

FEB 15 2006

DEPARTMENT OF
WATER RESOURCES

No. 31994

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re: SRBA Case No. 39576 (Subcase Nos. 55-10288B, 55-10289B, 55-10290B,
55-10292B, 55-10293B, 55-10295B, 55-10296, 55-10297B, 55-10298, 55-
10299B, 55-10300, 55-10301B, 55-10303B, 55-13451, 55-13844 and 55-13846

LU RANCHING CO.,
Appellant,
v.

UNITED STATES,
Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the SRBA District Court of the Fifth Judicial District
of the State of Idaho, in and for Twin Falls County
Honorable John M. Melanson, Presiding Judge

Michael J. Van Zandt
Elizabeth P. Ewens
McQuaid Bedford & Van Zandt LLP
221 Main Street, 16th Floor
San Francisco, CA 94105

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources
P.O. Box 23795
Washington, DC 20026

Roger D. Ling
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350

David Negri
U.S. Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 022
Boise, ID 83724

Attorneys for Appellant

Attorneys for Respondent

TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
II.	ISSUES PRESENTED ON APPEAL	12
III.	ATTORNEYS FEES ON APPEAL	12
IV.	ARGUMENT	13
A.	STANDARD OF REVIEW	13
B.	AS A MATTER OF LAW, QUALIFIED GRAZING PREFERENCES ARE EVIDENCE OF HISTORIC USE OF WATER SOURCES PRE-DATING THE ENACTMENT OF THE TAYLOR GRAZING ACT.	13
1.	Under the Prior Use Rule, Class One Grazing Preferences Were Only Awarded to Applicants Who Demonstrated They Owned Livestock, Had Private Property Sufficient to Support Their Herds, and Used the Public Range During the Five Years Prior to 1934	13
2.	The Fact that an Applicant Did Not Specify Each of His Private Water Rights on the Public Domain Does Not Mean that Those Rights Did Not Exist.	20
C.	THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT LU RANCHING'S WATER RIGHTS WERE FIRST APPROPRIATED PRIOR TO THE ENACTMENT OF THE TAYLOR GRAZING ACT	23
1.	Under Idaho Law and the Doctrine of Prior Appropriation, the Priority Date of a Water Right is Determined by the Date the Water Was First Diverted and Put to a Beneficial Use.	23
2.	The Priority Dates Awarded by the District Court Are Contrary to Law and Contrary to the Unrebutted Evidence at Trial.	27
D.	THE DISTRICT COURT'S DECISION TO DENY LU RANCHING ITS	

CLAIMED ATTORNEYS FEES WAS AN ABUSE OF DISCRETION. 32

1. The Equal Access to Justice Act as Applied to the Facts of this Case
Mandates an Award of Attorneys Fees to LU Ranching. 32

2. A Separate Basis for an Award of Attorneys Fees is Found in Idaho State
Law. 38

V. CONCLUSION 42

TABLE OF CASES AND AUTHORITIES

Cases

<i>Ardestani v. INS</i> , 502 U.S. 129, 138 (1991)	37
<i>Broder v. Natoma Water & Mining Co.</i> , 101 U.S. 275, 276 (1989)	2
<i>Clear Springs Foods, Inc. v. Clear Lakes Trout Company</i> , 136 Idaho 761, 764 (2002)	13
<i>Conley v. Whittlesey</i> , 133 Idaho 265, 269 (1999)	13
<i>Corbin v. Apfel</i> , 149 F.3d 1051, 1052 (9 th Cir. 1998)	35
<i>Cottonwood Water and Light Co. v. St. Michael's Monastery</i> , 29 Idaho 761 (1916)	24
<i>Crane Falls Power & Irrig. Co. v. Snake River Irrig. Co.</i> , 24 Idaho 63 (1913)	2
<i>Crow v. Carlson</i> , 107 Idaho 461 (1984)	25
<i>Dovel v. Dobson</i> , 122 Idaho 59, 63 (1992)	23
<i>Duckworth v. Watsonville Water & Light Co.</i> , 170 Cal. 425 (1915)	2
<i>First Security Bank of Blackfoot v. State</i> , 49 Idaho 740 (1930)	41
<i>Gutierrez v. Barnhart</i> , 274 F.3d 1255, 1262 (9 th Cir. 2001)	36, 37
<i>Hage v. United States</i> , 51 Fed. Cl. 570 (2002)	24
<i>Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.</i> , 619 P.2d 1130, 1132-1133 (1980).	21, 23
<i>Hunter v. United States</i> , 388 F.2d 148 (9 th Cir. 1967)	24, 41
<i>In Re SRBA Case 39576 (Minidoka National Wildlife Refuge v. United States)</i> , 996 P.2d 806, 811 (Idaho 2000)	23

