

1 Michael J. Van Zandt (Cal. SBN 096777)
Elizabeth P. Ewens (Cal. SBN 213046)
2 **McQUAID BEDFORD & VAN ZANDT LLP**
221 Main Street, 16th Floor
3 San Francisco, CA 94105
Telephone: 415/905-0200
4 Facsimile: 415/905-0202

5 ROGER D. LING (Idaho SBN 1018)
LING, ROBINSON & WALKER
6 P.O. Box 396
Rupert, Idaho 83350
7 Telephone: (208) 436-4717
Facsimile: (208) 436-6804
8
9 Attorneys for Joyce Livestock

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
14 Case No. 39576

REPLY BRIEF IN OPPOSITION TO
UNITED STATES' MOTION TO
DISALLOW COSTS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. The Procedural Status of this Case Does Not Impact This Court’s Authority to Rule
 on the Pending Motion for Attorneys Fees. 1

 B. Joyce Is Entitled to Recover Its Claimed Attorneys Fees under Idaho Law 3

 C. The McCarran Amendment Does Not Affect the Validity of Joyce Livestock’s
 Attorneys’ Fees Claim. 7

 D. The “Governmental Immunity Doctrine” Does Not Bar Joyce Livestock’s Attorneys’
 Fees Claim. 9

 E. The Equal Access to Justice Act Mandates an Award of Attorneys Fees in Cases
 Such as This. 9

III. CONCLUSION 15

TABLE OF AUTHORITIES

Cases

<i>Crowley v. Lafayette Life Ins. Co.</i> , 106 Idaho 818, 683 P.2d 854 (1984)	3
<i>Davis v. Michigan Dept. of Treasury</i> , 489 U.S. 803 (1989)	9
<i>Ellis v. United States</i> , 711 F.2d 1571, 1573-1575 (Fed.Cir. 1983)	13
<i>Essex Electro Engineers, Inc. v. United States</i> , 757 F.2d 247 (Fed.Cir. 1985)	12
<i>F.J. Vollmer Co. v. Magow</i> , 102 F.3d 591, 594 (D.C. Cir. 1996)	14
<i>FDIC v. Addison Airport of Texas, Inc.</i> , 733 F. Supp. 1121, 1125 (N.D. Tex. 1990)	15
<i>Federal Deposit Insurance Corp. v. Chaney</i> , 1986 WL 1283 (Ohio App. 8 Dist. 1996)	14
<i>Garcia v. Bowen</i> , 702 F. Supp. 409, 410 (S.D.N.Y. 1988)	14
<i>Kenaitze Indian Tribe v. State of Alaska</i> , 860 F.2d 312, 316 (9 th Cir. 1988)	8, 11
<i>Massachusetts Union of Public Housing Tenants, Inc. v. Pierce</i> , 755 F.2d 177 (D.C. Cir. 1985) ..	2
<i>Needs v. State</i> , 118 Idaho 518, 525, 20 P.3d 702, 709 (2001)	4
<i>O'Connor v. United States Dept. of Energy</i> , 942 F.2d 771 (10 th Cir. 1991)	12
<i>R.T. Nahas v. Hulet</i> 114 Idaho 23, 26-27 (1988)	5
<i>Ruckelshaus v. Sierra Club</i> , 463 U.S. 680 (1983)	8
<i>Shettel v. Bamesberger</i> , 130 Idaho 217, 221, 938 P.2d 1255, 1259 (1997)	4
<i>State of Nevada v. Morros</i> , 766 P.2d 263 (Nevada 1988)	5
<i>The Antelope</i> , 25 U.S. (12 Wheat) 546 (1827)	8
<i>United States Dep't of Energy v. Ohio</i> , 503 U.S. 607 (1992)	8
<i>United States v. Chemical Foundation</i> , 272 U.S. 1 (1926)	8
<i>United States v. Idaho ex. re. Director, Idaho Dept. of Water Resources</i> , 508 U.S. 1 (1993) ..	8, 10
<i>United States v. Missouri Pacific R.Co., supra; see also Azarte v. Ashcroft</i> , 394 F.3d 1278, 1285 (9 th Cir. 2005)	8, 9, 11

Statutes

Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412	1, 2, 6, 9, 10, 11, 12, 13, 14
28 U.S.C. 2412(d)(1)(A)	10-13

1	28 U.S.C. § 1920	8
2	28 U.S.C. § 1920	8
3	28 U.S.C. § 2412(a)(1)	7, 8
4	28 U.S.C. § 2412(d)	12, 14
5	McCarran Amendment, 43 U.S.C. § 666	7, 10, 13
6	Clean Water Act	8
7	Clean Air Act	8
8	I.A.R. 13(b)	2
9	I.C. §§ 42-113, 42-114, and 42-501	5
10	I.R.C.P. 54 (e)(1)	4
11	I.R.C.P. 54.	3
12	Tax Equity and Fiscal Responsibility Act of 1982, Pub.L.No 97-248.	13

