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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

Case No. 39576

Subcase Numbers 55-10288B, 55-10289B, 55-10290B, 55-10292B, 55-10293B, 55-10295, 55-10296, 55-10297B, 55-10298, 55-10299B, 55-10300, 55-10301B, 55-10303B, 55-13451, 55-13846 and 55-13844

**LU RANCHING CO.'S REPLY TO
UNITED STATES' MEMORANDUM IN
SUPPORT OF UNITED STATES'
MOTION TO DISALLOW COSTS**

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I. INTRODUCTION

“Congress originally enacted the EAJA [Equal Access to Justice Act] in response to its concern that persons might be deterred from seeking review of, or defending against, unreasonable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). There is no better example of this than the present case. For over seven years, LU Ranching has fought for the legal recognition of its private water rights sited on what are now federally administered grazing allotments. Every step of the way, the United States has opposed LU Ranching’s water right claims. Contrary to the arguments of the United States today, the primary basis of the United States’ objections was not the mere priority date of LU Ranching’s water rights, but the very existence of those water rights. From the initiation of this litigation forward, the United States has taken the position that no one other than the United States can acquire and maintain water rights on federal land. Only in the alternative has the United States claimed that LU Ranching is not entitled to a priority date earlier than 1976, and even on that point, the United States’ argument was rejected by the Court. At all times, the United States’ position in this litigation was unreasonable and lacked any justification in existing law. Ultimately, the United States’ position was rejected by the SRBA Court and LU Ranching secured partial decrees with pre-1976 priority dates for the claimed places of use on federally administered allotments. Under such circumstances where LU Ranching had to incur tremendous expense in defending its water rights against the United States’ unreasonable objections, an award of attorneys fees under the EAJA is justified and mandated by law.

II. ARGUMENT

A. The United States Mischaracterizes LU Ranching’s Motion for Attorneys Fees as a Motion to Disallow Costs.

LU Ranching is not asking this Court to award costs in this litigation, only attorneys fees as allowed by statute, hence the caption of LU Ranching’s original motion: “**Motion for Attorneys’ Fees.**” Accordingly, the United States’ attempt to misdirect the Court by re-labeling what is at issue as a “Motion to Disallow Costs” is telling, and skirts the real issue, which is the United States’ liability for attorneys fees under the provisions of the EAJA.

1 The EAJA specifically differentiates between “costs” and “attorneys fees.” *See* 28 U.S.C. §
2 2412(a) (1) (defining costs “not including the fees and expenses of attorneys”); *see also* 28 U.S.C. §
3 2412(d)(2) (defining fees and other expenses). Costs defined by the statute include filing fees, court
4 reporter fees, copying charges, and other related administrative expenses. *See* 28 U.S.C. § 2412(a),
5 *citing* 28 U.S.C. § 1920. In contrast, fees and expenses mandated by the EAJA are treated
6 separately as follows:

7 For purposes of this subsection, (A) “fees and other expenses” includes the
8 reasonable expenses of expert witnesses, the reasonable cost of any study, analysis,
9 engineering report, test, or project which is found by the court to be necessary for the
10 preparation of the party’s case, *and reasonable attorney fees*.

11 *See* 28 U.S.C. § 2412(d)(2)(A) (*emphasis added*). LU Ranching does not seek costs under the
12 EAJA, only its reasonable attorneys fees and costs.^{1/}

13 The United States’ motivation in attempting to re-name and recharacterize LU Ranching’s
14 Motion for Attorneys Fees is transparent. The United States would have this Court believe that the
15 McCarran Amendment (43 U.S.C. § 666) is dispositive of the issue of whether LU Ranching is
16 entitled to the recovery of attorneys fees. However, the only way the United States can make this
17 argument is if it can convert LU Ranching’s motion for attorneys fees into a motion to recover costs,
18 because the McCarran Amendment solely limits the shifting of litigation costs, and does not address
19 attorneys fees. The applicable portion of the McCarran Amendment states as follows:

20 Consent is given to join the United States as a defendant in any suit (1) for the
21 adjudication of rights to the use of water of a river system or other source, or (2) for
22 the administration of such rights, where it appears that the United States is the owner
23 of or is in the process of acquiring water rights by appropriation under State law ...
24 Provided that no *judgment for costs* shall be entered against the United States in any
25 such suit.

26 *See* 43 U.S.C. § 666 (2002) (*emphasis added*). Had Congress intended to exempt the United States
27 from both exposure for the payment of costs and attorneys fees, then Congress would have said so

28 ^{1/} Per the Court’s order on May 18, 2005, the issue of the reasonableness of LU
Ranching’s Fees has been left for another day.

