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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, 55-13451, 55-13846, and
	)	55-13844
Case No. 39576	)	
	)	MEMORANDUM IN SUPPORT OF
	)	THE UNITED STATES' MOTION TO
	)	DISALLOW COSTS

I. INTRODUCTION

On January 18, 2005, LU Ranching Co. (hereinafter "LU") filed a 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)) (hereinafter “EAJA”) citing IDAHO R. CIV. P. 54(d)(1), IDAHO CODE § 12-121, and 28 U.S.C. § 2412(d)(1)(A) as authority for the District Court to order the United States to pay LU’s attorney’s fees allegedly incurred in litigation of the priority date issue in the above-captioned subcases. This Memorandum supports the United States’ Motion to Disallow Costs.^{1/}

II. STATEMENT OF THE CASE

The United States’ Motion to Disallow Costs should be granted. LU cannot prove that it is a prevailing party entitled to costs. Even if LU were a prevailing party, such award of costs is barred by the doctrine of intergovernmental immunity. Because the United States has not waived its sovereign immunity, this Court is not authorized to order the United States to pay an opposing litigant’s costs in a general stream adjudication. Moreover, because the United States was substantially justified in pursuing its objections to LU’s claimed priority date, LU’s EAJA claim must be dismissed.

III. ARGUMENT

A. LU Is Not The Prevailing Party, And Is Therefore Not Entitled To Costs

In order to be entitled to costs, LU had to prevail in this litigation. See IDAHO R. CIV. P. 54(d)(1) (“court may award reasonable attorney fees to the prevailing party”), IDAHO CODE § 12-121 (“judge may award reasonable attorney’s fees to the prevailing party”), 28 U.S.C. §

^{1/} “Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs; provided, however, the claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed.” Idaho R. Civ. P. 54(e)(5) (emphasis added). For the purposes of this Memorandum, the term “costs” includes attorney fees.

2412(d)(1)(A) (“court shall award to a prevailing party other than the United States fees and other expenses”). LU is not the prevailing party; therefore, LU is not entitled to recover its litigation costs.

The United States filed objections to the above-captioned water right claims because LU could not prove its claimed 1872 priority date. See United States’ Motion for Partial Summary Judgment and Memorandum in Support, In Re SRBA, Case No. 39576, Subcases 55-10288 *et al.* (Oct. 15, 1998) at 1-2 (“the United States seeks a ruling that LU Ranching is not entitled to the very early priority dates it has claimed for these rights.”); see Order Granting United States’ Motion for Summary Judgment, In Re SRBA, Case No. 39576, Subcases 55-10288 *et al.* (Jan. 8, 1999) (holding LU is entitled to 1976 priority dates); see Order on Motion to Alter or Amend; Order on Motion for Permissive Appeal, In Re SRBA, Case No. 39576, Subcases 57-04028 *et al.* (Jun. 26, 1997) at 9. The SRBA District Court reversed the Special Master’s Report and Recommendation awarding LU a 1976 priority date, and remanded the subcases to the Special Master for trial so that LU would have an opportunity “to support its theory that each conveyance in its chain of title back to 1872 (or whatever priority date LU can prove) carried with it a grant of the subject water rights.” Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief, Order of Recommitment to Special Master Cushman, In Re SRBA, Case No. 39576, Subcases 55-10288 A & B, *et al.* (Apr. 25, 2000) at 26 (emphasis added). After trial on the merits, the Special Master recommended LU be awarded an 1876 priority date. Special Master’s Report and Recommendation, Findings of Fact and Conclusions of Law, In Re SRBA, Case No. 39576, Subcase No. 55-10288B *et al.* (Feb. 27, 2003). This Court reversed the Special Master, and instead awarded LU priority dates that post-date the