<i>Jennison v. Kirk</i> , 98 U.S. 453 (1879)	2
<i>Jones v. Adams</i> , 19 Nev. 78 (1885)	2
<i>Laurance v. Brown</i> , 94 Or. 387 (1919)	2
<i>LU Ranching Co. v. United States</i> , 138 Idaho 606 (2003).	7
<i>Munroe v. Ivie</i> , 2 Utah 535 (1880)	2
<i>Nampa & Meridian Irrigation District v. Washington Federal Savings</i> , 135 Idaho 518, 521 (2001)	13
<i>Needs v. State</i> , 118 Idaho 518, 525 (2001)	42
<i>Pierce v. Underwood</i> , 487 U.S. 552, 564-566 (1988)	34
<i>Public Lands Counsel v. Babbitt</i> , 529 U.S. 728, 732-733 (2000)	14, 16, 18, 19, 28
<i>Shettel v. Bamesberger</i> , 130 Idaho 217, 222 (1997)	33, 39
<i>Short v. Praisewater</i> , 35 Idaho 691 (1922)	41
<i>Southern Oregon Citizens Against Toxic Sprays, Inc. V. Clark</i> , 720 F.2d 1475, 1481 (9 th Cir. 1983)	39
<i>State v. Hagerman Water Right Owners, Inc.</i> , 130 Idaho 727, 731 (1997)	23
<i>Stevenson v. Steele</i> , 93 Idaho 4, 11 (1969)	24
<i>United States v. Real Property</i> , 283 F.3d 1146, 1151-1152 (9 th Cir. 2002)	37
<u>Statutes</u>	
48 Stat. 1269	14
Equal Access to Justice Act (28 U.S.C. § 2412)	1, 2, 13, 32, 33, 34, 36, 37, 38, 39, 43

28 U.S.C. § 2412(d)	32
28 U.S.C. § 2412(d)(1)(A)	33
Taylor Grazing Act (43 U.S.C. § 315 et seq.)	2, 9, 11, 12, 14-17, 19, 22, 23, 25, 26, 28, 35, 41, 42
43 U.S.C. § 315b	15
Mining Act of 1866. Act of July 26, 1866, 14 Stat. 253, Ch. 262, § 9, codified at 43 U.S.C. § 661	1, 3, 41
43 U.S.C.A. § 661	3
H.R. Rep. 99-120(I) (May 15, 1985)	34
I.A.R. 41.	13
I.C. § 12-121	12
I.C. § 42-1411	11, 40
ID. Const. Art. 15 § 3	23
Idaho Rule of Civil Procedure 54(d)(1)(B)	39

Other Authorities

Opinion of the Department of the Interior, by T.A. Walters, First Assistant Secretary, dated January 21, 1937	16
<i>Water Rights Law in the Nineteen Western States</i> , Wells A. Hutchins, J.D., Vol. I, p. 485	24

I. STATEMENT OF THE CASE

Appellant LU Ranching Company (“LU Ranching”) successfully claimed water rights that have been adjudicated in its favor by the Snake River Basin Adjudication trial court. The legal basis for these water rights is a beneficial use claim under Idaho state law, as confirmed to LU Ranching and its predecessors-in-interest by the United States Congress in the Mining Act of 1866. Act of July 26, 1866, 14 Stat. 253, Ch. 262, § 9, codified at 43 U.S.C. § 661. However, the trial court set LU Ranching’s priority date based on the issuance date of its predecessors-in-interest U.S. Bureau of Land Management (“BLM”) grazing permits, instead of the date on which the water rights were first initiated under Idaho law. Moreover, the trial court denied LU Ranching’s request for attorneys fees under Idaho law and the federal Equal Access to Justice Act (28 U.S.C. § 2412), ruling that LU Ranching was not the prevailing party, despite having secured its water rights and the United States was substantially justified in its position, despite 140 years of legal precedent that confirmed water rights on federal lands to settlers, such as LU Ranching and its predecessors.

