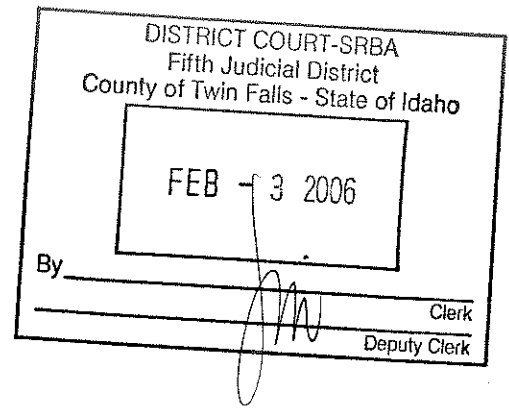




IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA
Case No. 39576

SUBCASES: 55-10135
55-11061
55-11385
55-12452

MEMORANDUM DECISION AND ORDER
RE: ATTORNEYS' FEES

A hearing was held in open court on December 14, 2005 on the motion of Joyce Livestock Co. for attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d).
Appearances were as follows:

Joyce Livestock Co:

Ms. Elizabeth P. Ewens
McQuaid, Bedford & VanZandt, LLP

United States of America:

Mr. Larry A. Brown
U.S. Department of Justice

The matter was submitted for decision on the day following the hearing. The Court, having considered the argument of counsel, the file in this matter and the memoranda submitted now enters the following:

MEMORANDUM DECISION

1. Facts and Procedural History.

1 The relevant facts and the procedural history of this case were summarized in this Court's
2 **Memorandum Decision and Order on Challenge** (August 3, 2005) and are restated here for the
3 convenience of the reader. Joyce Livestock Company (Joyce Livestock or Joyce) filed a single
4 instream *Notice of Claim to a Water Right*, claiming .23 cfs from Jordan Creek in Owyhee County
5 based on beneficial use with a priority date of 1865 for instream stockwater. The United States,
6 Department of Interior, Bureau of Land Management (United States or BLM) filed three notices of
7 claim, each for .02 cfs for instream stockwater with a January 1, 1874, priority date based on
8 beneficial use, which largely overlapped the stream reaches of Joyce's claimed right. Both sets of
9 claims are to water used in conjunction with a federal grazing allotment administered by the United
10 States on which Joyce Livestock or its predecessors have historically grazed cattle pursuant to a
11 grazing permit. The Director of the Idaho Department of Water Resources issued the *Director's*
12 *Report for Domestic and Stockwater, Reporting Area 6 (IDWR Basin 55)* on July 31, 1997. Joyce
13 Livestock's claim and the three United States claims were listed. The Director recommended Joyce's
14 claim with a reduction to .02 cfs, and the United States' claim as claimed.

15 The United States timely filed an objection to the recommendation for Joyce Livestock's
16 claim, objecting to the claimed priority date, the points of diversion and places of use. The State of
17 Idaho filed timely objections to the recommendations for the United States' claims, alleging that the
18 priority date should be no earlier than June 28, 1934, the date of the enactment of the Taylor Grazing
19 Act. On April 28, 2000, the BLM and the State of Idaho filed a stipulation, stating that if the three
20 United States' claims are decreed, the priority date would be no earlier than June 28, 1934. This
21 stipulation ended the State of Idaho's participation in these subcases.¹ On May 6, 1998, the Court

22 ¹ The State of Idaho filed objections to all of the United States' beneficial use instream stockwater claims. On June 11,
23 1999, and July 1, 1999, the State of Idaho and the United States entered into stipulations which among other things
24 resolved the State's objections to the United States' beneficial use claims and resolved the subcases where the State of
25 Idaho was the only objector. *Stipulation to Resolve Objections*, consolidated subcase nos. 23-10859, 24-10221, 25-
26 13659, 27-11604 and 65-19685 (June 11, 1999); *Stipulation to Resolve Objections*, subcase nos. 01-10249 *et seq.* (July
1, 1999). Pursuant to the *Stipulation to Resolve Objections* the State of Idaho and the United States agreed that the
priority date for all of the state-based beneficial use stockwater claims made by the United States (BLM) in 34 subbasins
would be June 28, 1934, (the date of enactment of the Taylor Grazing Act), unless the United States had previously
acquired the land from a third party with an earlier priority date or the claim was based on previously licensed or
permitted right with a different priority date. The *Stipulation to Resolve Subcases* agreed to the elements of
approximately 2000 stockwater rights where the claims were based solely on state law and the State of Idaho was the
only objector. The *Stipulation* provided that the elements would be as reported by the Idaho Department of Water
Resources (IDWR) except that the priority date would be June 28, 1934.