enactment of the Taylor Grazing Act of 1934 and range from 65 years to 79 years junior to the date originally claimed because the trial evidence was insufficient to prove LU's claimed priority date, just as the United States has alleged and argued for over six years. See generally, Memorandum Decision and Order on Challenge, Order of Partial Decrees, In Re SRBA, Case No. 39576, Subcases 55-10288B *et al.* (Jan. 4, 2005) (hereinafter "Court's Order") at 30-41; see generally Order on LU Ranching Co.'s Motion for Reconsideration, In Re SRBA, Case No. 39576, Subcases 55-10288B *et al.* (Apr. 29, 2005). Thus, the District Court held that LU's claimed priority date was not supported by the facts, and was unwarranted under the existing law. The United States, not LU, prevailed in this litigation. Therefore, the United States' Motion to Disallow Costs should be granted.

B. No Recovery Of Fees And Costs Is Warranted Under Idaho Law

"Idaho is an 'American rule' state requiring each party to bear the costs of their own attorney's fees absent statutory authorization or contractual right." Owner-Operator Indep. Drivers Assoc. v. Idaho Public Util. Comm'n, 871 P.2d 818, 824 (Idaho 1994) (citing Heller v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984)). IDAHO CODE § 12-121 provides statutory authorization for the award of attorney fees in certain limited circumstances. Id. at 825. IDAHO R. CIV. P. 54(e)(1), in turn, establishes a framework for applying IDAHO CODE § 12-121. Robison v. State, Dep't of Health and Welfare, 695 P.2d 440, 442 (Idaho App. 1985). IDAHO R. CIV. P. 54(e)(1) provides, in pertinent part:

In any civil action the court may award reasonable attorney fees . . . to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation

An award of attorney fees under IDAHO CODE § 12-121 is not a matter of right. In order to obtain fees, a party must do more than show it prevailed. See Owner-Operator Indep. Drivers, 871 P.2d at 825. A court may award such fees only when it “is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.” Id. (citing Minich v. Gem State Developers, Inc., 591 P.2d 1078 (Idaho 1979)). LU has alleged that the United States acted in a manner that was frivolous, unreasonable or without foundation, but those allegations are without merit.

In order to award fees pursuant to IDAHO R. CIV. P. 54(e)(1) and IDAHO CODE § 12-121, this Court must conclude that the United States’ pursuit of the entire action was frivolous, unreasonable, or without foundation. Order Denying Motion for Attorney’s Fees, In Re SRBA, Case No. 39576, Subcases 57-10486 *et al.* at 3; see Turner v. Willis, 812 P.2d 737, 739 (Idaho 1991). Idaho statutes define a frivolous action as one “obviously serv[ing] merely to harass or maliciously injure another party” or “not supported in fact or warranted under existing law and [which] cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.” IDAHO CODE § 12-123(1)(b); see also Bear Island Water Association, Inc. v. Brown, 874 P.2d 528, 537 (Idaho 1994) (action frivolous and unreasonable where it relied on clearly incorrect factual assertion). Here the United States filed its objections to LU’s stockwatering claims on public lands because, among other things, LU asserted an 1872 priority date which LU could not prove. See United States’ Motion for Partial Summary Judgment and Memorandum in Support, In Re SRBA, Case No. 39576, Subcases 55-10288 *et al.* (Oct. 15, 1998) at 1-2 (“the United States seeks a ruling that LU Ranching is not entitled to the very early priority dates it has claimed for these rights.”); see Order Granting United States’ Motion for

Summary Judgement, In Re SRBA, Case No. 39576, Subcases 55-10288 *et al.* (Jan. 8, 1999).

Federal land managers have a duty to ensure that any use of public lands is properly authorized and that the lands are not unnecessarily or improperly encumbered. See Camfield v. United States, 167 U.S. 518, 524 (1896) (the government has the rights of an ordinary proprietor to maintain possession of federal lands and protect the lands from trespassers). The objections, and all ensuing litigation regarding the priority dates that LU could prove, were well founded on both the facts and the law. See Order on Motion to Alter or Amend; Order on Motion for Permissive Appeal, In Re SRBA, Case No. 39576, Subcases 57-04028 *et al.* (Jun. 26, 1997) at 9. In the final analysis, LU could not prove its claimed priority date, but was instead awarded priority dates that post-date enactment of the Taylor Grazing Act of 1934 and range from 65 years to 79 years junior to the date originally claimed by LU. See generally, Court's Order at 30-41. Thus, the United States' litigation position was supported by the facts in the trial record and was warranted under the existing law.