The first issue in this appeal is the priority date to be assigned to these historic stockwater rights owned by LU Ranching Co. (“LU Ranching”) that are located on federally administered lands within the boundaries of the South Mountain, Cow Creek, and Cliff’s grazing allotments in southwest Idaho. Almost 140 years ago, on July 26, 1866, the United States Congress confirmed to settlers in the west water rights appropriated under local law and custom. *Id.* Every state in

the western United States has recognized the right of its citizens to appropriate water on federal lands and the right to place such water to beneficial use.¹ The United States Supreme Court has recognized the rights of these citizens in multiple opinions, beginning in 1879. *Jennison v. Kirk*, 98 U.S. 453 (1879); *Broder v. Natoma Water & Mining Co.*, 101 U.S. 275, 276 (1889). Long before the grazing allotments came into existence by virtue of the Taylor Grazing Act (43 U.S.C. 315 et seq.), LU Ranching's predecessors grazed cattle on the unsurveyed and unappropriated federal lands as early as 1876 and appropriated the same water rights claimed in this adjudication to a beneficial use, namely for stockwatering. These water rights, first acquired by LU Ranching's earliest predecessors in interest, were transferred as appurtenances through LU Ranching's chain of title to the present day. LU Ranching's water rights are entitled to a priority date that reflects the earliest date that these water rights were first appropriated by LU Ranching's predecessors. The evidence at trial demonstrated that date is June 10, 1876.

The District Court also found that LU Ranching was not entitled to its attorneys fees, either under Idaho law or the federal Equal Access to Justice Act. 28 U.S.C. § 2412. The trial court failed to find that LU Ranching was the prevailing party in this case, despite that fact that water rights were adjudicated in favor of LU Ranching over the objections of the United States. Despite 140 years of precedent, the United States took the position in this case that private

¹See for example, *Crane Falls Power & Irrig. Co. v. Snake River Irrig. Co.*, 24 Idaho 63 (1913); *Duckworth v. Watsonville Water & Light Co.*, 170 Cal. 425 (1915); *Laurance v. Brown*, 94 Or. 387 (1919); *Munroe v. Ivie*, 2 Utah 535 (1880); *Jones v. Adams*, 19 Nev. 78 (1885).

citizens could not own or appropriate water rights on federal lands because the United States controlled the water as the owner of the underlying land and needed the water rights to “manage” these lands as the landowner. Given a clear and consistent history of Congressional recognition of private water rights on federal lands, the United States' position in this litigation that private parties cannot appropriate a water right on federal land, is unfathomable, as is the United States' almost complete failure to recognize and address the Mining Act of 1866, or to mention any one of the over 139 cases in the annotations to the Mining Act that recognize that private citizens can appropriate water rights on the public domain. See 43 U.S.C.A. § 661 and annotations thereto.

The original water appropriations were initiated by LU Ranching's earliest predecessors-in-interest at a time when the livestock industry was the lifeblood of this area of the Idaho.² From the 1860s forward in Owyhee County, Idaho, the numbers of livestock increased rapidly, from a cattle population of about 30,000 head of cattle in the 1880s, expanding to upwards of 100,000 head of cattle and 150,000 sheep at the end of the 1880s. See Trial Tr. p. 391-392 (Testimony of Dr. Chad Gibson); see also Trial Exh. TT: Excerpts from Owyhee County Blue Book; Trial Exh. UU: Article from Enterprise Times. In sum, the livestock industry dominated the landscape at the time LU Ranching's predecessors first worked their homesteads and

² Idaho was admitted as a state in July 3, 1890. LU Ranching's earliest predecessor, Mr. Ezra Mills, filed a homestead entry application in 1881 and represented that he began to work the homestead in 1876. He was awarded a patent to the homestead in 1887. See Trial Exh. CC, bsn. 4048-4067; Trial Exh. 2, p. 220-222.

acquired their patents.

The original patents issued to LU Ranching's predecessors were to Ezra Mills in 1887, George Ewings in 1910, and Patrick Duncan in 1914, and each was associated with a 160 acre homestead. *See* Trial Exh. CC (Ezra Mills Patent file); *see also* Trial Exh. BB (Warren Duncan patent file); Trial Exh. K (George Ewings Patent File). The original homestead sites are near areas now known as the South Mountain, Cow Creek, and Cliffs Grazing Allotments but at the time were open range. Because these small homestead sites were insufficient to maintain large numbers of livestock, the original homesteaders as well as their successors made use of the federal range and water thereon to support their livestock operations. *See* Trial Tr. Vol. I, p. 386-389 (Testimony of Dr. Chad Gibson) (an original 160 acre homestead sites was sufficient only to support one cow and one calf for a period of one year, and ranchers would therefore have to use the federal land around them). Out of necessity, Mills, Ewings, and Duncan used the surrounding rangeland, and the forage and water thereon, to support their livestock. These facts are not disputed, nor were they rebutted at trial.