1 granted Joyce Livestock leave to file late objections to the United States' water right claims. Joyce
2 Livestock's objections alleged that the name on the United States' water right claims should be
3 Joyce Livestock, not the United States.

4 On July 16, 1998, Special Master Haemmerle entered an *Order Consolidating Subcases for*
5 *Summary Judgment* in subcases 55-10135, 55-11061, 55-11385 and 55-12452. On September 22,
6 1999, then-Presiding Judge Barry Wood entered an *Amended Order of Reference Appointing*
7 *Terrence A. Dolan Special Master* in the above subcases. On September 28, 2001, the Special
8 Master allowed the United States to amend the above claims to correct places of use and to amend
9 the priority date of the rights to June 28, 1934, in accordance with the stipulation reached with the
10 State of Idaho. On December 4, 2001, the Special Master allowed Joyce Livestock to amend the
11 above claimed water right to change the priority date to 1898, and to change the quantity to .02 cfs.
12 On March 8, 2002, Joyce Livestock filed a *Motion for Summary Judgment*, which was denied by the
Special Master on July 24, 2002.

13 On December 3-6, 2002, the Special Master held a trial on the objections to the four claims.
14 On October 6, 2003, the *Report and Recommendation of the Special Master* was filed,
15 recommending that Joyce's claim to water right 55-10135 be denied, and that the United States'
16 claims to water rights 55-11061, 55-11385 and 55-12452 be decreed as amended. On November 24,
17 2003, Joyce Livestock filed a *Motion to Alter or Amend Special Master's Report*, which was denied
18 by the Special Master on July 22, 2004. On August 4, 2004, Joyce Livestock filed its *Notice of*
19 *Challenge*. After a series of briefs were filed by both Joyce Livestock and the United States, oral
argument was heard on June 15, 2005.

20 For reasons set forth in the *Memorandum Decision and Order on Challenge*, this Court
21 reversed the Special Master's decision and denied the United States' state-law based claims and
22 granted Joyce Livestock's claim with a priority date of April 26, 1935 rather than the priority date
23 claimed by Joyce. On August 17, 2005, Joyce filed a timely Motion for Attorneys' Fees and
24 Memorandum of Points and Authorities under IRCP 54(e)(1), I.C. §12-121 and the Equal Access to
25 Justice Act, 28 U.S.C. §2412(d). The United States filed a Motion to Disallow Costs which the
26 Court will treat as an objection to costs pursuant to IRCP 54(d)(5). Joyce then filed a Reply to the
objection.

2. Applicable Law

Joyce seeks an award of attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d). Idaho follows the "American Rule" which requires parties to litigation to pay their own attorney fees absent statutory authority or contractual right. *Owner-Operator Indep. Drivers Assoc. of Idaho v. Idaho Public Util. Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994); *Great Plains Equip. Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999); IRCP 54(e).

I.C. §12-121 provides a statutory basis for an award of attorney fees in civil cases as follows:

Attorney's Fees. --- In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. §12-121 is, however, modified by IRCP 54(e)(1) which provides:

Attorney Fees. In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Plainly, therefore, attorney fees can only be awarded under I.C. §12-121 if the court finds that the party seeking attorney fees was the prevailing party and that the case was brought, pursued or defended frivolously, unreasonably or without foundation by the opposing party. The term "prevailing party" is defined in IRCP 54(d)(1)(B) as follows:

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

1 all of the issues and claims involved in the action and the resultant judgment or
2 judgments obtained.

3 Thus, a determination of the prevailing party is addressed to the court's discretion guided by the
4 provisions of IRCP 54(d)(1)(b) and cases decided applying that rule.

5 Joyce also seeks attorney fees pursuant to 28 U.S.C. §2412(d). In relevant part, §2412
6 provides:

7 **§ 2412. Costs and fees**

8

9
10 **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to
11 a prevailing party other than the United States fees and other expenses, in addition to
12 any costs awarded pursuant to subsection (a), incurred by that party in any civil action
13 (other than cases sounding in tort), including proceedings for judicial review of
14 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.

15 **(B)** A party seeking an award of fees and other expenses shall, within thirty days of
16 final judgment in the action, submit to the court an application for fees and other
17 expenses which shows that the party is a prevailing party and is eligible to receive an
18 award under this subsection, and the amount sought, including an itemized statement
19 from any attorney or expert witness representing or appearing in behalf of the party
20 stating the actual time expended and the rate at which fees and other expenses were
21 computed. The party shall also allege that the position of the United States was not
22 substantially justified. Whether or not the position of the United States was
substantially justified shall be determined on the basis of the record (including the
record with respect to the action or failure to act by the agency upon which the civil
action is based) which is made in the civil action for which fees and other expenses
are sought.