1 explicitly in the text of the McCarran Amendment. As it stands, pursuant to the plain language of the
2 statute, the McCarran amendment addresses a judgment for costs against the United States, but does
3 nothing to relieve the United States from potential obligations for the payment of attorneys fees, under
4 the separate waiver of sovereign immunity contained in the EAJA.

5
6 In arguing that the McCarran Amendment prohibits this Court from awarding attorneys' fees
7 against the United States in this case, the government relies on *United States v. Idaho ex re. Director,*
8 *Idaho Dept. Of Water Resources*, 508 U.S. 1 (1993). What the United States does not disclose,
9 however, is that the "fees and cost-shifting" at issue in *United States v. Idaho* involved the payment of
10 filing fees, and not, as in this case, attorneys fees. *Id.* Filing fees such as those at issue in *United States*
11 *v. Idaho* are costs under the United States Code. *See* 28 U.S.C. § 2412(a)(1) (judgment for costs, as
12 enumerated in section 1920 of this title, does not include the fees and expenses of attorneys); *see also*
13 28 U.S.C. § 1920 (costs include clerk's fees and docket fees). Accordingly, *United States v. Idaho* has
14 no probative value on the issue of whether LU Ranching is entitled to attorneys fees in this case.^{2/}

15
16 **B. The United States Waived Sovereign Immunity for the Award of Attorneys' Fees**
17 **under the Equal Access to Justice Act.**

18 Just as a court should not take it upon itself to extend a waiver of sovereign immunity beyond
19 that which Congress intended, neither should a court assume the authority to narrow the waiver that
20 Congress intended. *See United States v. Idaho ex re. Director, Idaho Dept. Of Water Resources*, 508
21 U.S. 1, 7 (1993). And yet, this is exactly what the United States is asking this Court to do. Through
22 the EAJA, the United States Congress expressly and unequivocally waived sovereign immunity
23 subjecting the United States to monetary liability for attorneys' fees in *any court* having jurisdiction
24 over the matter. Importantly, when the EAJA was enacted, the McCarran Amendment already was in
25

26
27 ^{2/} As discussed herein, below, *United State v. Idaho, supra*, does have relevance
28 on the issue of the jurisdiction of the SRBA Court over the United States pursuant to the
McCarran Amendment.

1 effect and, therefore, state courts already had jurisdiction over the United States in cases involving the
2 adjudication of water rights. *See* McCarran Amendment (July 10, 1952, C. 651, Title II, Section 208(a)-
3 (c), 66 stnt. 560. This SRBA Court has had, and continues to have jurisdiction over this case, and
4 under the plain language of the EAJA has jurisdiction and authority to award attorneys fees against the
5 United States in this case.
6

7 Cases dealing with waiver of sovereign immunity are, with good reason, alert to require a
8 specific waiver of sovereign immunity before the United States may be held liable for monetary
9 exactions. In this case, however, there is a specific waiver of sovereign immunity found in the plain
10 language of the EAJA. As in all cases, the starting point is the plain language of the applicable statutory
11 provision, which in this case states as follows:
12

13 Except as otherwise specifically provided by statute, a court *shall award* to a prevailing
14 party other than the United States fees and other expenses, in addition to any costs
15 awarded pursuant to subsection (a), incurred by that party *in any civil action* (other than
16 cases sounding in tort), including proceedings for judicial review of agency action,
17 brought by or against the United States *in any court having jurisdiction of that action*,
18 unless the court finds that the position of the United States was substantially justified
19 or that special circumstances make an award unjust.

20 28 U.S.C. 2412(d)(1)(A) (*emphasis added*). The crux of the issue, then, depends on whether this case
21 qualifies as “any civil action” pending in “any court having jurisdiction of that action.” This is a civil
22 action, and this Court most decidedly has jurisdiction over this case.
23

24 The EAJA provides that parties have a right to attorneys fees in any court having jurisdiction
25 over this matter. Under the provisions of the McCarran Amendment in effect at the time the EAJA was
26 enacted, the SRBA has jurisdiction over this case. The McCarran Amendment states as follows:
27

28 Consent is given to join the United States as a defendant in any suit (1) for the
adjudication of rights to the use of water of a river system or other source, or (2) for the
administration of such rights, where it appears that the United States is the owner of or
is in the process of acquiring water rights by appropriation under State law, by purchase,
by exchange, or otherwise, and the United States is a necessary party to such suit. The
United States, when a party to any such suit, shall (1) be deemed to have waived any

1 right to plead that the State laws are inapplicable or that the United States is not
2 amendable thereto by reason of its sovereignty, and (2) shall be subject to the judgments,
orders, and decrees of the court having jurisdiction ...