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Under the Equal Access to Justice Act, a Court must award attorneys fees to a private party who prevails in litigation against the United States unless the United States can prove that its position was substantially justified at all stages of the litigation. *See* Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. Neither the United States’ claims at issue herein, nor its objections to Joyce Livestock’s claims, were justified by law or by fact. From the initiation of this litigation forward, the United States has advanced the erroneous position that only the United States can acquire and maintain water rights sited on public lands or within federally administered allotments. The United States’ claims filed in furtherance of this policy position have no basis in law or in fact and, indeed, were contrary to the law of the case in the Snake River Basin Adjudication from the initiation of this litigation forward. Faced with the United States’ claims, Joyce Livestock had two options available to it. The prospect of litigating against the United States could have easily deterred Joyce Livestock from defending its rights and interests because of the cost of defending its rights against the United States. Alternatively, Joyce Livestock could stand up and defend its historic water rights. Joyce Livestock chose the latter course and prevailed. In doing so, Joyce Livestock had to incur tremendous expense in defending its water rights against the United States and to object to the United States’ baseless claims. Under such circumstances, an award of attorneys fees is appropriate under Idaho law and mandatory under the federal Equal Access to Justice Act.

II. ARGUMENT

A. The Procedural Status of this Case Does Not Impact This Court’s Authority to Rule on the Pending Motion for Attorneys Fees.

The fact that this case is on appeal is not a procedural bar to an award of attorneys fees. First, the District Court retains jurisdiction to consider a pending attorneys fees motion. Second, nothing precludes a party from filing a Motion before a filing deadline. Indeed, as a practical matter, the deadline to file a motion for attorneys fees under Idaho Rules of Civil Procedure falls before the deadline for filing a Notice of Appeal with the Idaho Supreme Court. Accordingly, in order to preserve a right to recover attorneys fees, a party would out of necessity need to file prior

1 to the date that the time for appeal has expired in order to preserve that right.

2 The Idaho Rules of Appellate Procedure specifically grant district courts continued
3 jurisdiction and authority to decide motions for attorneys fees even if a Notice of Appeal has been
4 filed. Rule 13 of the Idaho Rules of Appellate Procedure states as follows:

5 In civil actions ... the district court *shall* have the power and authority to rule upon
6 the following motions and to take the following actions *during the pendency of an*
7 *appeal* ... (9) Make any order regarding the taxing of costs or determination of
attorneys fees incurred in the trial of the action.

8 I.A.R. 13(b) (*emphasis added*). In application, this Court has exercised this right to make an order
9 regarding attorneys fees during the pendency of an appeal. *See In Re SRBA Case No. 39576*,
10 Memorandum Decision and Order Re: Attorneys Fees (L.U. Ranching) (August 2, 2005).

11 The authority cited by the United States does not alter the rule regarding the district court's
12 continued authority to issue orders respecting attorneys fees. The United States cites to
13 *Massachusetts Union of Public Housing Tenants, Inc. v. Pierce*, 755 F.2d 177 (D.C. Cir. 1985) for
14 the proposition that "EAJA applications 'must be filed within 30 days of the time that a judgment
15 becomes final because an appeal is completed or foregone.'" *See* Memorandum in Support of United
16 States' Motion to Disallow Costs, *citing Massachusetts Union, supra*. However, that case examines
17 the outer limits of the filing deadline, and does not address whether a party can file an EAJA motion
18 before that deadline is reached. At issue in *Massachusetts Union* was the timeliness of a motion for
19 attorneys fees filed by the appellants. The District Court held that the motion for attorneys fees was
20 untimely because it was filed more than thirty days after the District Court's final judgment. On
21 appeal, the attorney fee applicants contended that the thirty day period prescribed by the EAJA
22 should run not from the time the District Court's judgment was issued, but from the day that the
23 time to appeal had expired and that, therefore, their motion for attorneys fees was timely filed
24 pursuant to the EAJA. The Court of Appeals agreed and held that a motion for attorneys fees could
25 be filed any time before thirty days from the date that the time for appeal has expired. Again, the
26 issue in the case was the drop dead date by which a motion for attorneys fees must be filed under the
27 EAJA. Whether a motion for attorneys fees could be filed by the parties before that time period
28 runs was not at issue. Even if it was at issue, motions, even if filed prematurely, are considered to

1 be timely. *See Crowley v. Lafayette Life Ins. Co.*, 106 Idaho 818, 683 P.2d 854 (1984).

