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

12 In Re SRBA

Subcase Numbers 55-10135, 55-11061,
55-11385 and 55-12452

13 Case No. 39576

**Motion for Attorneys' Fees; Memorandum
of Points and Authorities in Support for
Attorneys' Fees under I.R.C.P. 54(e), I.C. §
12-121 and the Equal Access to Justice Act
[28 U.S.C. § 2412(d)]**

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 Joyce Livestock Co. ("Joyce Livestock") brings this Motion for Attorneys Fees pursuant to
3 Idaho Rules of Civil Procedure 54(e)(1), Idaho Code § 12-121 and 28 U.S.C. § 2412(d) of the Equal
4 Access to Justice Act ("EAJA"), for an award of reasonable attorneys' fees incurred in this action.
5 Relief under I.R.C.P. 54(e)(1) and I.C. § 12-121 is appropriate because Joyce Livestock is the
6 prevailing party and the United States' claims and the United States' objections to Joyce Livestock's
7 claims were not substantially justified. Under the EAJA, fees should be awarded because Joyce
8 Livestock was the prevailing party, Joyce Livestock is qualified under 28 U.S.C. § 2412(d)(2)(B),
9 the amount of attorneys fees incurred were reasonable, necessary and properly itemized, and neither
10 the United States' claims nor the United States' objections to Joyce Livestock's claims were
11 justified.

12 MEMORANDUM OF POINTS AND AUTHORITIES

13 I. INTRODUCTION

14 Throughout over seven years of litigation, it has been the position of the United States that
15 only the United States is entitled to acquire and maintain water rights on federal land. In furtherance
16 of this position, the United States claimed beneficial use water rights based not on its actual
17 appropriation of water, but based on its "ownership" and management of the rangeland. The United
18 States also objected outright to Joyce Livestock's beneficial use claims despite the United States'
19 knowledge of the appropriation of water by Joyce Livestock and its predecessors in interest. The
20 arguments of the United States have been rejected by the Court, and for good reason. At no time
21 was there legal or factual support for the United States' claims. To the contrary, from the initiation
22 of this litigation forward, the law of the case in the SRBA has been and continues to be that the
23 United States is not entitled to a beneficial use water right based on its acts of managing the
24 rangeland. Ignoring this well settled legal authority, the United States continued to litigate its
25 claims thereby subjecting Joyce Livestock to prolonged and expensive litigation to defend its rights.

26 II. PROCEDURAL HISTORY

27 The Court is well familiar with the procedural history of this case, detailed in the both the
28 Special Master's Report and Recommendation and this Court's Memorandum Decision and Order

1 on Challenge. *See* Special Master's Report and Recommendation, p. 1-7 (October 6, 2003); *see*
2 *also* Memorandum Decision and Order on Challenge, p. 1-3. What is important to note, however, is
3 the length of litigation and the recent end result. Joyce Livestock filed its initial water right claims
4 on January 19, 1989, and the Director's Report on the claim was issued on July 31, 1997
5 recommending Joyce Livestock's claim as filed. The United States' objection to Joyce Livestock's
6 claim soon followed, filed on December 5, 1997. Overlapping claims were filed by the United
7 States, with the United States claiming only beneficial use water rights with a priority date of
8 January 1, 1874 based, presumably, not on the beneficial use by the Bureau of Land Management
9 which was not in existence until after the enactment of the Taylor Grazing Act in 1934, but on the
10 beneficial use of the waters of Jordan Creek by Joyce Livestock's predecessors in interest. The
11 United States later amended its competing claims to claim a priority date of June 28, 1934, the date
12 the Taylor Grazing Act was enacted. Joyce Livestock filed objections to the United States' claims,
13 and the instant litigation ensued.

14 The path of this dispute has been long and has included two summary judgment proceedings,
15 a trial on the merits, a post-trial Motion to Alter or Amend Judgment filed by Joyce Livestock, and a
16 Challenge of the Special Master's Report and Recommendation filed by Joyce Livestock with the
17 SRBA District Court. Ultimately, this Court denied the United States' state-law based or beneficial
18 use water right claims in their entirety, and granted Joyce Livestock's claim with an April 26, 1935
19 priority date. *See* Memorandum Decision and Order on Challenge (August 3, 2005).

