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UNITED STATES OF AMERICA

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

In Re SRBA	) Subcase Numbers 55-10288B, 55-10289B,
	) 55-10290B, 55-10292B, 55-10293B,
	) 55-10295, 55-10296, 55-10297B,
	) 55-10298, 55-10299B, 55-10300,
	) 55-10303B, and 55-13451
	)
Case No. 39576	) UNITED STATES' MOTION TO
	) STRIKE LU RANCHING CO.'S
	) MOTION FOR ATTORNEYS' FEES,
	) INCLUDING MEMORANDUM OF
	) POINTS AND AUTHORITIES

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MOTION

The United States, by and through the undersigned attorney, respectfully moves this Court for an order striking LU Ranching Co.'s Motion for Attorneys' Fees filed in the above-captioned subcases because the Motion for Attorneys' Fees was prematurely filed.

MEMORANDUM OF POINTS AND AUTHORITIES

On January 18, 2005, LU Ranching Co. (hereinafter "LU") filed LU Ranching Co.'s Motion for Reconsideration and/or Motion to Amend arguing that the District Court should reconsider the District Court's Memorandum Decision and Order on Challenge, Order of Partial Decrees which was filed in the above-captioned subcases on January 4, 2005 (hereinafter "Court's Order"). On January 18, 2005, LU also filed a Motion for Attorneys' Fees in the above-captioned subcases.

LU is not the prevailing party here. This Court granted the United States' Challenge and overruled the Special Master's erroneous award of priority dates that pre-date the enactment of the Taylor Grazing Act. Based upon the evidence in the trial record, this Court then awarded LU priority dates that post-date the enactment of the Taylor Grazing Act. LU's Motion for Reconsideration argues that the District Court erred in awarding LU priority dates that post-date enactment of the Taylor Grazing Act. Even assuming *arguendo* that LU may be entitled to costs as a prevailing party, LU's Motion for Attorneys' Fees is premature because LU has asked for reconsideration of this Court's decision on priority dates. This Court cannot rationally determine whether or not LU is a prevailing party that may be entitled to attorneys' fees and costs until such time as the District Court files an order on LU's Motion for Reconsideration. Therefore, LU's

Motion for Attorneys' Fees was prematurely filed. See e.g. Bear Island Water Association, Inc. v. Brown, 874 P.2d 528, 537 (Idaho 1994); Slaathaug v. Allstate Insurance Company, 979 P.2d 107, 113 (Idaho 1999); J.R. Simplot Company v. Enviro-Clear Company, Inc., 970 P.2d 980, 985 (Idaho 1998). The correct procedural mechanism for LU's premature filing of its Motion for Attorneys' Fees is for this Court to grant the United States' Motion to Strike. See Williams v. Idaho Potato Starch Co., 245 P.2d 1045, 1052 (Idaho 1952).^{1/}

In Crowley v. Lafayette Life Ins. Co., 683 P.2d 854, 859 (Idaho 1984), the Court stated that it could "conceive of no prejudice to any party which would result from considering a memorandum of costs prior to a decision of the court . . ." and then declined to strike a prematurely filed memorandum of costs. However, here, the United States is prejudiced by the prematurely filed Motion for Attorneys' Fees because LU is not now the prevailing party, and thus there is no valid claim for attorneys' fees. Furthermore, the United States has only 30 days from the date the Equal Access to Justice Act claim against the United States was received to remove such claim to federal court. See 28 U.S.C. §§ 1441, 1442, and 1446. Since LU cannot now be considered a prevailing party, the United States is unable to discern if there is any valid Equal Access to Justice Act claim to remove.

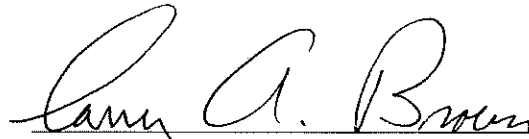
^{1/} The United States is fully aware that "[a] memorandum of costs prematurely filed shall be considered as timely." Idaho R. Civ. P. 54(d)(5). However, the United States is prejudiced by LU's premature filing of its Motion for Attorneys' Fees. LU invokes the Equal Access to Justice Act, a federal statute, as grounds for the recovery of costs. The United States has only 30 days to remove a claim based upon a federal statute from state court to federal court. 28 U.S.C. § 1446. At this point in time, neither this Court, nor a federal court, could determine whether LU is a prevailing party.

For good cause shown, this Court should file an Order striking LU's Motion for Attorneys' fees as premature.

DATED this 27th day of January, 2005.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", is written over a horizontal line.

Larry A. Brown
Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on 27th, 2005, that I served a true and correct copy of foregoing **UNITED STATES' MOTION TO STRIKE LU RANCHING CO.'S MOTION FOR ATTORNEYS' FEES, INCLUDING MEMORANDUM OF POINTS AND AUTHORITIES; SUBCASES 55-10288B ET AL.** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

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