3 *See* 43 U.S.C. § 666; *see also United States v. Idaho ex re. Director, Idaho Dept. Of Water Resources*,
4 508 U.S. 1 (1993) (recognizing the SRBA Court's jurisdiction over the United States pursuant to the
5 McCarran Amendment).
6

7 It is a basic tenet of statutory construction that where the language of a statute is clear, the words
8 employed by the legislature are to be taken as the final expression of the meaning intended. *See United*
9 *States v. Missouri Pacific R. Co.*, 278 U.S. 269, 278 (1929); *see also Azarte v. Ashcoft*, 394 F.3d 1278,
10 1285 (9th Cir. 2005) ("The starting point for [the] interpretation of a statute is always its language, and
11 courts must presume that a legislature says in a statute and means in a statute what it says there")
12 (*internal citations omitted*). In this case, there could be no plainer words and no clearer meaning than
13 when the United States Congress wrote that "*any* court having jurisdiction of that action" has the
14 authority to award attorneys fees to a private litigant under the EAJA. *See* 28 U.S.C. 2412(d)(1)(A).
15 If the United States Congress wanted to limit the authority to Article III Courts, it could have done so,
16 but it did not. If the United States Congress wanted to exclude state courts specifically from this
17 provision of the EAJA, it could have, but it did not. What the United States Congress did do was to
18 draft legislation specifically waiving the United States' sovereign immunity and subjecting it to liability
19 for attorneys fees in *any* civil action in *any* court having jurisdiction over the matter.
20

21
22 The United States' position that the District Court of the Fifth Judicial District of the State of
23 Idaho does not fall with in the definition of "a court" absolutely defies reason. It not only goes against
24 the plain meaning of the words in the EAJA, it also goes against established case law whereby appellate
25 courts have held that "any court" within the meaning of the EAJA is not limited to federal or Article
26 III courts, and runs afoul of cases in which state courts have actually awarded attorneys fees to a private
27 litigant under the EAJA.
28

1 In *O'Connor v. United States Dept. of Energy*, the Tenth Circuit Court of Appeals specifically
2 held that the phrase "any court" as used in the EAJA is defined as "a person or group of persons whose
3 task is to hear and submit a decision on cases at law." *O'Connor*, 942 F.2d 771, 773-774 (10th Cir.
4 1991). Further, the Court rejected the United States' position that "any court" was somehow limited
5 to only federal or constitutional courts. As explained by the Tenth Circuit:
6

7 While courts may be classified according to their means of creation as either
8 constitutional (Article III) or legislative (i.e. Bankruptcy), Congress chose not to modify
9 the word "court" when it drafted 28 U.S.C. §2412(d)(1)(A). Had it meant to restrict the
10 use of this provision to constitutional courts, Congress could have done so. The broad
11 language employed by Congress, in its ordinary usage, would include the bankruptcy
12 court. We also think it significant that the phrases utilized in §2412(d)(1)(A) are simply
13 "a court" and "any court" as opposed to the phrase "court of the United States" as used
14 in §1920 and defined in §451 ... Again, had Congress meant to limit jurisdiction under
15 §2412(d)(1)(A) to "any court of the United States," it could have done so. Rather, the
16 plain and unambiguous statutory language gives "any court," including the bankruptcy
17 court, the power to make a fee award under the EAJA.

18 *Id.* In another case, the Federal Circuit also held that the Claims Court had jurisdiction to award fees
19 and expenses under the EAJA even though the Claims Court did not fall within the definition of "courts
20 of the United States." See *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247 (Fed.Cir. 1985).
21 Similar to the United States in the present case, the United States in *Essex* argued that only a court of
22 the United States, or a constitutional or Article III court, has jurisdiction to award attorneys fees and
23 expenses under the EAJA. See *Essex*, 757 F.2d at p. 250-251; see also United States' Brief, p. 15. The
24 Court in *Essex* rejected the United States' analysis and held that application of 28 U.S.C. §2412(d) is
25 not limited to constitutional courts of the United States. *Essex*, 757 F.2d at p. 252. It also rejected the
26 holding in the case *Bowen v. Commissioner of IRS* upon which the United States relies so heavily now.
27 *Id.*; see also United States' Memorandum, p. 18, citing *Bowen v. Commissioner of IRS*, 706 F.2d 1087
28 (11th Cir. 1983).