Here the United States had a legitimate basis for objecting to LU's claims and, indeed, ultimately prevailed in this litigation because LU could not, as the United States successfully argued, prove its claimed priority date. Therefore, the United States is entitled to an order disallowing costs.

**C. LU Is Not Entitled To Recover Costs Because The McCarran Amendment
Does Not Waive The United States' Sovereign Immunity From The
Shifting Of Costs In A General Stream Adjudication**

1. Introduction

The United States is immune from suit unless it consents to be sued. See United States v. Sherwood, 312 U.S. 584, 586 (1941). Congress alone may consent to suit, and its consent --

which is in effect a waiver of sovereign immunity -- must be "unequivocally expressed" in the statutory text. See United States v. Idaho, ex rel. Director, Idaho Dept. of Water Resources, 508 U.S. 1, 6 (1993) (hereinafter "Idaho") (citing Irwin v. Depart. of Veterans Affairs, 498 U.S. 89, 95 (1990)). That rule is applied with particular vigor when a party, such as LU in this case, seeks monetary extractions from the United States. The U. S. Supreme Court has consistently required a specific waiver of sovereign immunity before the United States will be subject to monetary liability. See Id. at 8-9. Consequently, on numerous occasions the U.S. Supreme Court has rejected efforts to assess monetary liability against the United States for what would be normal incidents of litigation between private parties. Idaho, 508 U.S. at 7 (citing United States v. Chemical Foundation Inc., 272 U.S. 1, 20-21 (1926) (assessment of costs) and Library of Congress v. Shaw, 478 U.S. 310, 323 (1986) (recovery of interest on judgment)).

LU moved this Court to order the United States to pay LU's litigation expenses under IDAHO R. CIV. P. 54(d)(1), IDAHO CODE § 12-121, and 28 U.S.C. 2412(d). The United States' Motion to Disallow such costs should be granted because the McCarran Amendment, through which the United States is participating in this proceeding, does not waive the United States' immunity from the shifting of litigation costs, but instead, expressly prohibits this Court from awarding such costs.

2. The McCarran Amendment Does Not Waive The United States' Sovereign Immunity From An Award Of The Costs LU Seeks

LU seeks to have this Court order the United States to pay LU's litigation expenses. There is no express waiver of sovereign immunity from fee and cost-shifting in the McCarran Amendment. Thus, the motion to disallow such costs should be granted.

The United States is participating in the Snake River Basin Adjudication (the “SRBA”) pursuant to the McCarran Amendment, which waived the United States’ sovereign immunity and allowed it to be joined in comprehensive general stream adjudications. Idaho, 508 U.S. at 3. At the time the McCarran Amendment was enacted, the United States was generally immune from any method of cost-shifting in litigation, whether by a judgment for costs or by otherwise requiring litigants to pay litigation expenses, attorney’s fees, or interest. See Chemical Foundation, 272 U.S. at 20-21 (recognizing the United States’ “sovereign prerogative not to pay costs”); accord The Antelope, 25 U.S. (12 Wheat.) 546, 550 (1827). If Congress had intended to waive the United States’ long-standing immunity from costs and attorney’s fees in general stream adjudications, it would have done so explicitly. See United States Department of Energy v. Ohio, 503 U.S. 607, 615 (1992) (Congress is presumed to be aware of the “common rule” that “any waiver of the National Government’s sovereign immunity must be unequivocal”). As demonstrated below, there is no such specific waiver within the text of the McCarran Amendment.