The history of the water rights at issue in this appeal are inextricably tied to the ranching and grazing histories of these properties. From the earliest predecessors forward, the evidence demonstrates that LU Ranching's predecessors-in-interest were using federal land and the specific water sources at issue today to support their ongoing livestock operations. Evidence was produced connecting the earliest predecessors to LU Ranching through the transfer of the base

ranch properties and all appurtenances, water rights, and grazing preferences connected thereto, through the chain of title. *See* Trial Exh. X (Chain of Title to LU Ranching Base Property).

Undisputed documentary evidence of use of the water sources and surrounding range at issue herein is found in the grazing records which evidence that Class One grazing preference rights were confirmed to LU Ranching's predecessors in interest and later transferred, through LU Ranching's chain of title, to LU Ranching. *See* Trial Exh. A, C, D, E, F, G, H, I, M, P, S, V, and W (demonstrating BLM recommendations for preference rights on the federal allotments at issue, grazing permits, and transfers of grazing permits involving LU Ranching and its predecessors in interest). The recognition of LU Ranching's grazing preference right as "Class One" is significant. It means that the grazing records, including the grazing applications and confirmation of grazing preference rights, demonstrate conclusive evidence of use of the allotments at issue and water sources thereon as part of LU Ranching's predecessors' ongoing livestock operations prior to 1934. Under the prior use rule adopted by the then United States Grazing Service (now the U.S. Bureau of Land Management (BLM)), shortly after the enactment of the Taylor Grazing Act, in order to have a grazing preference right confirmed, the applicant must have used the public rangeland at issue in conjunction with his base ranch property (land patented to the homesteader) within, at least, the five years immediately prior to the enactment of the Taylor Grazing Act. *See* Trial Tr. Vol. I, p. 389-391 (Testimony of Dr. Chad Gibson). Further, evidence that grazing preference rights adjudicated by the BLM and confirmed to LU

Ranching's predecessors is evidence that LU Ranching's predecessors grazed, and therefore appropriated water for stockwatering, in the claimed places of use long prior to 1934.³ The grazing applications and the grazing preference rights confirmed by the United States are conclusive evidence that LU Ranching's predecessors-in-interest used the allotments at issue for watering livestock long prior to 1934. By operation of law, LU Ranching should have received a priority date for its water rights at least as early as 1929. However, factual evidence demonstrates that LU Ranching's priority date is even earlier.

Direct testimony from Mr. Thomas Skinner, who personally witnessed cattle operations in this area as early as 1926, corroborates the documentary evidence of use of the geographic areas at issue by LU Ranching's predecessors for their livestock operations. Mr. Skinner was an eye witness to and obtained personal knowledge regarding the ranching operations of LU Ranching's predecessors in interest, including the O'Keefe, McKay, Shea, Mendieta, Mills and Stanford cattle grazing operations. *See* Trial Tr. Vol. I, p. 461-512 (generally); p. 498-499 (O'Keefe livestock operation); p. 500-502 (McKay Cattle operation); p. 502, 504-505 (Shea livestock operation); p. 502-504 (Mendieta cattle operation); p. 505-508 (Mills and Stanford cattle operations); and p. 508-509 (Staples and Lowry cattle operations). Further evidence of

³ *See* Trial Tr. Vol. I, p. 390. Testimony of Dr. Chad Gibson. "Question: So that where you see in one of these adjudication records Galo Mendieta's name appearing in connection with a particular allotment, would you infer from that either Mr. Mendieta or someone he bought a ranch from had previously grazed in that area? Answer: Yes."

historic use was provided by Mr. William Lowry and Mr. Tim Lowry. *See* Trial Tr. Vol. I p. 282-304 (Testimony of Mr. William Lowry); *see also* Trial Tr. Vol. I p. 425-443 (Testimony of Mr. Tim Lowry). Notably, the documentary and testimonial evidence of the historic use of this rangeland and appropriation of the water thereon was un rebutted by the United States.

Based on this history, LU Ranching's water right claims were presented to the Idaho Department of Water Resources ("IDWR") in 1992. *See* R. Vol. I p. 1-109. Following investigation, the IDWR recommended that the water rights be decreed as claimed, each with a priority date of May 20, 1872. *See* R. Vol. I p. 118-140.

The United States filed objections to LU Ranching's claims in 1997 and litigation within the Snake River Basin Adjudication ensued. *See* R. Vol. I p. 141-196; R. Vol. II p. 202-213. The primary basis for the United States' objections was not priority date, but rather the fact that LU Ranching's claimed places of use were located on BLM administered land. *See* R. Vol. I p. 142 ("Reasons supporting objection(s): The United States of America, through the Bureau of Land Management, is the owner of the land upon which use is claimed. The claimant does not have a valid water right with the elements claimed"); *see also* R. Vol. I p. 143 (noting all places of use sited on BLM land). Moreover, the United States filed its own water right claims on the very same water sources. *LU Ranching Co. v. United States*, 138 Idaho 606 (2003).