29 The specific mention of the Court of Claims in the EAJA and in the legislative history of the
30 same also must be put into context. The United States relies heavily on the fact that there are specific
31 provisions in the EAJA specifying that the U.S. Court of Veterans Appeals and the U.S. Court of
32 Federal claims are included in the definition of Courts. The reason for the clarifying position in the

1 statute must be put in historic context. The language was inserted at a time when the courts, and
2 specifically the Claims Court, were in a state of transition. When the Federal Courts Improvement Act
3 of 1982 became effective on October 1, 1982, it designated a new Claims Court to be the forum for the
4 resolution of cases then pending in the Court of Claims. Through these transitions, it was important
5 to ensure that litigants would not be divested of the opportunity to pursue an award of fees and costs
6 because of the transfer provisions relating to the creation of the Claims Court. *See Ellis v. United*
7 *States*, 711 F.2d 1571, 1573-1575 (Fed.Cir. 1983). Specific mention, then, of the Claims Court or the
8 tax Court^{3/} does not diminish or devalue the plain language of the statutory provision at issue: “any
9 court having jurisdiction of that action” has the authority to award attorneys fees to a private litigant
10 under the EAJA. *See* 28 U.S.C. 2412(d)(1)(A); *see also Essex*, 757 F.2d at p. 251-253. Likewise, the
11 mention of the Veteran’s Court was in response to a specific case that had held the Veteran’s Court
12 could not award attorneys fees under the EAJA. *See Jones v. Derwinski*, 2 Vet. 231 (1992). This
13 decision was specifically disavowed in the Federal Courts Improvement Act of 1992, as recognized in
14 *Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992). In contrast to the courts specifically mentioned in
15 amendments to the EAJA, the state courts already had jurisdiction over the United States pursuant to
16 the McCarran Amendment at the time the EAJA was initially enacted. There was, therefore, no need
17 to clarify that those courts were “courts having jurisdiction of that action” under the EAJA. Moreover,
18 it should be noted with respect to amendments to the EAJA, that any time there was a question about
19 whether a court, and in particular a newly created court, is within the purview of the EAJA, Congress
20 has come back in a series of amendments to show that the EAJA applies. Such amendment was not
21 necessary with respect to Idaho state courts. This Court can take judicial notice of the fact that Idaho
22 state courts were in existence long before the enactment of the EAJA.

23 Not only have federal courts recognized that when Congress stated that “any court
24 having jurisdiction of the action” truly means “any court” for purposes of application of the EAJA, in
25 practice, state courts also have recognized their jurisdiction to award attorneys fees to a private litigant
26 under the EAJA. An example of this is found in a case brought by the Federal Deposit Insurance
27

28 ^{3/} *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub.L.No 97-248.

1 Corporation in state court in Ohio in connection with several negotiable notes. In an unpublished
2 opinion, *Federal Deposit Insurance Corp. v. Chaney*, 1986 WL 1283 (Ohio App. 8 Dist. 1996), the
3 Court of Appeals of Ohio reversed the lower court's opinion awarding over \$34,000 in attorneys fees
4 under 28 U.S.C. § 2412(d), because the Ohio Court of Appeals had reversed the judgment for Mr.
5 Chaney on the merits. The lower court, however, found the government's position to be substantially
6 unjustified and had awarded Mr. Chaney his attorneys fees. The Ohio Court of Appeals never
7 questioned whether it had jurisdiction, nor apparently did the United States raise the issue. (Applicants
8 shall lodge a copy of this opinion with the court contemporaneously with the filing of their Motion for
9 Attorney's Fees).

10 **C. LU Ranching Meets All Tests for the Award of Attorneys Fees under the Equal**
11 **Access to Justice Act.**

12 In addition to the above, the United States disputes that LU Ranching is the prevailing party in
13 this litigation and disputes whether the United States' position in this litigation was substantially
14 justified. As briefed before, and as explained in additional detail below, LU Ranching is the prevailing
15 party in this case and the positions advanced by the United States were far from justified.

16 As previously briefed, a party need not prevail on all issues to be a prevailing party under the
17 EAJA. See *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1481 (9th Cir.
18 1983). If the relief on the merits alters the legal relationship between the parties by modifying the
19 government's behavior in a manner beneficial to the private litigant, then the private party will be
20 considered the prevailing party. See *F.J. Vollmer Co. V. Magaw*, 102 F.3d 591, 594 (D.C. Cir. 1996).
21 In this case, LU Ranching is the prevailing party. It prevailed on the two most significant issues in this
22 case: whether as a private parties LU Ranching's predecessors could perfect water rights on what are
23 now federally administered grazing allotments and whether those rights could be transferred as
24 appurtenances to the base ranch properties. Ultimately, as outline below, the arguments advanced in
25 this litigation by the United States were rejected, and LU Ranching was not only awarded water rights
26 for its claimed places of use, but with a priority date pre-dating 1976.