20 **III. ARGUMENT**

21 **A. Joyce Livestock is Entitled to Attorneys Fees Under Idaho Law.**

- 22 1. Under Idaho Law, Attorneys Fees May Be Awarded to the Prevailing Party
23 When the Case at Issue was Brought, Pursued or Defended Frivolously,
Unreasonably, or Without Foundation.

24 In Idaho, a Court is authorized to award attorney's fees to the prevailing party where the case
25 was "brought, pursued or defended frivolously, unreasonably or without foundation." *See* I.R.C.P.
26 54(e)(1). The determination of whether attorney's fees should be awarded rests in the discretion of
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28

1 the trial court or, in this case, the SRBA District Court.^{1/} In this instance, then, the Court is charged
2 with examining with respect to each of the subcases at issue whether Joyce Livestock was the
3 prevailing party and whether the United States' position in the litigation was frivolous, unreasonable
4 or without foundation.

5 Idaho law defines the term "prevailing party" as follows:

6 Prevailing Party. In determining which party to an action is a prevailing party and
7 entitled to costs, the trial court shall in its sound discretion consider the final
8 judgment or result of the action in relation to the relief sought by the respective
9 parties. The trial court in its sound discretion may determine that a party to an action
10 prevailed in part and did not prevail in part, and upon so finding may apportion costs
between and among the parties in a fair and equitable manner after considering all of
the issues and claims involved in the action and resultant judgment or judgments
obtained.

11 I.R.C.P. 54(e)(1); *see also Shettel v. Bamesberger*, 130 Idaho 217, 221, 938 P.2d 1255, 1259 (1997)
12 (the court must examine the "final result obtained in relation to the relief sought, wether there were
13 multiple claims or issues and the extent to which either party prevailed on each separate issue or
14 claim.")

15 The second prong of the analysis addresses whether the action was pursued, defended or
16 brought frivolously or without foundation. *See* I.R.C.P. 54(e)(1); *see also Nampa & Meridian Irr.*
17 *Dist. v. Washington Federal Sav.*, 135 Idaho 518, 525, 20 P.3d 702, 709 (2001). Courts have
18 applied this to mean that when settled law clearly precludes a legal claim, it is both unreasonable
19 and frivolous to pursue that claim. *See Needs v. State*, 118 Idaho 207, 208-209, 795 P.2d 912, 913-
20 914 (Ct. App. 1990).

21 Although the subcases at issue herein were consolidated early in the litigation, this case truly
22 involves two distinct (although overlapping) sets of claims: claims filed by the United States and a
23 claim filed by Joyce Livestock. With respect to each, then, the issue is whether Joyce Livestock was
24

25 ^{1/} If an award or denial of a motion for attorneys fees is appealed subsequent to
26 the decision of the trial court or district court, then that initial decision on the motion for
27 attorneys fees is reviewed by the Court of Appeals using an abuse of discretion standard.
28 *See e.g. Shettel v. Bamesberger*, 130 Idaho 217, 222, 938 P.2d 1255, 1260 (1997) ("After a
thorough review of the record, we (the Court of Appeals) conclude that the award of attorney
fees incurred before the magistrate was not an abuse of discretion ... We affirm the award of
attorney fees for the proceedings before the magistrate and the district court.")

1 the prevailing party and, second, whether the United States' position in the litigation was
2 unreasonable or without foundation. As detailed, below, as to both the United States' claims and
3 Joyce Livestock's claim, Joyce Livestock was the clear prevailing party and the United States'
4 position was at all times unreasonable and without foundation in either law or fact.

5 2. Joyce Livestock Prevailed in Its Objection to the United States' Claims and
6 the United States' Claims At All Times Lacked Any Foundation or Basis in
7 Law or in Fact.