In case dealing specifically with the McCarran Amendment’s waiver of sovereign immunity, the Supreme Court stated, “[i]n several of our cases exemplifying the rule of strict construction of a waiver of sovereign immunity, we rejected efforts to assess monetary liability against the United States for what are normal incidents of litigation between private parties.” Idaho, 508 U.S. at 7.² Thus, under traditional principles of sovereign immunity, courts cannot construe the McCarran Amendment to authorize an award of attorney’s fees against the United

² The Supreme Court also specifically stated that “‘costs’ are those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against a losing party.” Id. at 8.

States because it lacks an explicit waiver of the government's immunity to fee shifting under state law or under the EAJA. See Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983) (holding that, waiver aside, sovereign immunity bars the shifting of attorney's fees against the federal government) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 267-68 & n. 42). Therefore, the United States is entitled to an order granting its Motion to Disallow Costs.

3. The McCarran Amendment Expressly Prohibits The
Recovery Of Costs From The United States

Not only is there no express waiver of sovereign immunity from fee and cost-shifting in the McCarran Amendment, but the McCarran Amendment itself expressly provides that "[n]o judgment for costs shall be entered against the United States."^{3/} Idaho, 508 U.S. at 8 (quoting 43 U.S.C. § 666(a)). Thus, by its very terms, the McCarran Amendment bars the shifting of fees and costs to the United States. If Congress had meant for the United States to be liable for the fees and costs that are incident to the litigation of water rights in general stream adjudications, it could have amended the McCarran Amendment at any time to explicitly state that the Court having jurisdiction could award fees and costs to the prevailing party. Instead, Congress has left the provision barring the shifting of fees and costs to the United States in place. Therefore, by

^{3/} Like the United States, the State of Idaho has also declined to waive its sovereign immunity to allow recovery of costs. After the state was assessed costs in Musser v. Higginson, 871 P.2d 809 (1994), the Idaho legislature enacted IDAHO CODE § 42-1414 § 42-1423, which "expressly refuse[d]" to waive the immunity of the State and all state agencies from awards of costs or attorney fees, other than the costs imposed by IDAHO CODE § 42-1414 for appearing in an adjudication.

the express provisions of the statute allowing the United States to be joined in this adjudication, the United States' Motion to Disallow Costs must be granted.⁴

D. LU's Motion Is Barred By The Intergovernmental Immunity Doctrine

IDAHO CODE § 42-1423 expressly cloaks the State of Idaho with immunity from award of costs and attorneys fees: "No judgment for costs or award of attorneys fees against the State of Idaho, any state agency, or any officer or employee of the state of Idaho shall be allowed in any water rights adjudication proceeding pursuant to this chapter." According to the intergovernmental immunity doctrine, a state sovereign may not treat itself, its employees, or its own interests more favorably than those of the United States. See North Dakota v. United States, 495 U.S. 423, 437-438 (1990); see generally Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 811-816 (1989); see Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376, 385 (1960). Thus, LU's Motion for Attorney's Fees is barred by the intergovernmental immunity doctrine.

In Davis, the Court struck down a Michigan tax scheme that unfairly taxed federal retiree benefits while exempting state retiree benefits. Davis, 489 U.S. at 817. In so holding, the Court analyzed the two classes of state and federal retirees and found that there were no "significant differences" that justified disparate treatment. Id. at 816. Here, the United States is of the same

⁴ Both the Idaho and U. S. Supreme Courts have explained that "costs" are litigation expenses that a prevailing party is allowed by rule to tax against the losing party. Idaho, 508 U.S. at 8; Idaho Dept. of Water Resources v. United States, 832 P.2d 289 (Idaho 1992) rev'd Idaho, 508 U.S. 1 (1993). Thus, for the purposes of Idaho law, the term "costs" includes attorney fees that are litigation expenses allowed by IDAHO R. CIV. P. 54(e)(1) and IDAHO CODE § 12-121. See also IDAHO R. CIV. P. 54(e)(5) ("Attorney fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs . . .").

class as the State of Idaho. Like Davis, there are no “significant differences” between the two governmental entities which would justify disparate treatment. Therefore, according to the intergovernmental immunity doctrine, the United States should be afforded the same protections and benefits provided to the State of Idaho under state law.