27 According to the United States, the sole reason for its objection to LU Ranching's water right
28 claims was that "LU could not prove its claimed 1872 priority date." See United States' Memorandum,

1 p. 3. As demonstrated by the pleadings filed by the United States in this case, beginning with its
2 Objections, this is not true. As evidenced, by way of example, by the United States' Objection filed in
3 Subcase 55-10288, the basis for the United States' objection was to the points of diversion and places
4 of use claimed by LU Ranching because "[t]he United States of America, through the Bureau of Land
5 Management, is the owner of the land upon which use is claimed. The claimant does not have a valid
6 water right with the elements claimed." *See* Objection filed by the United States in Subcase 55-10288.
7 The United States goes on to submit, as attachments to the Objection, IDWR recommendations with
8 handwritten notations identifying those claimed rights the United States believed to belong to "BLM."
9 From the initiation of this litigation forward, it has been the stated position of the United States that as
10 a private party, LU Ranching and its predecessors-in-interest could not acquire, transfer or maintain
11 water rights sited on what are now federally administered grazing allotments. Each of these arguments
12 were rejected by this Court. As a backup position, the United States claimed that LU Ranching was not
13 entitled to a priority date earlier than 1976, and even in this argument, the United States failed. Under
14 such circumstances, LU Ranching is the prevailing party in this litigation.

15 In addition to the above assertions in the United States' Objections that LU Ranching was not
16 entitled to water rights on BLM land, the United States' arguments have included, the following:

- 17 1. "[S]tockwater rights on the federal public land are appurtenant to the federal
18 land, not base ranches." *See* United States Response to Court's Request for
19 Additional Information on LU Ranching's Notice of Challenge, p. 4 (January 14,
20 2000).^{4/}
- 21 2. "Congress enacted statutes designed to prevent any individual or private entity
22 from monopolizing the use of the grazing commons by acquiring exclusive
23 rights to public land and water available for livestock consumption." *See* United
24 States Post Trial Memorandum, p. 3 (May 18, 2001).^{5/}
- 25 3. "[A] livestock watering right should be appurtenant to the land adjoining the
26 stream where livestock drink." *See* United States Post Trial Memorandum, p.

25 ^{4/} Rejected by the SRBA District Court in its Memorandum Decision and Order
26 on Challenge ("Memorandum Decision"), p. 22-25 (holding that an instream stock water
right appropriated on the public domain can transfer as an appurtenance to the base ranch
property).

27 ^{5/} Rejected by the SRBA Court in its Memorandum Decision, p. 13-14
28 (Congressional acts specifically acknowledge private ownership of water rights on the public
domain and federally administered grazing allotments).

- 18 (May 18, 2001).^{6/}
4. "The conveyance of a water right, as well as any other real property, can only occur if the conveyance is in writing." *See* Memorandum in Reply to LU's Opposition to the United States' Motion to Alter or Amend, p. 6 (May 30, 2003).^{7/}
5. "[I]f LU is entitled to the water rights at issue, the priority dates should be not earlier than September 23, 1976." *See* Memorandum in Support of United States' Challenge, p. 2 (July 29, 2004).^{8/}
6. "[I]n order for a water right to be appurtenant to a tract of land, there must be unity of title between the land designated as POU's and the water right." *See* Memorandum in Support of United States' Challenge, p. 4 (July 29, 2004).^{9/}
7. "[T]he Taylor Grazing Act does not expressly recognize those who use water on public lands as owners of a water right." *See* Memorandum in Support of United States' Challenge, p. 32 (July 29, 2004).^{10/}
8. "A water right claimant must have a possessory interest in the land designated as a place of use." *See* Memorandum in Support of United States' Challenge, p. 33 (July 29, 2004).^{11/}
9. "Without any written conveyance of the water rights whatsoever, LU cannot now improve its priority date over all other water users by 'tacking' its use of water sources back to the date of earlier water uses by unknown stock growers who allowed their livestock to roam at large on public land in common with livestock owned by other stock growers." " *See* Memorandum in Support of United States' Challenge, p. 33 (July 29, 2004).^{12/}
10. "Mere use of livestock water in common with others on the open unenclosed grazing commons does not satisfy the test of a valid appropriation." *See* United

^{6/} Rejected by the SRBA Court in its Memorandum Decision, p. 22-25 (an instream stock water right appropriated on the public domain can transfer as an appurtenance to the base ranch property).

^{7/} Rejected by the SRBA Court in its Memorandum Decision, p. 25-26 (instream stockwater right can transfer as an appurtenance to the base ranch property and does not require express language in the instrument of conveyance).