8 With respect to the United States' claims,^{2/} Joyce Livestock was the clear prevailing party.
9 The United States' state-based claims were denied in their entirety and decreed as disallowed. *See*
10 Memorandum Decision and Order on Challenge, p. 21-30. In its analysis, the Court specifically
11 concluded what Joyce Livestock has argued since the inception of this litigation: the United States is
12 not entitled to a beneficial use state-based water right based solely on its administration of grazing
13 lands without regard for actual beneficial use. *Id.*; *see also* Motion for Summary Judgment by Joyce
14 Livestock for 1. An Order Decreeing a Stockwater right as Reported in Subcase 55-10135 and 2. An
15 Order Disallowing the Claimed Stockwater Rights in Subcases 55-11061, 55-11385 and 55-12452,
16 p. 22-26 ("For the United States to claim a stockwater right on federally administered grazing
17 allotments under Idaho state law, it would either have to show appropriation and beneficial use of the
18 water source issue, or it would have to show either that it is a successor in interest to the actual
19 appropriator or, in the alternative, that it was the actual owner based upon an express agency
20 relationship with an actual appropriator. . . . [T]he United States government cannot and does not
21 own stockwater rights on grazing allotments that it regulates merely by virtue of its property interest
22 in those allotments or its authority to regulate grazing thereon"); *see also* Closing Argument by Joyce
23 Livestock, p. 11-14 ("The United States did not acquire stockwater right(s) as a result of its range
24 management activities under the Taylor Grazing Act. . . . [M]anagement of rangelands by the BLM
25 under the Taylor Grazing Act does not constitute an appropriation of water"); Joyce Livestock's
26 Opening Brief in Support of Motion to Alter or Amend, p. 23-31; Joyce Livestock's Opening Brief
27 in Support of Challenge, p. 4-10. Consistent with Joyce Livestock's objections and arguments

28 ^{2/} The United States' claims at issue are associated with Subcase Numbers 55-
11061, 55-11385, and 55-12452.

1 throughout this litigation, each and every argument raised by the United States in support of its
2 claims was rejected by this Court.

3 The benchmark for determining prevailing party status is the “final judgment or result of the
4 action in relation to the relief sought by the respective parties.” *See* I.R.C.P. 54(d)(1)(B). In this
5 case, the relief sought by Joyce Livestock when it filed its objections was that the United States’
6 claims be denied in their entirety. This is the relief that was ultimately granted by the Court and,
7 therefore, Joyce Livestock meets the first prerequisite for an award of attorneys fees under Idaho law.

8 The second issue is whether the United States’ claims were “brought, pursued or defended
9 frivolously, unreasonably or without foundation.” *See* I.R.C.P. 54(e)(1). This test also is met. The
10 United States’ claims from the date of filing forward were unreasonable and lacked any foundation
11 in law or fact. Not only did the United States’ position lack any affirmative support, established
12 Idaho Supreme Court precedent as well as the settled law of the case within the SRBA rejected the
13 arguments being advanced by the United States in support of its claims.

14 As correctly noted by this Court in its Memorandum Decision and Order on Challenge, the
15 law of the case in the SRBA as early as 1997, and consistently thereafter, has been that the United
16 States as the administrator of a grazing allotment could *not* perfect a beneficial use water right when
17 it did not actually water livestock, unless there was an agency relationship between the United States
18 and the permittee, whereby the permittee appropriating the water was acting on behalf of the United
19 States.^{3/} Rulings from 1997 forward have been consistent on this point and were summarized in the
20 Memorandum Decision as follows:

21 The issue regarding the establishment and ownership of a water right where there is
22 not unity of title between the appropriator of the water right and the owner of the
23 land on which the right is used was previously decided and has been applied
24 consistently in the SRBA ... The issue arose in the context of the ownership of
25 stockwater rights on federal grazing allotments as between the United States and the
26 livestock rancher who grazed the cattle and actually put the water to beneficial use ...
27 In *Order on Motion to Alter or Amend*; *Order on Summary Judgment*; and *Order on*
28 *Motion to Withdraw Objections*, Subcases 57-11124 *et al.* (Mar. 25, 1997); *Order on*
Motions to Ater or Amend; *Order on Motion for Permissive Appeal*, Subcases 57-
04028 *et al.* (June 26, 1997), one of the issues before Special Master Hammerle was
whether the United States as administrator of a grazing allotment could perfect a

^{3/} In this case, at no time has the United States claimed or alleged an agency
relationship with Joyce Livestock or its predecessors in interest.