2 As a practical matter, given the various timelines prescribed by the rules at issue, in order to
3 preserve a right to petition for attorneys fees, such a motion would have to be filed before the time
4 for filing a notice of appeal has expired. Under the Idaho Rules of Civil Procedure, the deadline for
5 filing a motion for attorneys fees is fourteen (14) days from the date of the district court's final
6 judgment. *See* I.R.C.P. 54. As discussed above, the deadline under the EAJA is thirty (30) days
7 from the date of final judgment and that final judgment also may well be, absent a decision by either
8 party to appeal, the date that the district court entered its judgment in the case. If the case is not
9 appealed after forty-two days, and a party did not file a motion for attorneys fees within fourteen
10 days from the District Judgment under Idaho law, or within the thirty days under the EAJA, then the
11 opportunity to seek attorneys fees is lost. Under the United States' theory of how these deadlines
12 should be interpreted, private parties would be forced to decide whether to appeal a matter well
13 within that fourteen day window and, moreover, have the ability to predict with absolute certainty
14 whether the opposing parties will appeal. This is an illogical interpretation of the rules and the law,
15 and should not be used to forestall this Court's decision on the attorneys fees issue.

16 **B. Joyce Is Entitled to Recover Its Claimed Attorneys Fees under Idaho Law.**

17 While the general rule is that each litigant is to bear the costs of its own attorneys fees, the
18 state of Idaho has carved out an important exception where a case has been brought or pursued
19 unreasonably or without foundation. Despite arguments to the contrary by the United States, this is
20 just such a case. From the initiation of this litigation forward, the United States has pursued this
21 action with the full knowledge and understanding that the positions it was advancing were contrary
22 to law and to the law of the case in the SRBA.^{1/}

23 As previously briefed at length, at all times throughout this litigation, the United States'

25 ^{1/} It is interesting to note that the United States does dispute Joyce Livestock's
26 position that Joyce Livestock is the prevailing party based on the Memorandum Decision
27 and Order on Challenge, but only argues that this determination cannot be made because the
28 case is on appeal. However, as discussed, above, the District Court has continuing
jurisdiction and authority to determine, based on its own ruling, whether Joyce Livestock is
the prevailing party for purposes of deciding the attorneys fees motion following the District
Court's decision on the merits.

1 position lacked any foundation or basis in law or in fact. *See* Joyce Livestock's Motion for
2 Attorneys Fees, p. 4-6 (regarding the United States' position with respect to its claims), p. 6-9
3 (regarding the United States' opposition to Joyce Livestock's claims).^{2/} Now, the United States
4 attempts to rehabilitate its claims and to argue that its position was justified. However, a closer
5 examination of the United States' brief reveals that the United States is merely attempting to re-
6 invent its arguments and to justify them after the fact.

7 As a preliminary matter, the standard for evaluating attorneys fees motions advanced by the
8 United States must be examined. The United States argues and under Idaho law, the Court must
9 conclude that the pursuit of the entire action was frivolous. This is contrary to the plain language of
10 applicable rule of law. The applicable statute provides, in pertinent part, that the court must
11 examine whether "the action was brought, *pursued* or defended frivolously, unreasonably, or
12 without foundation." *See* I.R.C.P. 54 (e)(1). Further, in evaluating the merits of a claim for
13 attorneys fees, the law is clear that a party need not prevail on all issues in order to be entitled to
14 attorneys fees. *See* I.R.C.P. 54(e)(1); *see also Shettel v. Bamesberger*, 130 Idaho 217, 221, 938 P.2d
15 1255, 1259 (1997).

16 When settled law clearly precludes a legal claim, it is, by definition, both unreasonable and
17 frivolous to pursue that claim. *See Needs v. State*, 118 Idaho 518, 525, 20 P.3d 702, 709 (2001). In
18 this case, the law with respect to the government's beneficial use claims was settled from the outset
19 of this litigation, and it was not in the government's favor. The case between the United States and
20 Joyce Livestock became at issue as of February 11, 1998 with the filing of Joyce Livestock's
21 objections to the United States' beneficial use claims. As early as 1997, the law in the SRBA was
22 that the United States was not entitled to a state-based or beneficial use stock water right because it
23 does not own cattle, unless the United States could prove that an agency relationship existed with
24 the private appropriators who were actually putting the water to beneficial use. *See Order on*
25 *Motion to Alter or Amend; Order on Summary Judgment; and Order on Motion to Withdraw*
26 *Objections*, Subcases 57-11124 et al., p. 20 (March 25, 1997). Consistent with this, in 1998 the
27

28 ^{2/} These arguments are incorporated herein by reference.

1 SRBA District Court adopted the following:

2 [T]he Court finds that the United States is not the appropriator of water based solely
3 on the fact that it issues permits and that Congress regulates access to water sources.
4 Again, if the United States is not the actual appropriator of water, it must perfect a
water right through an appropriator under an agency theory ... or the right must be
conveyed to the United States from a party who actually perfected the right.