^{8/} Rejected by the SRBA Court in its Memorandum Decision, p. 27-49 (awarding LU Ranching water rights with pre-1976 priority dates).

^{9/} Rejected by the SRBA Court in its Memorandum Decision, p. 11 (rule in Idaho is that, excluding trespass, an appropriator need not have an ownership interest in the land in order to appropriate a water right).

^{10/} Rejected by the SRBA Court in its Memorandum Decision, p. 13-14 (Congressional acts specifically acknowledge private ownership of water rights on the public domain and federally administered grazing allotments)

^{11/} Rejected by the SRBA Court in its Memorandum Decision, p. 11 (rule in Idaho is that, excluding trespass, an appropriator need not have an ownership interest in the land in order to appropriate a water right).

^{12/} Rejected by the SRBA Court in its Memorandum Decision, p. 20-22 (rejecting the argument that cattle drinking water from a stream in common does not satisfy the requirement of intent to appropriate water) and p. p. 25-26 (instream stockwater right can transfer as an appurtenance to the base ranch property and does not require express language in the instrument of conveyance).

- 1 States' Memorandum in Reply, p. 10 (Sept. 24, 2004).^{13/}
- 2 11. "However, here, no one recognized or defended water rights which is evidence
- 3 that no one in LU's chain of title acquired stockwatering and/or domestic water
- 4 rights." See United States' Memorandum in Reply, p. 18 (Sept. 24, 2004)
- 5 (*emphasis in original*).^{14/}
- 6 12. "LU's water rights, if any such water rights were established, lack unity of title
- 7 with the land designated as places of use and, therefore, have to be independent
- 8 water rights that must be conveyed in writing ... If there is no written conveyance
- 9 that describes independent water rights 'in terms of the priority, amount, season
- 10 of use, purpose of use, point of diversion and place of use' ... then LU's
- 11 predecessors 'could not transfer [them] to another...' See United States'
- 12 Memorandum in Reply, p. 22-23 (Sept. 24, 2004).^{15/}
- 13 13. "LU failed to carry its burden of proving that its predecessors satisfied Idaho's
- 14 test of a valid appropriation, and then, if any water rights were established,
- 15 conveyed those water rights to successors in accordance with Idaho law." See
- 16 United States Memorandum in Reply, p. 24 (September 24, 2004).^{16/}

17 As demonstrated above through a sampling of the arguments repeatedly raised by the United States

18 throughout the course of this litigation, the basis for the United States' objections to LU Ranching's

19 claimed water rights was to contest the very existence of LU Ranching's rights and not merely the

20 priority date. In all of these attempts, the United States' arguments were rejected by the Court.

21 The other factor to be considered is whether the United States' position in this case was

22 substantially justified. Importantly, it is *the United States' burden* to demonstrate that its position in

23 the litigation was substantially justified, and to show that its position was justified at every stage of the

24 proceeding. See *Garcia v. Bowen*, 702 F. Supp. 409, 410 (S.D.N.Y. 1988); see also *FDIC v. Addison*

25 *Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990). The United States in its brief fails

26 to explain why its position in this litigation was substantially justified. Moreover, not only did the

27 ^{13/} Rejected by the SRBA Court in its Memorandum Decision, p. 20-22

28 (rejecting the argument that cattle drinking water from a stream in common does not satisfy

the requirement of intent to appropriate water).

^{14/} Rejected by the SRBA District Court in its Memorandum Decision p. 27-49

(awarding LU Ranching water rights based on appropriations by predecessors in its chain of

title) and p. 21-22 (rejecting application of Utah law regarding exclusive use and control and

defense of water right).

^{15/} Rejected by the SRBA Court in its Memorandum Decision, p. 22-26

(instream stockwater right can transfer as an appurtenance to the base ranch property and

does not require express language in the instrument of conveyance)

^{16/} Rejected by the SRBA District Court in its Memorandum Decision p. 27-49

(awarding LU Ranching water rights based on appropriations by predecessors in its chain of

title).

1 United States' arguments in this litigation fail to have any basis in law or fact from the outset, but the
2 United States continued to advance the same arguments throughout this litigation even after they were
3 rejected by the SRBA Court at various stages of these proceedings.