The intergovernmental immunity doctrine dictates that this Court should not impose greater burdens upon United States than those imposed upon the State of Idaho. As the Supreme Court stated in Davis, “the danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself. . . ‘[I]t does not seem too much to require that the State treat [the Federal Government] as well as it treats. . . itself.’” Id. at 815 n.4 (quoting Phillips Chemical Co., 361 U.S. at 385). Thus, the United States, like the State of Idaho, is immune from the award of costs and attorney’s fees under IDAHO CODE § 42-1423 and is therefore entitled to an order disallowing costs.

E. LU Is Not Entitled To Recover Attorney’s Fees and Costs Under EAJA

1. Introduction

In 1980, Congress enacted the Equal Access to Justice Act (“EAJA”), Pub. L. No. 96-481, Title II, 94 Stat. 2321, 2325 (1980), which permits prevailing parties to obtain awards of attorney’s fees and other expenses against the United States in certain administrative proceedings and judicial actions. See 5 U.S.C. § 504; 28 U.S.C. 2412. Congress originally enacted EAJA in response to its concern that persons might be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. See H.R. Rep. No. 96-1418, at 14 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4992-93; S. Rep. No. 96-253, at 1 (1979). Thus, EAJA authorizes certain

courts, under certain circumstances, to award reasonable attorney's fees and expenses to parties who prevail against the United States either in a civil action or in certain administrative proceedings, known as "adversary adjudications." See 28 U.S.C. §§ 2412(b); 2412(d)(1)(A); 2412(d)(3).

LU invoked section 2412(d)(1)(A) of EAJA as authority for the SRBA District Court to order the United States to pay \$270,629.75 in attorney's fees and costs in these subcases. For the reasons demonstrated below, LU is not a prevailing party that would be entitled to an award of attorney's fees and costs, and the award of attorney's fees and expenses is barred because the United States' position on the issues was, at all times, substantially justified. Furthermore, even if LU were otherwise entitled to an award of fees under EAJA, this Court is not a "court" empowered to make such an award under section 2412(d)(1)(A).

2. LU is not a prevailing party entitled to EAJA fees

In order to be entitled to attorney's fees and expenses under EAJA, LU had to prevail in this litigation. See 28 U.S.C. § 2412(d)(1)(A) ("court shall award to a prevailing party other than the United States fees and other expenses"). As demonstrated supra, at 3-4, LU is not a prevailing party that is entitled to EAJA fees.

3. EAJA Fees cannot be awarded to LU because the United States' position in this litigation was, at all times, substantially justified

Even if LU could establish that it had prevailed in this litigation, which it did not, the inquiry does not end. A prevailing party is not entitled to recover EAJA fees if "the position of the United States was substantially justified" 28 U.S.C. § 2412(d)(1)(A). "Substantial justification" means that the government's position must have a "reasonable basis both in law

and in fact,” *i.e.*, the government need not be “‘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.” Pierce v. Underwood, 487 U.S. 552, 565 (1988). “The government need not, therefore, ‘show that it had a substantial likelihood of prevailing.’” Bay Area Peace Navy v. United States, 914 F.2d 1224, 1230 (9th Cir. 1990) (quoting United States v. First Nat'l Bank of Circle, 732 F.2d 1444, 1447 (9th Cir. 1984)). “‘The standard . . . should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case.’” Dole v. Phoenix Roofing, 922 F.2d 1202, 1209 (5th Cir. 1991) (quoting EAJA’s legislative history, H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 10, 18); accord Kali v. Bowen, 854 F.2d 329, 334 (9th Cir. 1988).

