ **A possibility of incurring loss or damage**
- ✓ **Probability of a know loss**
- ✓ **Concept that denotes a potential negative impact to an asset arising from a present or future process**

# 3 Types of Blasting Risk

- **Actual Damage**
- **Perceived impact from blasting operations**
- **Perception of lack of concern/interest by operator**

# Risk Management Important for Blasting

- **In today's environment, community opposition is widespread**
  - ✓ **Well organized**
  - ✓ **No compromise**
  - ✓ **Understands weight of “registered voters”**
  - ✓ **Supported by professionals**
  - ✓ **Supported by government**
- **Even with modern blasting methods, opposition continues to grow...**



# Opposition Can Result in Constraints

- **Places significant limitations on blasting operations**
  - ✓ **Shot size**
  - ✓ **Number of shots**
  - ✓ **Bench height**
  - ✓ **Vibration levels**
  - ✓ **Weather conditions**
  - ✓ **Time of day**
- **All of these issues can cost you time and money, usually both**

# Constraint = Loss of Efficiency (\$)

- **Shot size**
  - ✓ loss of volume discounts and efficiency
  - ✓ Loss of drill efficiency (small holes + more drilling capacity required)
- **Number of blasts**
  - ✓ overall production constraints
  - ✓ Need for larger shots (see problem above)
- **Vibration limits**
  - ✓ Limit shot size
  - ✓ Limit bench height (loss of volume, productivity issues)
- **Weather Conditions**
  - ✓ Cancelled shots (cancellation fees, loss of production)
- **Time of Day**
  - ✓ Rushed shots (always a time bomb)
  - ✓ Loss of production efficiency

# Causes of Increased Risk From Blasting

- **Closer proximity of community**
- **NIMBY concept**
- **CAVE concept**
- **Sympathetic legal environment**
- **Increased community organization**
- **Legal “specialists”**





# Nashville Blasting Victims

Communicate, Educate, Legislate



Homepage

Bulletins-2006

Survey Form 2006

Trenching vs Blasting

Randy Feb Image

Blasting Code 2006

Legislation 2006

K. Hale Complaint

District #25- Letters

Siesmic Images

Blasting Log - 2006

S. Hall Complaint

S. Casto Complaint

Joe Hooper Seismic

Council Minutes

Florida Study 2000

[Help for Citizens of Nashville & Surrounding Counties, Tennessee:](#)

[SEE BELOW:](#)

[THIS COULD BE YOUR HOME!! WHEN DEVELOPERS START DEVELOPING A NEW OR ADDITIONAL SUBDIVISION IN YOUR NEIGHBORHOOD OR NEXT TO IT, YOUR INSURANCE COMPANY WILL DENY YOUR CLAIM FOR DAMAGES CAUSED BY "BLASTERS", using "Boiler Plated" unethical reports, UNTIL TOUGHER LEGISLATION and MORE ETHICAL ACCOUNTABILITY IS EXERCISED BY THE TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE, under Governor](#)

*If you have any further questions, contact the following environmental groups and government agencies.*

Mountain Watershed Association, Inc.  
www.mtwatershed.com  
(724) 455-4200

TriState Citizens Mining Network  
www.tristatecitizens.org  
724-223-8644

PA Department of Environmental Protection (DEP)  
www.dep.state.pa.us/  
(724) 925-5500

OH Division of Natural Resources (ODNR)  
www.dnr.state.oh.us/  
614-265-6633

WV Department of Environmental Protection (DEP)  
www.dep.state.wv.us/  
(304) 759-0595

Office of Surface Mining (OSM)  
www.osmre.gov/

*The information in this brochure no way constitutes a legal opinion. It is a list of suggestions.*

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[www.realcountrylife.com](http://www.realcountrylife.com)

For additional copies of this brochure and others in the series, contact the



P.O. Box 408, Melcroft, PA 15462  
Phone: (724) 455-4200 Fax: (724) 455-4201  
Email: [mwa@helicon.net](mailto:mwa@helicon.net)  
[www.mtwatershed.com](http://www.mtwatershed.com)

### *In Case of Blasting Emergency!*

**B**lasts need to be noted on your calendar.

**L**ook for damage to windows, doors, plumbing, foundations & fixtures.

**A**cute stress caused by blasting is not healthy. Calm down and tend to others at risk.

**S**oap solution can be used to check for gas leaks.

**T**ake careful notes. Decide where, how and to whom you want to complain.

**B**last records should be secured as soon as possible.

**A**ny public safety hazard, trespass or destruction of property caused by the mine's blasting should be reported to the police.