5 *In Re SRBA Case No. 39576*, Special Master's Order Denying Motion to Alter or Amend, p. 11
6 (April 15, 1998); *In Re SRBA Subcase 39576*, Order Denying Challenges and Adopting Special
7 Master's Reports and Recommendations (September 30, 1998). Contemporaneous with the filing of
8 Joyce Livestock's objections, and a full four years before the trial in this case, the settled law is in
9 the SRBA was that the United States was not entitled to common-law beneficial use stockwater
10 rights based on its management of the rangeland. *See* Subcase 55-10135 et al., *Memorandum*
11 *Decision and Order on Challenge*, p. 21-29 (August 3, 2005). As a party to the cases in which this
12 law was settled, the United States was fully aware by 1997 or, at the latest, 1998 that its beneficial
13 use water right claims were contrary to the law of the case in the SRBA. With that knowledge, the
14 United States could have, and should have, withdrawn its beneficial use claims. Instead, the United
15 States continued to litigate its claims, to the financial detriment of Joyce Livestock, for what is now
16 eight years and counting.

17 Interestingly, in its Motion to Disallow Costs, the United States all but acknowledges that
18 Idaho law did not, and does not, support its beneficial use water right claims, because instead of
19 turning to legal authority relating to common law beneficial use water rights, the United States
20 instead relies on statutory provisions, and statutory case law to justify its litigation position. *See*
21 United States' Brief, p. 9, 18 (citing to Idaho statutes, an Idaho Attorney General Opinion, and *State*
22 *of Nevada v. Morros*, 766 P.2d 263 (Nevada 1988) all addressing statutory based water rights). The
23 problem is that these statutory provisions do not help the United States' cause. First, statutory rights
24 are completely separate and distinct from beneficial use water rights and the United States did not
25 file statutory based water right claims. *See R.T. Nahas v. Hulet* 114 Idaho 23, 26-27 (1988); *see*
26 *also* I.C. §§ 42-113, 42-114, and 42-501 (a permit for a statutory based water right will only be
27 issued to persons making a written application therefore). In this case, the United States did not file
28 a statutory based water right claims in the SRBA litigation, nor has it ever filed a written application

1 pursuant to statute for such a right to these waters.

2 In a further attempt to justify its litigation position, the United States notes in its brief that it
3 has been awarded partial decrees for other in-stream stockwater rights in other cases. This is
4 irrelevant. First, none of those were awarded after the issues had been fully litigated, as evidenced
5 by the fact that the United States can cite to no precedent within the state of Idaho that supports its
6 position. Further, the fact that the United States obtained default decrees and settlement agreements
7 in these other cases is irrelevant to whether the United States' position was unreasonable or without
8 foundation in *this* case, especially given the deterrent effect the prospect of litigating against the
9 United States may have had on the other parties. *See e.g.* H.R. Rep. No. 96-1418, at p. 14 (1980)
10 ("Congress originally enacted the EAJA in response to its concern that persons might be deterred
11 from seeking review of, or defending against, unreasonable governmental action because of the
12 expense involved in securing the vindication of their rights.")

13 With respect to Joyce Livestock's claims, the United States' position that Joyce is not
14 entitled to a stockwater right also was flawed from the outset. Again, the United States' position
15 that Joyce Livestock's predecessors could not acquire water right on federal lands and transfer those
16 rights as appurtenances was contrary to established law of the case and, therefore, was unreasonable.
17 *In Re SRBA Case No. 39576*, Order Denying Challenges and Adopting Special Master's Report and
18 Recommendations (September 30, 1998) (for an instream stockwater right, the party claiming a
19 stockwater right will point to the act of placing stock it owns or operates near a water source and the
20 drinking of water by the stock as the act constituting an appropriation of water) of stockwatering,
21 appropriation is evidenced by watering livestock directly from the source); *see also In Re: SRBA*
22 *39576 (Subcase 55-10288b et al.)*, Memorandum Decision and Order on Challenge, Judge Wood,
23 April 25, 2000, p. 18 (a water right can be conveyed without expressly mentioning the water right in
24 the same instrument that conveys the real property to which the water right is appurtenant).
25 Moreover, it was unreasonable for the United States to continue to object to Joyce Livestock's
26 claims and to argue that a private party could not even acquire or transfer a water right on public
27 land or within federally administered allotments, even after the District Court ruled on this issue in
28 the *LU Ranching II* decision. Despite a ruling directly on point by the SRBA District Court in *LU*

1 *Ranching II*, the United States inexplicably and without reason continued to advance and pursue
2 arguments that had been rejected outright by this Court with respect to a private party's ability to
3 own and transfer water rights sited within federally administered allotments.