1 beneficial-use right despite not actually grazing or watering livestock. Special Master
2 Hammerle ruled that because the permittee, not the United States, beneficially use the
3 water, the only way in which the United States could perfect a state-law based (non-
4 statutory) water right was through an agency relationship between the permittee and
5 the United States, whereby the permittee appropriating the water was acting on behalf
6 of the United States ... The Special Master's reasoning and ruling was subsequently
7 adopted by Judge Hurlbutt. *Order Denying Challenges and Adopting Special*
8 *Master's Reports and Recommendations*, Subcase 57-04028B (Joyce Livestock)
9 (September 30, 1998). Judge Wood, who succeeded Judge Hurlbutt, adopted this
10 same reasoning in a subsequent consolidated subcase involving similar issues.
11 *Memorandum Decision and Order on Challenge; Order Denying Motion to File*
12 *Amicus Curiae Brief; Order of Recommitment to Special Master Cushman*, Subcases
13 55-10288A & B, *et al. (LU Ranches I)* (April 25, 2000). Judge Burdick applied the
14 same reasoning in *Order Denying Joint Motion to Consolidate Subcases, Vacate*
15 *Order of Reference to Special Master and Stay Related Subcases*, (Jan. 3, 2001),
16 based on the reasoning that each of the claims was fact specific. Recently, this Court
17 applied the same reasoning. *Memorandum Decision and Order on Challenge,*
18 *Subcases 55-10288B, et al. (LU Ranches II)* (Jan. 3, 2005).

19 Memorandum Decision and Order on Challenge, p. 23-24. This is in accord with the law as stated
20 by the Idaho Supreme Court as well as long established federal law, including the specific provisions
21 of the Taylor Grazing Act. *See* Memorandum Decision and Order on Challenge, p. 23-26. When, as
22 in this case, settled law clearly precludes a legal claim, it is both unreasonable and frivolous to
23 pursue that claim. *See Needs v. State*, 118 Idaho 207, 208-209, 795 P.2d 912, 913-914 (Ct. App.
24 1990). Given the undisputed fact that the United States never acted as the beneficial user of the
25 stockwater at issue and never had an agency relationship with either Joyce Livestock or its
26 predecessors in interest, and given the United States' knowledge of the settled applicable federal law
27 and law of the case in the SRBA, it was unreasonable for the United States to claim and pursue its
28 beneficial use water right claims in this litigation. Under such circumstances, Joyce Livestock is
entitled to and should be awarded its attorneys fees incurred as a result of the United States'
unreasonable pursuit of its claims.

3. The United States' Objections to Joyce Livestock's Claim Lacked a
Foundation in Law and Fact.

Joyce Livestock also is the prevailing party with respect to its own claim and is entitled to its
attorneys fees based on the United States' unreasonable position taken in opposition to Joyce
Livestock's claim. Joyce Livestock's original amended claim was based on beneficial use, with a
priority date of 1898. The United States objected to the claim outright, arguing that Joyce Livestock
was not entitled to a water right or, in the alternative, that even if Joyce Livestock's predecessors in

1 interest appropriated a water right, they could not transfer that right as an appurtenance to the base
2 ranch property.

3 A party need not prevail on all issues to be a prevailing party under Idaho law. *See* I.R.C.P.
4 54(e)(1). In this case, while Joyce Livestock was not awarded the 1898 priority date it claimed, its
5 primary objective in pursuing its claim was to obtain a decreed water right for the places of use
6 claimed, and to obtain a senior water right in relationship to the United States' claims. On each
7 count, Joyce Livestock prevailed. *See* Memorandum Decision and Order on Challenge (granting
8 Joyce Livestock's claim with an April 26, 1935 priority and denying the United States' competing
9 claims in their entirety).