23

24 Finally, the Court notes that the Snake River Basin Adjudication is a comprehensive stream
25 adjudication pursuant to the McCarran Amendment, 43 U.S.C. §666, which provides, in relevant
26 part:

Suits for adjudication of water rights

1
2 (a) Joinder of United States as defendant; costs

3 Consent is given to join the United States as a defendant in any suit (1) for the
4 adjudication of rights to the use of water of a river system or other source, or (2) for
5 the administration of such rights, where it appears that the United States is the owner
6 of or is in the process of acquiring water rights by appropriation under State law, by
7 purchase, by exchange, or otherwise, and the United States is a necessary party to
8 such suit. The United States, when a party to any such suit, shall (1) be deemed to
9 have waived any right to plead that the State laws are inapplicable or that the United
10 States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to
11 the judgments, orders, and decrees of the court having jurisdiction, and may obtain
12 review thereof, in the same manner and to the same extent as a private individual
13 under like circumstances: *Provided*, that no judgment for costs shall be entered
14 against the United States in any such suit.

15 (b) . . .

16 3. Analysis and Decision.

17 a. Attorney Fees Under I.C. 12-121 and IRCP 54(e)(1).

18 1. Determination of Prevailing Party.

19 The threshold issue for an award of attorney fees under Idaho law is a determination of the
20 prevailing party. This determination is committed to the discretion of the court. Here, Joyce first
21 claimed a priority date for its water rights of 1865. That claim was later amended to 1898. The
22 United States objected to the claimed priority date, as well as the points of diversion and place of use
23 elements of the right. Ultimately, this Court ruled that Joyce was not entitled to the claimed priority
24 date but that the evidence supported a later priority date. Joyce has appealed this decision. The
25 United States claimed largely overlapping rights based upon beneficial use. The Court denied the
26 claims of the United States ruling that the administration of public lands, standing alone, does not
constitute a beneficial use of water for purposes of establishing a state law based beneficial use
stockwater right. Joyce did not prevail on all issues but, considering the final result in comparison to
the relief sought, Joyce was the prevailing party in this case. Although Joyce was not awarded the
priority date claimed, it nevertheless was awarded a water right. Joyce prevailed on its objection to
the United States' claims. Ultimately, Joyce was awarded the senior, and only, right on the source.

1 2. The case was not brought, pursued or defended frivolously, unreasonably or without
2 foundation.

3 The two issues of importance decided in this case were whether administration of federally
4 administered grazing allotments, without more, constitutes beneficial use sufficient to support the
5 United States' claims to instream stockwater rights and whether Joyce or its predecessors had
6 demonstrated the requisite intent to appropriate or transfer an instream stockwater right based upon
7 its interest, or lack of interest, in the property to which the water right was "appurtenant." The later
8 issue required application of the evidentiary standard established by this Court in the *Memorandum*
9 *Decision and Order on Challenge, Subcases 55-10288B, et al. (LU Ranches II)* (January 3, 2005).
10 The issues raised therein have not been squarely addressed by our Supreme Court and that case is on
11 appeal. As noted by this Court in its *Memorandum Decision and Order Re: Attorney's Fees*
12 *Subcases 55-10288B, et al. (LU Ranching)* (August 2, 2005):

13 Regarding the appurtenance issue the United States cited and argued decisions from
14 other jurisdictions holding that water rights claimed on public lands are not
15 appurtenant to other privately owned property. *Robinson v. Schoenfeld*, 218 P. 1041,
16 1042-1043 (Utah 1923) and that appropriation may not be made by a temporary
17 possessor of land. *Tattersfield v. Putnam*, 41P.2d 228 (Ariz. 1935). In addition, the
18 United States made a good faith argument for an extension of the holding in *Lenmon*
19 *v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1980) (water right claimant must have a
20 possessory interest in the land designated as a pace of use) to include claims such as
21 those made by LU.

22 As to the priority date issue, an issue on which Joyce did not entirely prevail, the United States
23 correctly pointed to certain deficiencies in the evidence offered in support of Joyce's claims. Joyce's
24 claims for water rights cannot be said to have been based upon "well-settled" law. Further, the
25 assertion that the United States is not entitled to a water right based upon administration, an issue on
26 which Joyce prevailed, the United States cited and this Court considered numerous good faith
27 arguments contrary to the decision ultimately entered. This Court has found no instance in this case
28 in which the United States has asserted or defended any matter frivolously, unreasonably or without
29 foundation. It would be an abuse of the Court's discretion to award attorney fees under these
30 circumstances.