4 The United States claims and objection to Joyce Livestock's claim were without foundation
5 in law or in fact. Under such circumstances, an award of attorneys fees pursuant to Idaho law is
6 justified.

7 **C. The McCarran Amendment Does Not Affect the Validity of Joyce Livestock's**
8 **Attorneys' Fees Claim.**

9 The McCarran Amendment does not work to deny Joyce Livestock's claim for attorneys
10 fees. By its own terms, the McCarran Amendment restricts the ability of parties to recover costs
11 incurred in litigation, but is entirely silent with respect to attorneys fees. Further, as discussed,
12 below, the Equal Access to Justice Act specifically authorizes an award of attorneys fees against the
13 United States and specifies that an award of fees can be made by "any court", which includes, by
14 definition, a state court such as this.

15 The United States argues that "by its very terms, the McCarran Amendment bars the shifting
16 of fees and costs to the United States." *See* United States' Motion to Disallow Costs, p. 13. This is
17 false. The McCarran Amendment only limits the shifting of costs, and does not address attorneys
18 fees. The McCarran Amendment states plainly:

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

23 *See* 43 U.S.C. §666 (2002) (*emphasis added*). This distinction between attorneys fees and costs is
24 significant, and the United States is well aware of the difference. In other legislation enacted by
25 Congress, the legislature has been careful to specify whether what is at issue is costs, attorneys fees,
26 or both costs and attorneys fees. Further, in other sections, the United States Code specifically
27 defines "costs," and in those definitions Congress has specifically differentiated between the terms
28 "costs" and "attorneys fees." *See* 28 U.S.C. §2412(a)(1) (judgment for costs, as enumerated in

1 section 1920 of this title, does not include the fees and expenses of attorneys); *see also* 28 U.S.C. §
2 1920 (costs include clerk's fees and docket fees).

3 Of the cases cited in support of the United States' McCarran Amendment argument, only
4 one actually deals specifically with the McCarran Amendment. The others include *United States v.*
5 *Chemical Foundation*, 272 U.S. 1 (1926) which addresses the "Trading with the Enemy Act" and
6 *The Antelope*, 25 U.S. (12 Wheat) 546 (1827) involving the identification of African slaves
7 delivered to Spanish claimants and, specifically, the "expense of keeping, maintaining, etc. of the
8 Africans by the (government) marshals." Other cases cited by the United States include *United*
9 *States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) and *Ruckelshaus v. Sierra Club*, 463 U.S. 680
10 (1983) dealing with the interpretation of the Clean Water Act and the Clean Air Act, respectively.
11 The only case cited by the United States that purports to be on point because it involves the
12 interpretation of the McCarran Amendment is *United States v. Idaho*, 508 U.S. 1 (1993). But even
13 that case does not support the United States' argument. The fees and cost-shifting analysis and
14 McCarran Amendment issues in *United States v. Idaho*, *supra*, do not have anything to do with
15 attorneys fees or whether attorneys fees fall within the definition of costs. Rather, at issue in *United*
16 *States v. Idaho* is the payment of filing fees which would clearly fall within the definition of "costs"
17 under section 1920. *Id*; *see* 28 U.S.C. §2412(a)(1) (judgment for costs, as enumerated in section
18 1920 of this title, does not include the fees and expenses of attorneys); *see also* 28 U.S.C. § 1920
19 (costs include clerk's fees and docket fees)

20 The plain language of the McCarran Amendment provides that there will be no judgment for
21 costs entered against the United States in water right adjudications. The statute is purposefully
22 silent on the issue of attorneys fees, and this Court should not write such language into the statute.
23 *See Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 316 (9th Cir. 1988) ("We (the courts) do
24 not rewrite the language ... an interpreting body may not invent a completely new meaning for a
25 statutory term"); *see also United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929) (where the
26 language of an enactment is clear, the words employed are to be taken as the final expression of the
27 meaning intended).

1 **D. The “Governmental Immunity Doctrine” Does Not Bar Joyce Livestock’s Attorneys’**
2 **Fees Claim.**

3 The United States explicitly and specifically waived sovereign immunity from an award of
4 attorneys fees by way of the Equal Access to Justice Act. The fact that the state of Idaho did not
5 similarly waive such immunity is, therefore, irrelevant, and none of the cases cited by the United
6 States in its Motion hold otherwise.

7 The primary case relied upon by the United States for its theory of “intergovernmental
8 immunity” is *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). However, the *Davis* case
9 has nothing to do with waivers of immunity or entitlement to attorneys fees. Rather, that case
10 involves the disparate treatment of individuals and, specifically, the imposition of taxes and the
11 state’s authority to tax federal retiree benefits versus state retiree benefits. In contrast, what is at
12 issue here is the United States’ specific waiver of its sovereign immunity.