**C**oordinate your local group's actions. Inform the press. TV cameras help focus regulators on their duty.

**K**eep track of documentation by your neighbors. Encourage your neighbors to keep records and keep track of documentation.

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Melcroft, PA 15462

We all live downstream... [www.mtwatershed.com](http://www.mtwatershed.com)

# 10 Steps For



# Blasting Back!

Mountain  
Watershed Association  
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# Blasting in Florida



## A guide to filing complaints

Florida Department of  
Financial Services

Division of State Fire Marshal



Division of State Fire Marshal  
Regulatory Licensing Section  
200 East Gaines Street  
Tallahassee, FL 32399-0342

### What happens if the investigation finds the complaint to be justified?

The Division of State Fire Marshal has the authority to impose administrative penalties against a mining company that exceeds established blasting limits or violates other laws or rules. If the investigation indicates that a violation occurred, the Division can impose penalties ranging from a monetary fine to the suspension or revocation of the company's permit.

### Will I be compensated for my losses as a result of filing this complaint?

The Division of State Fire Marshal does not have the authority to award monetary compensation. To seek compensation for losses, you may either request a hearing through the Florida Division of Administrative Hearings (DOAH) or hire an attorney to guide you through the process. DOAH can be reached by phone at (850) 488-9675 or via the Web at [www.doah.state.fl.us](http://www.doah.state.fl.us).



# Causes of Complaints

Table 2. Distribution of the complaints by type (Appendix A).

<b>Complaint Type</b>	<b>WV</b>	<b>KY</b>	<b>VA</b>	<b>TN</b>	<b>Total</b>
Dust and Fumes	11	9	9	0	29
Flyrock	5	7	3	0	15
Annoyance/noise	278	177	75	4	534
Water Quantity/Quality	38	44	8	6	96
Structure Damage	85	110	38	3	236
Other	10	31	8	1	50
<b>Total</b>	<b>427</b>	<b>378</b>	<b>141</b>	<b>14</b>	<b>960</b>

# JACKSON, FIKES, HOOD & BRAKEFIELD



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[Richard Fikes](#)

[David Hood](#)

[James Brakefield](#)

[Judson Allen](#)

## JAMES "JIM" C. BRAKEFIELD'S PROFILE



**Jim Brakefield** received his Juris Doctor degree from the Cumberland School of Law of Samford University in 1995. During his time at Cumberland School of Law he served as a Member and Associate Justice on the Henry Upson Sims Moot Court Board. He was also recognized for his abilities in legal research and writing while at law school. Jim was admitted to the Alabama State Bar in 1995. He is also admitted to practice in United States District Courts for the Northern District and Middle District of Alabama, as well as admitted to practice before the United States Court of Appeals for the Eleventh Circuit. He received his degree of Bachelor of Science in Commerce and Business Administration from the University of Alabama in 1990.

Jim practices in all areas of litigation with a focus on personal injury, worker's compensation, premises liability, and mining and blasting litigation. He engaged in his first jury trial shortly after joining the firm and continued trying cases to a jury verdict in each year since. While his practice is focused in all areas of

litigation, Jim also represents several municipal water works and sewer boards, and engages in the formation of corporations and limited liability companies, as well as, the drafting of contracts, residential leases, and mining leases to name a few.