As shown supra., at 3-4 and at 7-9, the United States had a valid basis, both in fact and in law, to file objections to LU’s stockwatering claims on public lands. In the end, LU could not prove its claimed priority date, and the priority dates awarded by the SRBA District Court were from 65 to 79 years junior to the date originally claimed. Thus, the United States’ litigation position was supported by the facts in the trial record and was warranted under the existing law. Because the United States’ objections were successfully resolved through this litigation, the United States’ position was, at all times, substantially justified. Therefore, the SRBA District Court is barred by EAJA from shifting LU’s fees and costs to the United States.

4. EAJA Fees cannot be awarded to LU because the McCarran Amendment specifically bars the award of costs against the United States

The EAJA states, “[e]xcept as otherwise provided by statute, a court shall award to a prevailing party other than the United States, fees and other expenses . . . incurred by the party in

any civil action” 28 U.S.C. 2412(d)(1)(A) (emphasis added). As demonstrated above, the McCarran Amendment expressly provides that “[n]o judgment for costs shall be entered against the United States.” *Idaho*, 508 U.S. at 8 (quoting 43 U.S.C. § 666(a)). As stated *supra.*, n.2, “‘costs’ are those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against a losing party.” *Id.* at 8. Thus, the EAJA itself precludes the award of attorney’s fees against the United States because the McCarran Amendment specifically bars the award of attorney’s fees against the United States.

5. The SRBA District Court is not authorized by the EAJA to order the United States to pay LU’s attorney’s fees

The Supreme Court has held, “[t]he EAJA renders the United States liable for attorney’s fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.” *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (emphasis added). See also *Resolution Trust Corp. v. Gaudet*, 192 F.3d 485, 487 (5th Cir. 1999); *St. Louis Fuel & Supply Co. v. FERC*, 890 F.2d 446 (D.C. Cir. 1989); *In Re Perry*, 882 F.2d 534 (1st Cir. 1989); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988), *aff’d sub nom., Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990) (S. Ct. decision addresses only the “fees for fees” issue); *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988); *Smedberg Mach. & Tool, Inc. v. Donovan*, 730 F.2d 1089 (7th Cir. 1984).

LU invokes 28 U.S.C. § 2412(d) of EAJA in order to extract money from the United States for attorney fees allegedly incurred in the SRBA where the United States is a party pursuant to the McCarran Amendment’s waiver of sovereign immunity. Section 2412(d)(1)(A) of EAJA, in relevant part, authorizes “a court” to award a prevailing party’s attorney’s fees

“incurred by that party in any civil action . . . brought . . . against the United States in any court having jurisdiction of that action.” 28 U.S.C. § 2412(d)(1)(A) (emphasis added). The award of attorney’s fees LU seeks here is not authorized under EAJA because the Court presiding over these subcases – a court of the State of Idaho – is not a “court” constituted under Article III of the Constitution or other court specifically enumerated in the EAJA, in which sovereign immunity is waived for an award of attorney’s fees against the United States.

An examination of the development of the EAJA, and complementary statutes, reveals that when Congress has intended to make EAJA applicable in non-Article III courts, Congress has expressly so provided through specific, affirmative legislation. For example, when Congress reenacted EAJA in 1985, it specifically included the United States Court of Federal Claims as a court authorized to award EAJA fees under section 2412(d). Pub. L. No. 99-80, § 2, 99 Stat. 183, 185 (1985); 28 U.S.C. § 2412(d)(2)(F). And in 1992, Congress added the United States Court of Veterans Appeals to the courts authorized to award attorney’s fees under § 2412(d). Pub. L. No. 102-572, §§ 506(b), (d), 106 Stat. 4506, 4513 (1992); 28 U.S.C. § 2412(d)(2)(F). Congress has enacted similar legislation expressly giving the Tax Court, another non-Article III court, its own EAJA-type provisions. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 292(a), 96 Stat. 324, 572 (1982); 26 U.S.C. § 7430; 28 U.S.C. § 2412(e). Other than these specific provisions, Congress did not specify that “court” within the meaning of section 2412 includes non-Article III courts, much less State courts like this one.