13 Through the enactment of the EAJA, the United States specifically waived its sovereign
14 immunity and authorized “*any court* having jurisdiction of that action” to award attorneys fees to a
15 private party. Under the United States’ theory of “intergovernmental immunity,” the EAJA would
16 have no effect in any state where there was a state law protecting the state from an award of
17 attorneys fees. The EAJA clearly and expressly waives the sovereign immunity of the United States
18 in *any court* found in any state having jurisdiction over the matter, and to infer in that language, as
19 the United States urges, an additional clause, namely: “except in states where the state itself is
20 immune from an award of attorneys fees” would lead to an absurd and unintended result. *See*
21 *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929) (where the language of an
22 enactment is clear, and construction according to its terms does not lead to absurd or impractical
23 consequences, the words employed are to be taken as the final expression of the meaning intended.).
24 The absurd result would be in a limited number of states, the United States would be exempt from
25 reimbursing attorney’s fees; whereas, in most states, it would be required to do so. This would make
26 citizens who litigate in those limited states with “intergovernmental immunity” issues second class
27 citizens to those in the rest of the states, raising all kinds of equal protection, due process and
28 privileges and immunities issues. The plain language of the EAJA contains no such restrictions and

1 none should be read into the statute.

2 **E. The Equal Access to Justice Act Mandates an Award of Attorneys Fees in Cases Such**
3 **as This.**

4 Joyce Livestock has satisfied each and every test under the Equal Access to Justice Act thus
5 triggering application of the mandatory award of attorneys fees thereunder. First, Joyce Livestock is
6 the prevailing party in this litigation. Second, the United States' position in this litigation was not
7 substantially justified. To the contrary, the United States' position was contrary to pre-existing legal
8 precedent within the SRBA. Accordingly, because this Court falls within the plain meaning and
9 definition of "any court," it is authorized and, indeed, required to award attorneys fees to Joyce
10 Livestock in this case.

11 As a preliminary matter, the United States' position that this Court does not have the
12 jurisdiction or authority to award attorneys fees under the EAJA must be addressed and rejected. In
13 addressing this issue, the United States in its brief ignores the first step in statutory construction: the
14 plain meaning of the statute. It is Joyce Livestock's position that the Court need not go any further
15 than the plain wording and meaning of the EAJA to determine that it is authorized to award
16 attorneys fees under the EAJA. However, even if you look beyond the plain meaning of the statute
17 and to the legislative history of the statute, the conclusion remains the same. This Court has the
18 authority to award attorneys fees under the EAJA and is obligated to do so under the facts of this
19 case.

20 The starting point in the analysis is the plain language of the EAJA which states, as follows:

21 Except as otherwise specifically provided by statute, a court *shall award* to a
22 prevailing party other than the United States fees and other expenses, in addition to
23 any costs awarded pursuant to subsection (a), incurred by that party *in any civil*
24 *action* (other than cases sounding in tort), including proceedings for judicial review
of 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 made an award unjust.

25 28 U.S.C. 2412(d)(1)(A) (*emphasis added*). The issue, then, is whether this case qualifies as "any
26 civil action" pending in "any court having jurisdiction of that action."

27 Under the provisions of the McCarran Amendment, the SRBA has jurisdiction over this
28 case. *See* 43 U.S.C. § 666; *see also United States v. Idaho ex. re. Director, Idaho Dept. of Water*

1 *Resources*, 508 U.S. 1 (1993) (recognizing the SRBA Court’s jurisdiction over the United States
2 pursuant to the McCarran Amendment). It cannot be disputed that this Court has jurisdiction over
3 this case, as the United States has been an active litigant in these proceedings for the past eight
4 years. Instead, the issue as raised by the United States is whether the District Court of the Fifth
5 Judicial District of the State of Idaho falls within the definition of “any court.”

6 Where the language of a statute is clear, the words of the legislature are to be taken as the
7 final expression of the meaning intended. It is submitted that when Congress used the words “any
8 court,” it truly meant “any court” which includes this Court having jurisdiction over this case. *See*
9 *United States v. Missouri Pacific R.Co.*, *supra*; *see also Azarte v. Ashcroft*, 394 F.3d 1278, 1285 (9th
10 Cir. 2005) (“The starting point for [the] interpretation of a statute is always its language, and courts
11 must presume that a legislature says in a statute and means in a statute what it says there.”) In sum, a
12 court must give effect to the plain meaning of a statute. The rationale for this rule of statutory
13 construction is good, and has been described by the Ninth Circuit as follows:

14 We (the courts) do not rewrite the language ... An interpreting body may not invent a
15 completely new meaning for a statutory term. Any other rule of construction would
16 rob statutes of binding force and allow free rein to those who implement federal
statutes to do what they wish rather than what Congress directed.