# Risk Exposure is Rising

- **What does it add up to?????**
  - ✓ **Lawyer - \$50,000.00 + (\$300-\$500/hr)**
  - ✓ **Legal logistics - \$5,000.00+**
  - ✓ **Blasting Consultant - \$7,500.00+ (\$150 - \$250/hr)**
  - ✓ **Structural Engineer - \$5,000.00+ (\$150 - \$250/hr)**
  - ✓ **Your time???????**
  - ✓ **Increased insurance rates**
- **Costs you pay regardless of if case is won, lost or settled out of court**

# Risk Exposure is Rising

- **Lawsuits are routinely won with no real evidence of causing damage**
  - ✓ **Improper documentation**
  - ✓ **Nuisance**
  - ✓ **Failure to respond**

# Blasting Claims

- **Negligence**
  - ✓ Failure to use care
  - ✓ Conduct below established standards
  - ✓ Allows for financial awards even if no damage claimed or proven
- **Strict Liability**
  - ✓ Must prove cause and effect
  - ✓ Blasting = ultra hazardous activity
  - ✓ Allows for claims even if every rule and SOP followed correctly
  - ✓ Obligates property owner for all responsibilities of contractors

# Blasting Claims

- **Negligence**

- ✓ **Failure to use care**

- ✓ **Conduct below established standards**

- Regulatory law
- Company operation procedures (SOP)
- Common sense

- ✓ **Failure to meet a rational standard of care**

- ✓ **Can also be applied to strict liability cases**

- “but for” standard
- “but for the failure to stem the hole, flyrock would not have damaged the structure”

# Blasting Claims

- **Nuisance**

- ✓ **Persons in possession of real property are entitled to the quiet enjoyment of their lands**
- ✓ **Very subjective**
- ✓ **remedies can be in various forms**
  - Payment of damages
  - Injunction
- ✓ **Becoming a common form of legal action against mining**

# Blasting Claims

- **Strict Liability**

- ✓ **Does not require proof of negligence**
- ✓ **Must show a cause and effect relationship to alleged damage or wrong**
- ✓ **Calls for award for damages even if all precautions and safety measures taken**
- ✓ **If you break it, you buy it**
- ✓ **Most blasting claims are fall under strict liability due to nature of blasting activity**





# Blasting Claims

- **Punitive Awards**

- ✓ Damages awarded to punish or deter defendant from a specific action
- ✓ Awarded in addition to damages in strict liability
- ✓ Awards should be “reasonable” and based on “degree of reprehensibility” of action

# Blasting Claims

Law Dictionary

BARRON'S

[Directory](#) > [Legal](#) > [Law Dictionary](#)

## Ultrahazardous Activity

An activity which gives rise to strict liability, because it "necessarily involves a risk of serious harm to the person, land or chattels of others, which cannot be eliminated by the exercise of utmost care" and it "is not a matter of common usage." Restatement, (Second), Torts §§519, 520. Modern usage of "abnormally dangerous." Blasting is universally recognized as an ultrahazardous activity, and it should be noted that strict liability in this context means the duty owed cannot be delegated, e.g., an owner of property who hires an independent contractor to perform blasting cannot thereby escape liability for damage resulting from the blasting operation. See Restatement (Second), Torts §§423, 427.

# Blasting Claims

- **Because blasting is accepted as an ultrahazardous activity....**
  - ✓ **Plaintiff must only prove a cause and effect relationship**
  - ✓ **If they can prove blasting activities occurred in vicinity of their property, they are deemed to have shown just cause**
  - ✓ **Burden of proof lies with the blaster to prove claimed damage was not a result of his/her activities**

# Blasting Claims

- **Expert Witness**

- ✓ **One who by education, training and or experience has attained such skill, knowledge or experience of some science, profession, business or occupation, not of common knowledge to the average layman.**

# Minimizing Blasting Risk

- Optimize blasting program
- Utilization of blast/seismic technology
- **Insuring proper documentation**
- Immediate response to community concerns
- Proactive communication with community

# Record Keeping – Your Best Defense

- **Shot report**
- **Considered most important record for litigation**
  - ✓ **Considered a business record, and is available for discovery**
  - ✓ **It may be **years** before you have to testify or give a deposition**
    - Best means of remembering what happened
    - Vital that you can reconstruct what occurred
  - ✓ **Technically seen as having three parts**

# Shot Report

- **Part 1 – Prediction**
  - ✓ How do you know what is going to happen when you shoot?
  - ✓ How do you know what the effects will be on adjacent properties?
  - ✓ How do you know how much explosive to use?
- **Must show the methodology used to allow for prediction of results before blast**