10 The next issue is whether the United States' arguments were unreasonable or without
11 foundation. *See* I.R.C.P. 54(e)(1). Again, the United States' position that Joyce Livestock's
12 predecessors could not acquire water right on federal lands and transfer those rights as appurtenances
13 was contrary to established law and, therefore, was unreasonable. This conclusion is especially
14 apparent when one considers the United States' arguments were unreasonable and without
15 foundation is especially apparent when one considers federal law on this point. Private water rights
16 on the public domain, such as those acquired by Joyce Livestock and its predecessors in interest,
17 were specifically recognized and protected through the passage of several federal laws including the
18 Mining Act of 1866, 43 U.S.C. §661, the Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323, and
19 the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316. The intent of each of these laws was to
20 confirm and protect the policy of appropriation for beneficial use as the test and measure of *private*
21 *rights* in and to the waters on the public domain. *Id.*; *see also California Oregon Power co. v.*
22 *Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935). The position of the United States in this
23 litigation was in direct conflict with these laws. Specifically, the sole and stated purpose of the
24 United States in this litigation was to defeat Joyce Livestock's private water right claim and to secure
25 for the United States the sole right to the waters in Jordan Creek located on federal land. The United
26 States' efforts to circumvent these well established federal laws failed, and Joyce Livestock's private
27 water rights were protected.

28 An additional consideration is whether an appeal is defended frivolously. *See Shettel v.*

1 *Bamesberger*, 130 Idaho 217, 221, 938 P.2d 1255, 1259 (1997). In this case, the “appeal” of the
2 Special Master’s Report and Recommendation was in the form of Joyce Livestock’s Challenge, and
3 the United States’ opposition to that Challenge was both unreasonable and frivolous particularly after
4 the SRBA District Court issued its opinion in the LU Ranching case. Despite a ruling directly on
5 point by the SRBA District Court in *LU Ranching II*, the United States inexplicably and without
6 reason continued to advance and pursue arguments that had been rejected outright by the Court and
7 that were law of the case in the SRBA Court.

8 The *LU Ranching II* Decision was issued on January 4, 2005. The issues in that case mirror
9 almost exactly the issues raised in Joyce Livestock’s claim number 55-10135. Notwithstanding this
10 fact, on March 31, 2005, the United States, with full knowledge of the *LU Ranching II* decision,^{4/}
11 continued to advance legal theories that had been rejected outright by the Court in the *LU Ranching*
12 *II* decision. These include the following:

- 13 1. The United States argued that there must be unity of title between the land
14 designates as a place of use and the water right. *See* United States’
15 Responsive Brief, p. 17 (March 31, 2005). This argument was rejected by the
16 SRBA Court in the *LU Ranching II* Decision, p. 22-23 (January 4, 2005).
- 17 2. The United States argued that Joyce Livestock and its predecessors in interest
18 were a kin to itinerant cattlemen or stockgrowers. *See* United States’
19 Responsive Brief, p. 26. Prior to that, the SRBA Court ruled that cattle
20 ranches who used the range as part of their base ranch operations and who
21 applied for and were granted grazing preferences are entirely distinguishable
22 from itinerant herdsman. *See LU Ranching II* Decision, p. 22.
- 23 3. The United States continued to argue that use of water in common defeats a
24 water right. *See* United States’ Responsive Brief, p. 26-27, 31-32. This
25 theory was soundly rejected by the Court in the *LU Ranching II* Decision, p.
26 21-22.
- 27 4. The United States argued that a private party could not acquire and transfer a
28 water right sited on federal land as an appurtenance to the base ranch property.
See United States’ Responsive Brief, p. 17-18. The *LU Ranching II* Decision
rejected this theory and specifically recognized the ability of private parties to
perfect and transfer water rights on federal land both before and after the
enactment of the Taylor Grazing Act in 1934. *See LU Ranching II* Decision,
p. 17.

24 The United States continued to raise the above defunct arguments at oral argument held on June 15,
25 2005, again despite this Court’s explicit ruling rejecting these theories in the *LU Ranching II*
26 Decision.

27 ^{4/} The United States’ counsel in *LU Ranching* is the same as in the Joyce
28 Livestock litigation.