17 *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 316-317 (9th Cir. 1988). In that case, the
18 term used in the statute that was at issue was the word “rural.” The Court noted that the term “rural
19 is not difficult to understand; it is not a term of art.” *Id.* The same can be said about the words “any
20 court.” Presumably, this Court can take judicial notice of the fact that it is, indeed, a “court,” and
21 that leaves the word “any.” The standard definition of “any” is as follows: “one, no matter which,
22 of more than two ... every [*any* child can do it] ... any one or ones; any amount or number.” *See*
23 *Webster’s New World Dictionary*, Second College Edition (1986). When the legislature wrote “any
24 court” it meant “any court” and full effect must be given to this plain language as written in this
25 statute. If the United States Congress wanted to exclude certain courts from this provision in the
26 EAJA, it would not have used the words “any court.” Congress drafted this legislation specifically
27 waiving the United States’ sovereign immunity and subjecting it to liability for attorneys fees in *any*
28 civil action in *any court* having jurisdiction over the matter. *See* 28 U.S.C. 2412(d)(1)(A).

1 Any attempts by the United States to delve into the legislative history for the purpose of re-
2 writing the above statute to limit its application to certain courts should be rejected. Such an
3 interpretation is illogical and contrary to the rules of statutory construction. It is also contrary to
4 case law and the history of the EAJA.

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

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

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

28 The specific mention of the Court of Claims in the EAJA and in the legislative history of the

1 same also must be put into context. The United States relies heavily on the fact that there are
2 specific provisions in the EAJA specifying that the U.S. Court of Veterans Appeals and the U.S.
3 Court of Federal claims are included in the definition of Courts. The reason for the clarifying
4 position in the statute must be put in historic context. When the Federal Courts Improvement Act
5 of 1982 became effective on October 1, 1982, it designated a new Claims Court to be the forum for
6 the resolution of cases then pending in the Court of Claims. It was important to ensure that litigants
7 would not be divested of the opportunity to pursue an award of fees and costs because of the
8 transfer provisions relating to the creation of the Claim Court. *See Ellis v. United States*, 711 F.2d
9 1571, 1573-1575 (Fed.Cir. 1983). Specific mention, then, of the Claims Court or the tax Court^{3/}
10 does not diminish or devalue the plain language of the statutory provision at issue: “any court
11 having jurisdiction of that action” has the authority to award attorneys fees to a private litigant
12 under the EAJA. *See* 28 U.S.C. 2412(d)(1)(A).

13 In contrast to the courts specifically mentioned in amendments to the EAJA, the state courts
14 already had jurisdiction over the United States pursuant to the McCarran Amendment at the time the
15 EAJA was initially enacted. There was, therefore, no need to clarify that those courts were “courts
16 having jurisdiction of that action” under the EAJA. Further, it should be noted that any time there
17 has been a question about whether a court, and in particular a newly created court, is within the
18 purview of teh EAJA, Congress has come back in a series of amendments to show that the EAJA
19 applies. Again, such a clarifying amendment was not necessary with respect to Idaho state courts
20 because Idaho state courts were in existence and had jurisdiction over the United States pursuant to
21 the McCarran Amendment long before the enactment of the EAJA. Specific mention, then, of the
22 Claims Court or the Tax Court does not diminish or devalue the plain language of the statutory
23 provision at issue: “any court having jurisdiction of that action” has the authority to award attorneys
24 fees to a private litigant under the EAJA. *See* 28 U.S.C. 2412(d)(1)(A).

25 Not only have federal courts recognized that when Congress stated that “any court
26 having jurisdiction of the action” truly means “any court” for purposes of application of the EAJA,
27

28 ^{2/} *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub.L.No 97-248.

1 in practice, state courts also have recognized their jurisdiction to award attorneys fees to a private
2 litigant under the EAJA. An example of this is found in a case brought by the Federal Deposit
3 Insurance Corporation in state court in Ohio in connection with several negotiable notes. In an
4 unpublished opinion, *Federal Deposit Insurance Corp. v. Chaney*, 1986 WL 1283 (Ohio App. 8
5 Dist. 1996), the Court of Appeals of Ohio reversed the lower court's opinion awarding over \$34,000
6 in fees where the lower court found the government's position to be substantially unjustified
7 (Applicants shall lodge a copy of this opinion with the court contemporaneously with the filing of
8 their Motion for Attorney's Fees).

9 Having established that this Court has the authority to award attorneys fees under the EAJA,
10 what is left is application of the EAJA to the facts of this case. This Court must award attorneys
11 fees if Joyce Livestock is the prevailing party and if the United States position was not substantially
12 justified. *See* 28 U.S.C. §24129(d). In this case, both are met.