4 In the face of almost 140 years of federal legislation confirming private parties' right to acquire
5 and maintain water rights on public land and federally administered grazing allotments, the United
6 States in this litigation, from the filing of its initial Objections through the briefs on Challenge,
7 continued to maintain that private parties, like LU Ranching and its predecessors could not acquire or
8 transfer water rights on the so-called public domain or BLM lands. Not only were the United States
9 arguments not substantially justified, they went against all established federal and state law precedent.
10 *See* Mining Act of July 26, 1866, C. 262, Section 9, 14 Stat. 251, 43 U.S.C. § 661(a) and the annotated
11 cases to the same recognizing private rights within the public domain; Desert Land Act, 43 U.S.C. §
12 321; Taylor Grazing Act, 43 U.S.C. § 315. All of these Congressional Acts clearly acknowledged
13 private water rights on the then public domain as well as private water rights on federally administered
14 allotments even after the enactment of the Taylor Grazing Act. Still, as detailed at length, above, from
15 the filing of its Objections forward, the United States continued to argue that private parties like LU
16 Ranching and its predecessors could not appropriate, let alone transfer, their water rights.

17 The United States' decision to ignore well defined and settled law regarding private water rights
18 is egregious, but perhaps more offensive is the United States' continued determination to litigate these
19 issues even in the face of explicit SRBA rulings. By way of example, in April 2000, the Presiding
20 Judge of the SRBA ruled as follows: "there is not always unity of title between the water right and the
21 land on which it is used ... The same rule can also apply to the appropriation of water on federal public
22 lands ownership of waters subject to appropriation on federal land vests in the appropriator." *See*
23 *In Re SRBA 39576 (Subcases 55-10288B et al.) Memorandum Decision and Order on Challenge*, Judge
24 Wood, April 25, 2000, p. 14-15. In the same opinion, the SRBA Court ruled that a water right can be
25 conveyed as an appurtenance without expressly mentioning the water right in the same instrument that
26 conveys the real property to which the water right is appurtenant. *See In Re SRBA 39576 (Subcases 55-*
27 *10288B et al.) Memorandum Decision and Order on Challenge*, Judge Wood, April 25, 2000, p. 18-21.
28 Notwithstanding this clear statement of the law, the United States continued to maintain until the end

1 of this litigation that “A water right claimant must have a possessory interest in the land designated as
2 a place of use” and “LU’s water rights, if any such water rights were established, lack unity of title with
3 the land designated as places of use and, therefore, have to be independent water rights that must be
4 conveyed in writing ... If there is no written conveyance that describes independent water rights ‘in
5 terms of the priority, amount, season of use, purpose of use, point of diversion and place of use’ ... then
6 LU’s predecessors ‘could not transfer [them] to another...” *See* United States’ Memorandum in Reply,
7 p. 22-23, 33 (Sept. 24, 2004). Again and again, in order to preserve and protect its rights, LU Ranching
8 was required to litigate and re-litigate legal issues that already were well settled in federal law and are
9 the law of the case in the SRBA. The United States’ arguments were not substantially justified in the
10 first instance, and became even less so after Judge Wood clarified the law of the case in the SRBA.
11 Under these circumstances, LU Ranching’s request for attorneys fees is justified and the United States’
12 position is totally without merit.

13 **D. As the Prevailing Party that Successfully Overcame the United States’**
14 **Unreasonable Objections, LU Ranching is Entitled to Attorneys Fees under Idaho**
Law.

15 As briefed before, under Idaho law a judge may award reasonable attorneys fees to the prevailing
16 party if the case was “brought, pursued or defended frivolously, unreasonably, and without foundation.”
17 *See* I.R.C.P 54(d)(1)(B); *see also* LU Ranching’s Motion for Attorneys Fees, p. 4-6. As detailed, above,
18 the basic position taken by the United States in this litigation was that LU Ranching’s claims should
19 be denied because the places of use were sited on BLM lands. *See* Objections filed by the United States
20 in Subcase Nos. 55-10288 et al. This position is contrary to federal law, and is contrary to the law of
21 the case in the SRBA, and ultimately was rejected by this Court in its 2005 Memorandum Decision.

22 The United States takes issue with LU Ranching’s characterization of the United States’
23 arguments as frivolous, unreasonable, and without foundation. *See* United States’ Memorandum, p.
24 5. Frankly, there are no other words to describe the arguments advanced by the United States. In the
25 face of over 140 years of federal law recognizing and protecting private water rights on federal land,
26 how can the United States in good faith argue that Congress enacted statutes designed to *prevent* private
27 entities from acquiring water rights on public land? *See* United States Post Trial Memorandum, p. 3
28 (May 18, 2001). Or argue that “[T]he Taylor Grazing Act does not expressly recognize those who use

1 water on public lands as owners of a water right.” See Memorandum in Support of United States’
2 Challenge, p. 32 (July 29, 2004). How, in the face of established statutory and decisional law, can the
3 United States claim, as the primary basis for objection, that LU Ranching’s claims should be denied
4 because they are located on BLM land? See United States’ Objections, Subcases 55-10288 et al. The
5 United States’ arguments are and always have been unreasonable. They are and always have been
6 without foundation. And, it can reasonably be concluded, the arguments were advanced for improper
7 purposes designed to deter LU Ranching, a private party with limited resources, from continuing to
8 defend its rights.