Moreover, the United States continued to pursue claims for constitutionally based water rights when the articulated bases for its claims was either a federal reserved water right or a riparian based water right. Memorandum Decision and order on Challenge, p.25-26 (August 3, 2005). Since these bases were neither supported by the facts or law in this case, the United States continued prosecution of these claims was baseless. The United States also continued to argue legal issues when the SRBA Court had already ruled on these issues and there had been no appeal taken. Memorandum Decision and Order on Challenge at p. 28 and 29. This Court found that Special Master Hammerle had ruled that the United States could not appropriate water based solely on the fact that it issues permits and regulates access to water sources. *Id*; *Order Denying Motions to Alter or Amend (Amended order on State's Motion for Summary Judgment)*, Subcase 72-15929C 9April 15, 1998). As noted by this Court, this ruling was adopted by Judge Hurlbutt. *Order Denying Challenges and Adopting Special master's Reports and Recommendations*, Subcases 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B, and 72-15929C (Sept. 30, 1998). Since this ruling is law of the case, the United States is barred from attacking it. The continued arguments by the United States on issues settled by this Court almost seven years ago is evidence of the baseless nature of the United States arguments.

There was absolutely no justification for the United States' continued advancement of these legal theories and its decision to do so when settled law clearly precluded those arguments renders the United States' arguments both unreasonable and frivolous. *See Needs v. State*, 118 Idaho 207, 208-209, 795 P.2d 912, 913-914 (Ct. App. 1990).

B. Joyce Livestock is Entitled to a Mandatory Award of Attorneys Fees Pursuant to the Equal Access to Justice Act.

Federal law provides an independent basis for an award of attorneys fees pursuant to the Equal Access to Justice Act ("EAJA"), a law whose purpose and design was to provide for attorneys fees in all actions involving the United States where the United States' position was not substantially justified. The EAJA is broad, and mandates an award of attorneys fees in any action where the following criteria are met:

Except as otherwise specifically provided by statute, a court shall award to a

1 prevailing party other than the United States fees and other expenses, in addition to
2 any costs awarded pursuant to subsection (a), incurred by that party in an civil action
3 (other than cases sounding in tort), including proceedings for judicial review of
4 agency action, brought by or against the United States in any court having jurisdiction
of that action, unless the court finds that the position of the United States was
substantially justified or that special circumstances make an award unjust.

5 28 U.S.C. §2412(d). Although a federal statute, the EAJA vests in all courts having jurisdiction over
6 the underlying matter, including state courts, the authority to award attorneys fees pursuant to this
7 statute. *See O'Connor v. United States Dept. Of Energy*, 942 F.2d 771, 773-774 (10th Cir. 1991) (the
8 phrase "any court" means "a person or group of persons whose task it to hear and submit a decision
9 on cases at law); *see also United States v. Idaho ex rel. Director, Idaho Dept. Of Water Resources*,
10 508 U.S. 1 (1993) (recognizing the SRBA Court's jurisdiction over the United States pursuant to the
11 McCarran Amendment, 43 U.S.C. §666); *Federal Deposit Insurance Corp. V. Chaney*, 1986 WL
12 1283 (Ohio App. 8 Dist. 1996) (Ohio state court ruling on an award of attorneys fees pursuant to the
13 EAJA).

14 There are three basic requirements under the EAJA which, if satisfied, triggers the provision
15 in the statute mandating an award of attorneys fees. The first is that the party claiming fees pursuant
16 to the EAJA must be the prevailing party. As detailed at length, above, with respect to the United
17 States' claims, Joyce Livestock is the clear and unequivocal prevailing party. The United States' was
18 accorded no relief, and its beneficial use claims were denied in their entirety. *See Memorandum*
19 *Decision and Order on Challenge*. With respect to Joyce Livestock's claim, Joyce also is the
20 prevailing party. Over the United States' objections, Joyce Livestock sought and obtained decreed
21 private water rights with senior priority dates. Although Joyce Livestock did not obtain the priority
22 date originally claimed, a party need not prevail on all issues to be a prevailing party under the EAJA
23 and will qualify as a prevailing party under the EAJA when the relief granted modifies the other
24 party's behavior in a way that directly benefits the party seeking relief. *Southern Oregon Citizens*
25 *Against Toxic Sprays, Inc. V. Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983); *see also F.J. Vollmer Co.*
26 *V. Magaw*, 102 F.3d 591, 594 (D.C. Cir. 1996). In this case, the relief granted Joyce Livestock
27 places it as the sole and senior water right holder, materially altering the relationship and priorities as
28 between Joyce Livestock and the United States with respect to the waters of Jordan Creek.