Further, the legislative history of EAJA and its amendments reinforces the interpretation that “court” is limited to federal Article III courts except to the extent otherwise specified. When it enacted EAJA in 1980, Congress entitled the statute, “An Act to provide for the payment by

the United States of certain fees and costs incurred by prevailing parties in federal agency adjudications and in civil actions in courts of the United States.^{5/} H.R. Rep. No. 96-1418, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4999 (emphasis added). The legislative history provides:

Section 2412(b) permits a court in its discretion to award attorney fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties. The courts so empowered are those defined in section 451 of title 28, United States Code. This is consistent with the present law in section 2412.

H.R. Rep. No. 96-1418, at 17 (1980), 1980 U.S.C.C.A.N. at 4996 (emphasis added).^{6/} Further, the statute was supported by the Congressional Budget Office's ("CBO") estimate of EAJA's costs to the federal fisc.^{7/} Notably, the CBO estimate omitted any estimate of the costs of paying attorney's fees to prevailing parties in State courts in general stream adjudications, notwithstanding the fact that the McCarran Amendment had been law for nearly 25 years. See

^{5/} Section 2412(a) of EAJA, which preserved the former law providing for certain discretionary awards of costs not including attorneys' fees and expenses, incorporated by reference the enumeration of "costs" under 28 U.S.C. § 1920, which by its express terms is limited to "any court of the United States" – a term which is defined under 28 U.S.C. § 451 to include only Article III courts: "the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."

^{6/} The language of section 2412(d)(1)(A) is identical in relevant respects to that of section 2412(b), and the House Report does not suggest any different definition of the courts empowered to award fees under section 2412(d)(1)(A). See id. at 18, 1980 U.S.C.C.A.N. at 4997. See also Sullivan v. Stroop, 496 U.S. 478, 483-85 (1990) (where Congress uses the same term in different sections of a statute, that term should be given a consistent interpretation absent clear evidence of contrary legislative intent); Sorenson v. Secretary of the Treasury, 475 U.S. 851, 860 (1986) (same).

^{7/} See 2 U.S.C. § 602 (duties and functions of the Congressional Budget Office).

id. at 20-24, 1980 U.S.C.C.A.N. at 5000-5003. In light of the United States' participation in general stream adjudications across the Western United States with hundreds of thousands of water claims at issue, the potential cost to the public fisc of attorney's fee awards would be considerable and, thus, the CBO's omission of such costs from its estimate for EAJA reinforces the inference that Congress never intended EAJA to apply to such proceedings.

The legislative history of the 1985 reenactment of EAJA further reinforces the interpretation that "court" is limited to federal courts. The House Report indicated Congress's view that the issue of the United States' substantial justification might arise "in EAJA proceedings in two contexts: agency adjudications and federal court proceedings." H.R. Rep. 99-120(I) at 12, reprinted in 1985 U.S.C.C.A.N. 132, 140 (emphasis added). The hearings on reenactment were referred to as "The Awarding of Attorneys Fees in Federal Courts: Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary." See id. at 22, 1985 U.S.C.C.A.N. at 151 (emphasis added). Moreover, the Congressional Budget Office made no revision to the cost estimate to include State courts. See id. Thus, there is no indication whatsoever that Congress ever intended State courts to have authority to order the United States to pay EAJA fees.

Finally, the legislative history of other related legislation further reinforces the interpretation that "court" for purposes of EAJA is limited to federal courts. In enacting the Independent Counsel Reauthorization Act of 1994, P.L. 103-270, the Conference Committee expressed its view that EAJA allows "Federal courts to award attorney fees to private parties in suits against the United States" H.R. Conf. Rep. 103-511 at 14 (emphasis added), reprinted in 1994 U.S.C.C.A.N. 792.