13 Joyce Livestock is the prevailing party in this case. A party need not prevail on all issues to
14 be a prevailing party under the EAJA. Rather, the test is whether the relief on the merits alters the
15 legal relationship between the parties by modifying the government's behavior in a manner
16 beneficial to the private litigant. *See F.J. Vollmer Co. v. Magow*, 102 F.3d 591, 594 (D.C. Cir.
17 1996). In this case, the relationship between the parties is altered. The Court's Memorandum
18 Decision and Order on Challenge leaves Joyce Livestock as the sole and senior water right holder,
19 denying each of the United States' claims outright. This materially alters the relationship and
20 claimed priorities as between Joyce Livestock and the United States with respect to the waters of
21 Jordan Creek. The prevailing nature of Joyce Livestock's claim is even starker in this situation
22 because the SRBA court reversed a Special Master Recommendation denying Joyce's claims and
23 awarding water the United States. Despite the fact that Joyce Livestock did not receive the earliest
24 priority date claimed, it was awarded its claimed water rights and there are no other senior rights.

25 The second test is whether the position of the United States in connection with the litigation
26 was substantially justified. Importantly, it is the United States' burden to demonstrate that its
27 position in the litigation was substantially justified and, moreover, to show that its position was
28 justified at every stage of the proceeding. *See Garcia v. Bowen*, 702 F. Supp. 409, 410 (S.D.N.Y.

1 1988); *see also* *FDIC v. Addison Airport of Texas, Inc.*, 733 F. Supp. 1121, 1125 (N.D. Tex. 1990).
2 This is something the United States has failed to do. As briefed at length, above, given the
3 undisputed fact that the United States never acted as the beneficial user of the stockwater at issue,
4 never had an agency relationship with either Joyce Livestock or its predecessors in interest, and
5 never filed or claimed a statutory based water right, it was unreasonable for the United States to
6 claim and pursue its beneficial use water right claims in this litigation *especially* given its full
7 knowledge of the law of the case in the SRBA that it was not entitled to beneficial use water rights.
8 Because Joyce Livestock was the prevailing party in this litigation and because the United States
9 has failed to demonstrate that its position in this litigation was substantially justified, under the
10 EAJA this Court must award Joyce Livestock attorneys fees in this case.

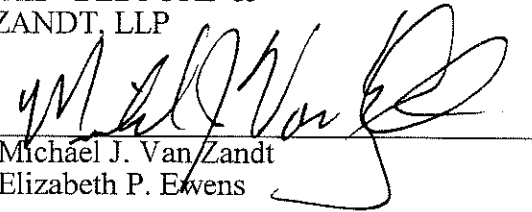
11 III. CONCLUSION

12 “Congress originally enacted the EAJA in response to its concern that persons might be
13 deterred from seeking review of, or defending against, unreasonable governmental action because of
14 the expense involved in securing the vindication of their rights.” *See* H.R. Rep. No. 96-1418, at 14
15 (1980). Joyce Livestock is the type of litigant this statute was designed to protect. For almost eight
16 years, Joyce Livestock has litigated against the United States for the sole purpose of protecting its
17 water rights as against the United States. At no time were the United States’ arguments justified
18 under the applicable law or the facts of this case. In accordance with Idaho law and the mandate of
19 the EAJA, Joyce Livestock therefore respectfully requests this Court to award Joyce Livestock its
20 attorneys fees in this case.

21 Dated: November 17, 2005

22
23 Respectfully submitted,
24 McQUAID BEDFORD &
25 VAN ZANDT, LLP

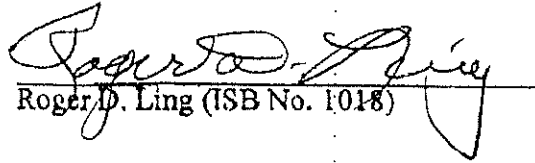
26 By:

27 
28 Michael J. Van Zandt
Elizabeth P. Ewens

1 Dated: November 17, 2005.

2 LING, ROBINSON & WALKER

3 By:


Roger D. Ling (ISB No. 1018)

4
5
6
7 G:\Docs\21381\001\ATTORNEYS FEES MOTION\Reply Attorney Fees 11-17-05.wpd
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27



CERTIFICATE OF SERVICE

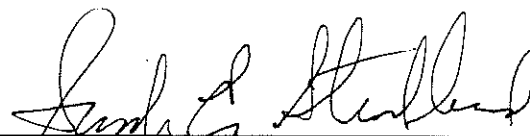
I certify that on November 17, 2005, I served a true and correct copy of foregoing
**JOYCE LIVESTOCK'S REPLY BRIEF IN OPPOSITION TO UNITED STATES' MOTION
TO DISALLOW COSTS** upon the following individuals by placing the document in the United
States Mail, postage paid, and addressed as follows:

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

Larry Brown
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724
(via U.S. Mail and electronic transmission)

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098



Sarah E. Strickland