1 The second requirement under the EAJA is that Joyce Livestock meet basic eligibility
2 requirements pursuant to the statute. Pursuant to the EAJA, a party includes “any partnership,
3 corporation, association, unit of local organization, the net worth of which did not exceed \$7,000,000
4 at the time the civil action was filed.” *See* 28 U.S.C. §2412(d)(2)(B). As set forth in the Declaration
5 of Paul Nettleton filed herewith, Joyce Livestock meets this threshold requirement.

6 The final issue under the EAJA tests whether the position of the United States in connection
7 with the litigation was substantially justified. Importantly, it is the United States’ burden to
8 demonstrate that its position in the litigation was substantially justified and, moreover, to show that
9 its position was justified at every state of the proceeding. *See Garcia v. Bowen*, 702 F. Supp. 409,
10 410 (S.D.N.Y. 1988); *see also FDIC v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125
11 (N.D. Tex. 1990). While it is not Joyce Livestock’s burden to address this factor, the analysis of
12 Joyce Livestock’s right to attorneys fees pursuant to Idaho state law makes it clear that the United
13 States lacked a valid basis in law or in fact to claim beneficial use water rights when it had never
14 placed the subject stockwater to beneficial use, and lacked a valid basis in law or in fact to contest
15 Joyce Livestock’s claims particularly after the *LU Ranching II* Decision issued in January 2005.

16 The purpose of the EAJA is to encourage individuals and small businesses to challenge
17 adverse government action notwithstanding the high cost of civil litigation. In the present case, the
18 United States pursued its beneficial use claims for a period of over seven years despite the fact that it
19 had no legal or factual support for its claims. Indeed, all precedent supported an opposite
20 conclusion. The United States is not entitled to a beneficial use state-based water rights based solely
21 on its administration of the grazing lands. This is just the type of prolonged and unnecessary
22 litigation the EAJA was designed to address. The United States engaged in prolonged litigation over
23 issues it knew were not justified, placing Joyce Livestock in a position of having to incur significant
24 legal expenses. The United States, with unlimited resources, was attempting to exhaust the resources
25 of Joyce Livestock. This is precisely the type of case that requires an award of attorneys’ fees under
26 the EAJA. Accordingly, pursuant to provisions of the EAJA, Joyce Livestock is the clear prevailing
27 party, meets the requirements of a qualified party pursuant to the statute, and the United States’
28 arguments were at no time justified by either established law or the evidence in the case, and Joyce

1 Livestock is entitled to an award of attorneys fees.

2 **C. Joyce Livestock is Entitled to an Award of Attorneys' Fees at Market Rates.**

3 The EAJA by its terms sets the attorney's hourly rate at \$125.00 per hour when calculating
4 the amount of attorneys fees to be awarded. *See* 28 U.S.C. §2412(d). However, the court may
5 increase the fees to market rate based on the cost of living or if specifal factors, including distinctive
6 knowledge or specialized skill required to represent the parties in the litigation at issue exist. *See*
7 *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). As set forth by the Ninth Circuit, if the following
8 three requirements are met, an increase in the hourly rate awarded is warranted: (1) the attorney must
9 possess distinctive knowledge and skills developed through practice specialty; (2) those distinctive
10 skills must be needed in the litigation; and (3) those skills must not be available elsewhere at the
11 statutory rate. *See Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991). Environmental litigation is a
12 recognized specialty requiring distinctive knowledge and skill. *See Animal Lovers Volunteer Ass'n*
13 *Inc. V. Carlucci*, 867 F2d. 1224, 1226 (9th Cir. 1989). Specific to EAJA attorneys' fees awards,
14 courts have upheld specialty rates as high as \$350.00 per hour for an environmental attorney who
15 possessed unique expertise in environmental law and litigation. *Humane Society of the United States*
16 *v. Bush*, 159 F. Supp.2d 707, 712 (Ct. Of Int'l Tr. 2001).