The United States Court of Appeals for the Eleventh Circuit has specifically held that authority to award fees under section 2412 is limited to Article III courts. See Bowen v. Commissioner of IRS, 706 F.2d 1087 (11th Cir. 1983) (U.S. Tax Court did not have authority to award fees under section 2412(d)); In Re Davis, 899 F.2d 1136, 1139 (11th Cir. 1990) (U.S. Bankruptcy Court did not have authority to award fees under section 2412(d)). The Tenth Circuit has disagreed, see O'Connor v. Department of Energy, 942 F.2d 771, 773-74 (10th Cir. 1991) (U.S. Bankruptcy Court did have authority to award fees under section 2412(d)), as has the Federal Circuit, see Essex Electro Engineers, Inc. v. United States, 4 Cl. Ct. 463, 465 (Fed Cir. 1985), and several non-Article III courts. One State court has even held that a State court is authorized to award fees against the United States under another provision of EAJA, section 2412(b). See United States v. Hood, 699 P.2d 98, 100 (Nev. 1985). However, the United States is aware of no court that has held that section 2412(d)(1)(A) authorizes an award of attorney's fees against the United States in State court.

Further, it would be particularly improvident to construe section 2412(d) as applying to State courts. Congress specifically incorporated explicit provisions in section 2412(d), see 28 U.S.C. § 2412(d)(2)(F) (specifying that "court" for purposes of section 2412(d) includes the U.S. Court of Veterans Appeals and U.S. Court of Federal Claims), making this subsection applicable in certain non-Article III courts. To interpret section 2412(d) as applying to other, unspecified non-Article III courts would render section 2412(d)(2)(F) superfluous, which would be a statutory construction that should be eschewed. See, e.g. Jackson v. Birmingham Bd. of Educ., ___ U.S. ___, 125 S. Ct. 1497, 1513-14 (2005) (statutory interpretations that render explicit statutory references superfluous are eschewed) (citing Central Bank of Denver, N.A. v. First

Interstate Bank of Denver, N. A., 511 U.S. 164, 176-177, 114 S. Ct. 1439 (1994)); Hibbs v. Winn, 542 U.S. 88, 124 S.Ct. 2276, 2286 (2004) (citing 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant” (footnotes omitted))). Further, in light of the fact that Congress made no reference to State courts in section 2412(d) – as it did, in contrast, in other statutes waiving federal sovereign immunity in State courts, see 28 U.S.C. §§ 2410, 1441-46 – such an interpretation would conflict with the requirement that waivers of sovereign immunity must be “unequivocally expressed,” see, e.g., Idaho, 508 U.S. at 6, and, under EAJA in particular, must be “strictly construe[d].” See Ardestani, 502 U.S. at 137.

IV. CONCLUSION

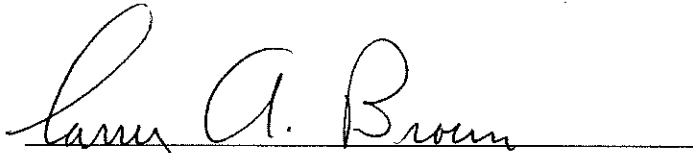
LU is not entitled to attorney fees because LU is not the prevailing party in this litigation, and is therefore not entitled to attorney fees under any statute or rule. Moreover, this Court is barred from ordering the United States to pay LU’s attorney’s fees under EAJA because the United States’ position was substantially justified at all times. In addition, the United States has not waived its sovereign immunity so that this Court is authorized to order the United States to pay LU’s attorney’s fees in this general stream adjudication, and, in any event, LU’s Motion is

barred by the doctrine of intergovernmental immunities. For all of the above-stated reasons, the United States is entitled to an order granting its Motion to Disallow Costs.

DATED this 23rd day of May 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 May 23, 2005, that I served a true and correct copy of foregoing **MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISALLOW COSTS; 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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Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, ID 83301
(By Federal Express, overnight delivery)

Copies to:

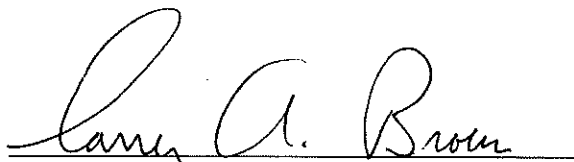
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