**Dyno Nobel North America**  
**Southeast Region**



**Blaster's Pre/Post-Blast Checklist**

Customer \_\_\_\_\_ Location \_\_\_\_\_  
 Blaster \_\_\_\_\_ Date \_\_\_\_\_

**Pre-Blast Checks:**

	<b>Yes</b>	<b>No</b>
Performed a pre-use inspection of all equipment and vehicles?	___	___
Signed in and notified quarry management that we're on site and ready to load shot?	___	___
Review driller's log?	___	___
Review seismic report from previous blast in this area?	___	___
Confirm seismic monitoring and instrument placement for this shot?	___	___
Inspected the blast area for personnel working, equipment broken down or other items that need to be addressed before loading?	___	___
Established blast site security and high wall safety zone by use of cones, markers, tape, blasting signs or yellow blasting men?	___	___
Inspected the face for cracks, caves, overhangs or light burden areas?	___	___
Inspected the blast site surface for cracks, slippery conditions and highwall hazards?	___	___
Checked for stray current, if applicable?	___	___
Placed stemming materials next to holes?	___	___
Checked actual layout vs. diagram and measured burdens and spacing at various points in shot?	___	___
Held a tailgate meeting with crew to assign duties and discuss the specifics of the shot?	___	___
Tape and check holes for proper depth, blockage & water?	___	___
Profile front row of holes for burden?	___	___
Scale Distance Factor: _____ Expected Vibration: _____		



# Shot Report

- **Part 2 – Action**

- ✓ **Activities involved with loading the shot as planned**
- ✓ **Confirm application of initial blast design**
- ✓ **Note changes from plan**
  - Blocked holes
  - Custom loading
  - Modified explosive selection

# Shot Report

- **Part 3 – Verification**

- ✓ **Compare results with predictions**
- ✓ **Review, include seismic data**
- ✓ **Reconcile explosive inventory**
- ✓ **Document additional comments or conditions present**
  - Write as if you are handing to the judge
  - Be accurate but not inflammatory
- ✓ **CHECK YOU MATH !!!!!**

<b><i>Loading Checks:</i></b>	<b>Yes</b>	<b>No</b>
Density checks for bulk products? #1 _____ #2 _____ #3 _____	___	___
Adjust front row loading to prevent excessive face movement?	___	___
Cleared the blast site of unnecessary personnel and equipment?	___	___
Completed a final inspection of blast to check for proper initiation sequence. Each connection physically checked by Blaster-in-Charge and helper? Blaster _____ Helper _____	___	___
Establish setback markers and noted the distance?	___	___
Set a blast time, cleared Safety Zone, posted guards and established communication with them?	___	___
Protection provided for blaster and observers?	___	___
<b><i>Post Blast Checks:</i></b>	<b>Yes</b>	<b>No</b>
Waited for fumes to clear & checked for misfire?	___	___
Given "All Clear" signal?	___	___
Review seismic data?	___	___
Review video of shot?	___	___
Complete Blast Report?	___	___
<b>Revised 08/26/02</b>		

# Shot Report

- **With today's seismographs and over a half century of research, it is hard to prove blast damage from vibration.**
- **As a result, cases are won and lost on the accuracy of the blasters paperwork**

# Shot Report Train Wrecks

- **Erasures, improper corrections**
- **Date on SR does not match seismogram**
- **Time on SR does not match time on seismogram**
- **Location printed on seismogram from another quarry**
- **Distance from shot to closest structure never changes**
- **No seismograph data**

# Shot Report Train Wrecks

- **Number of detonators doesn't match number of holes**
- **Lbs used per hole does not match total shown for shot**
- **Lbs used for shot does not match bulk truck weigh ticket**
- **Booster and detonator count does not match**

# Other paperwork

- **Shot reports not the only records reviewed**
  - ✓ Weigh tickets
  - ✓ Shipping papers
  - ✓ Inventory records
- **Any discrepancy, no matter how small will be aggressively attacked**
- **Be accurate and keep it simple so you do not risk confusing the issue....**



# Putting It All together

**“There are few issues or costs that can override the ability of any operation to be profitable and successful. The only thing that can force us to lock the front gate are the people who live around us”**

**- Jim Smack, President – Vulcan Materials’ Mid-East Division**

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