17 In the present case, Joyce Livestock required highly specialized legal representation to protect
18 its rights in this litigation. This is particularly so given the legal and evidentiary complexities
19 involved in this case. It involved over a 140 year history of the settlement of the public lands,
20 issues bearing on the development of western water law, and the unique complexities associated with
21 federal laws designed in purpose an effect to protect state based water rights located on public or
22 federal lands.

23 The attorneys representing Joyce Livestock throughout this case possess distinctive
24 knowledge and skills associated with the specialty practice of water rights adjudications in the west,
25 with a particular emphasis on the water rights located on what are today federally administered lands.
26 These legal skills and related litigation experience were crucial to this case. *See* Declaration of
27 Michael Van Zandt; *see also* Declaration of Alan Schroeder. Such representation would not be
28 available at the statutory rate of \$125.00 per hour. Further, as evidenced in the Declaration of Alan

1 Schroeder, rates of \$250.00 or higher are within the market rate in Idaho in cases such as the one at
2 issue herein. Mr. Schroeder bases his opinion based on his experience practicing in the area of
3 environmental and water law in Idaho. Under such circumstances, the attorneys fees incurred by
4 Joyce Livestock, with attorney rates ranging from \$125 to \$360 per hour were reasonable and are
5 supportable, and an award of the total attorneys fees incurred by Joyce Livestock in this matter,
6 \$297,209.60 were reasonable and necessary to the litigation and, accordingly, Joyce Livestock
7 should be compensated for these fees.

8 V. CONCLUSION

9 The Equal Access to Justice Act was designed to protect the rights of individuals and
10 small businesses in litigation against the United States. It recognizes the disproportionate resources
11 of private parties which may act as a deterrent to private parties seeking to vindicate or protect their
12 rights. As explained in Senate Report 96-253 (July 20, 1979) explaining the purpose and policy
13 behind the Equal Access to Justice Act:

14 The deterrent effect created by this inability to recover fees against the Government is
15 particularly disturbing in light of the rapid growth in Government regulations in
16 recent years. While the influence of the bureaucracy over all aspects of life has
17 increased, the ability of most citizens to contest any unreasonable exercise of
18 authority has decreased. Thus, at the present time, the Government with its greater
19 resources and expertise can in effect coerce compliance with its position. Where
20 compliance is coerced, precedent may be established on the basis of an uncontested
21 order rather than the thoughtful presentation and consideration of opposing views. In
22 fact, there is evidence that small businesses are the target of agency action precisely
23 because they do not have the resources to fully litigate the issue. This kind of
24 truncated justice undermines the integrity of the decision-making process.

25 It is in this context and for this reason that Joyce Livestock seeks an award of attorneys fees
26 in this case under the EAJA and pursuant to Idaho law.

27 The United States' beneficial use claims in this case lacked any basis in law or in fact.
28 Notwithstanding the complete absence of any evidence indicating that it had ever put the water to
beneficial use, and despite the complete absence of any legal authority to support its argument that
management of land constitutes a beneficial use of water, the United States with dogged
determination pursued its state based claims for over seven years before they were finally rejected in
their entirety by this Court. Almost as egregious, the United States opposed Joyce Livestock's
claims also for a period of seven years despite the fact that the United States had actual knowledge of

1 the beneficial use and appropriation of the waters of Jordan Creek by Joyce Livestock and its
2 predecessors in interest. Finally, the United States persisted in its opposition to Joyce Livestock's
3 claims despite specific rulings by the SRBA Court in *LU Ranching II* that rejected nearly all of the
4 United States' arguments, and previous rulings that are law of the case. Under such circumstances,
5 an award of attorneys fees is required under the EAJA and is additionally supported pursuant to
6 Idaho law.

7 Dated this 16th day of August, 2005.

8 Respectfully submitted,

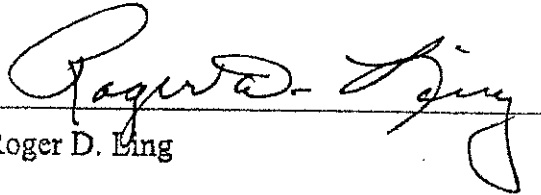
9 McQUAID BEDFORD & VAN ZANDT LLP

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11 By:


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13 Elizabeth P. Ewens
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1 Dated: August 16, 2005

LING, ROBINSON & WALKER

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