9 **E. The “Intergovernmental Immunity Doctrine” Has No Relevance to the Present**
10 **Motion.**

11 In a final attempt to avoid liability for attorneys fees, the United States advances a theory of
12 “intergovernmental immunity.” This theory has no application to the present case. First, the primary
13 authority cited for this proposition is the case *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803
14 (1990). *Davis*, however, has not relevancy to this case and is readily distinguishable on its facts. It
15 involves the imposition of taxes and the state’s authority to tax federal retiree benefits versus state
16 retiree benefits. It is not a case involving attorneys fees. Further, it is not a case involving the issue
17 here which is the United States’ knowing waiver of its right to sovereign immunity.

18 Through the EAJA, the United States specifically waived its sovereign immunity and authorized
19 “any court having jurisdiction of that action” to award attorneys fees to a private party. Under the
20 United States’ theory of “intergovernmental immunity,” the EAJA would have no effect in any state
21 where there was a state law protecting the state from an award of attorneys fees against it. Such an
22 interpretation would lead to an absurd result. The EAJA clearly and expressly waives the sovereign
23 immunity of the United States in *any* court in any of the states having jurisdiction over the matter, and
24 to infer in that language an additional provision “except in states where the state is immune from an
25 award of attorneys fees” would read into the statute its negation. See *United States v. Missouri Pac.R.*
26 *Co.*, 278 U.S. 269, 278 (1929) (where the language of an enactment is clear, and construction according
27 to its terms does not lead to absurd or impractical consequences, the words employed are to be taken
28 as the final expression of the meaning intended). Under the United States’ theory, no award under

1 EAJA could be granted, even by a federal court, in a state that prohibited award of attorneys fees against
2 that state. This interpretation would completely undercut the policy behind the EAJA, to provide an
3 incentive to private litigants to defend against actions by the United States.

4 **V. CONCLUSION**

5 The undisputed purpose of the EAJA is to encourage individuals and small businesses to
6 challenge adverse government action notwithstanding the high cost of civil litigation. In the present
7 case, it took over seven years for LU Ranching to secure its water rights with places of use found on
8 BLM land. This litigation, and certainly the length and scope of this litigation, would have been wholly
9 unnecessary but for the baseless legal arguments raised by the United States throughout this litigation.
10 It is this situation that the EAJA and Idaho law were designed to protect. In cases such as this where
11 the United States brought, pursued and defended an action unreasonably and without foundation or
12 substantial justification, attorneys fees are appropriate and mandated by statute. For that reason, LU
13 Ranching respectfully requests that this Court grant its Motion for Attorneys Fees in its entirety.

14 Dated this 7th day of June, 2005.

15 Respectfully submitted,

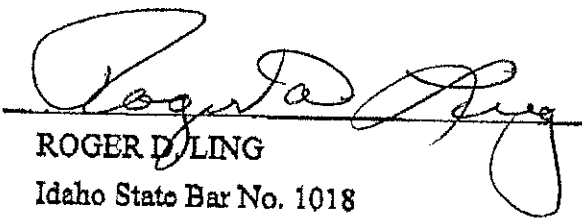
16 McQUAID BEDFORD & VAN ZANDT, LLP

17
18 By: 

19 MICHAEL J. VAN ZANDT
20 ELIZABETH EWENS
21
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25
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1 Dated this 7th day of June, 2005.

2
3
4 LING, ROBINSON & WALKER

5
6 By: 
7 ROGER D. LING
8 Idaho State Bar No. 1018
9 Attorneys for LU Ranching Co.
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1 **CERTIFICATE OF SERVICE**

2 I certify that on June 7, 2005, I served a true and correct copy of foregoing **LU RANCHING**
3 **CO.S' REPLY TO UNITED STATES' MEMORANDUM IN SUPPORT OF THE UNITED**
4 **STATES' MOTION TO DISALLOW COSTS** upon the following individuals by placing the
document in the United States Mail, postage paid, and addressed as follows:

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

10 Larry Brown
11 Attorney, U.S. Dept. of Justice
12 General Litigation Section
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14 550 West Fort Street, MSC 033
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16 Chief, Natural Resources Division
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19 P.O. Box 44449
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24 
25 _____
26 Teresa Bechelli

27 G:\Docs\21347\001\Post-Trial Pleadings\Reply Attorney Fees.wpd
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