31 The "bottom-line" in this matter is that the issues pertaining to the ownership of stockwater
32 rights on the public domain are not well settled. The need for resolution of the issues was first

1 identified in 1996 in the context of a motion to have the issues designated as Basin-Wide Issue 9A.
2 However, because of the piecemeal (interlocutory) nature of subsequent orders addressing these
3 issues and ultimately a stipulation between the state of Idaho and the United States and a "global"
4 settlement between the United States and almost all other ranching entities claiming stockwater
5 rights on grazing allotments, these issues did not become ripe for appeal to the Idaho Supreme Court
6 until LU Ranches II and the instant case.² Additionally, the resolution of these issues is conflicting
7 among other states.

8 **b. Attorneys' Fees under 28 U.S.C. 2412(d).**

9 A decision to award or deny attorneys' fees pursuant to 28 U.S.C. §2412(d),
10 the Equal Access to Justice Act, is reviewed under an abuse of discretion standard. *See Pierce v.*
11 *Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988); *Minor v. United*
12 *States*, 797 F.2d 738, 739 (9th Cir.1986) (per curiam). Pursuant to 28 U.S.C. §2412(d), if the United
13 States shows that its position was substantially justified the court may not award attorney' fees. The
14 United States Supreme Court has defined the term "substantially justified" noting that the two
15 common connotations of the word "substantially" are "justified to a high degree," and "justified in
16 substance or in the main." The Court held:

17 We are of the view, therefore, that as between the two commonly used connotations
18 of the word "substantially," the one most naturally conveyed by the phrase before us
19 here is not "justified to a high degree," but rather "justified in substance or in the
20 main"--that is, justified to a degree that could satisfy a reasonable person. That is no
21 different from the "reasonable basis both in law and fact" formulation adopted by the
22 Ninth Circuit and the vast majority of other Courts of Appeals that have addressed
23 this issue. (Citations omitted). To be "substantially justified" means, of course, more
24 than merely undeserving of sanctions for frivolousness; that is assuredly not the
25 standard for Government litigation of which a reasonable person would approve.³

26 *Pierce v. Underwood*, 487 U.S. 552, 564-566, 108 S.Ct. 2541, 2549 – 2550 (U.S. Dist. Col., 1988).
The Court further explained, by way of footnote: "...a position can be justified even though it is not
correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person

² The United States entered into a "global" settlement with almost all of the ranching entities claiming stockwater rights
on public grazing allotments, except LU Ranches, Joyce Livestock and one other ranching entity. The case involving the
other ranching entity is currently pending before the Special master.

³ Here, the Court is referring to *sanctions*, presumably such as those provided in Rule 11, F.R.C.P.

1 could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* 487 U.S. 552, 566, 108
2 S.Ct. 2541, 2550, fn.2. The United States need not show that it had a substantial likelihood of
3 prevailing. *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1230 (9th Cir. 1990) and no
4 presumption is raised that the government's position was not substantially justified because it did not
5 entirely prevail. *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988).

6 Here, for the reasons stated in this Court's determination of attorney fees under state law, the
7 United States has shown that its position was, at all times, substantially justified. While the United
8 States did not prevail, its position taken in the case at all times had a reasonable basis in the law.
9 Accordingly, it would be an abuse of discretion to award attorneys' fees pursuant to 28 U.S.C.

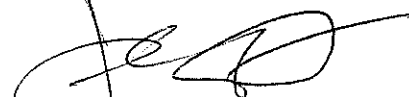
10 **c. Sovereign Immunity, Intergovernmental Immunity and the McCarran Amendment.**

11 The Court has ruled that Joyce is not entitled to an award of attorneys' fees under applicable
12 provisions of either state or federal law. Accordingly, it is not necessary for the Court to decide
13 whether the United States is immune from an award of attorneys' fees under the doctrines of
14 sovereign immunity or intergovernmental immunity. Similarly, the Court need not decide whether
15 the McCarran Amendment's prohibition of an award of costs against the United States also bars an
16 award of attorneys' fees.

17 **ORDER**

18
19 Based upon the foregoing, it is hereby ORDERED that the Motion for Attorneys' Fees of
20 Joyce Livestock Company is, in all respects, DENIED.

21
22 Dated February 3, 2006

23
24 

25 John Melanson
26 Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM
DECISION AND ORDER RE: ATTORNEYS' FEES was mailed on February
03, 2006, with sufficient first-class postage to the following:

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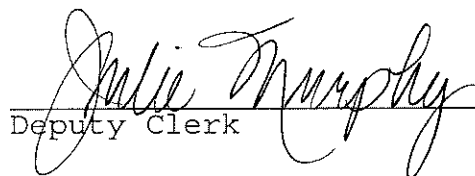
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A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".