At trial, the Special Master held that LU Ranching proved its water right claims and was entitled to a priority date of June 10, 1876, the date that the evidence proved that cattle had been grazed and watered in conjunction with the homestead property owned by Ezra Mills. *See* R.

Vol. II p. 297-327. Central to the Special Master's conclusion was the recognition of the legal implications surrounding the United States' decision to award LU Ranching's predecessors grazing preferences. As explained by the Court, grazing preferences were only awarded to those, like LU Ranching's predecessors, who had used the relevant rangeland prior to 1934 in conjunction with the operation of their base ranch properties. The Special Master held:

Multiple documents were admitted into evidence showing BLM recommendations for preferences on federal allotments, grazing permits, and transfers of grazing permits (*see e.g.* Exhibits D, F, P, S, V, A, C, D, E, F, G, H, I). *Acquiring a grazing preference required prior use and commensurate base property. Furthermore, to acquire a grazing preference from BLM and commensurate base property in the 1960s required grazing prior to 1934. There was proof of a grazing preference for each of these water rights.*

See R. Vol. II p. 302-303 (Special Master's Report and Recommendation) (emphasis added).

The Special Master went on to summarize other historic evidence supporting his recommended June 10, 1876 priority date for the claimed rights as follows:

LU has, however, been able to show that their predecessors in interest were using open federal land and the water thereon from the dates that the original patent holders occupied and commenced working their homesteads. This resulted in different dates for the base property as it was pieced together. However, this special master believes that these amount to distinguishments without a difference. LU has not claimed multiple water rights for each location with a different priority for each of its predecessors who were using the water in common. They claimed only one right for each location, which their earliest predecessors used in common with each other and with others. They are entitled to the earliest of those dates proven which is June 10, 1876.

See R. Vol. II p. 306-307 (Special Master's Report and Recommendation). Based on the above evidence and the law, the Special Master concluded that LU Ranching's predecessors had been appropriating and applying the claimed water to a beneficial use since the original patent holders

first occupied their homesteads, that these water rights were appurtenant to the base ranch properties, and that the water rights were intended to be transferred, and did indeed transfer, as appurtenances to the base ranch properties. On this basis, the Special Master recommended that water rights claimed by LU Ranching be decreed with an 1876 priority date. *See* R. Vol. II p. 297-307 (Special Master's Report and Recommendation).

The District Court largely upheld the Special Master's findings. The District Court correctly held that private parties could legally appropriate beneficial use water rights on federally administered lands both prior to and subsequent to the enactment of the Taylor Grazing Act, and correctly held that once acquired, an instream stock water right appropriated on the federal lands can transfer as an appurtenance to patented or base ranch property together with the early priority date. *See* R. Vol. III p. 403-429 (Memorandum Decision and Order on Challenge). Where the District Court departed from the Special Master, and the portion of that decision from which LU Ranching appeals, is on the issue of priority date. Instead of holding that each of the water rights held a June 10, 1876 priority date, the District Court separated out the water rights and traced them, individually, from the earliest patent holder forward to LU Ranching. *See* R. Vol. III p. 430-431 (Memorandum Decision and Order on Challenge). The error in this analysis stems, not from the District Court's decision to trace the water rights individually through LU Ranching's chain of title back to the three different original patent holders, but in the Court's holding that none of the water rights were entitled to a pre-1934, or pre-Taylor Grazing Act, priority date. In this respect, there are internal inconsistencies within the District Court's

analysis. Initially, the District Court correctly recognized that:

[A] claimant can trace his or her chain of title back to the patent and demonstrate that the original homesteader was engaged in the livestock business. This can be demonstrated from subsequent grazing permit applications wherein the applicant was required to set forth the prior historic use of the adjacent public domain in conjunction with the homesteaded property ... Subsequent conveyances of the base property together with the attached grazing privileges and the continued use of the grazing privileges are probative that any water rights transferred as appurtenances to the base property.

See R. Vol. III p. 429, n. 13 (Memorandum Decision and Order on Challenge). After recognizing the legal basis for LU Ranching's claims to the water rights, however, the District Court failed to recognize and give legal effect to the historic evidence of pre-1934 use, including the direct testimony by a percipient witness. The District Court, in applying the law, failed to find that, as a matter of law, the grazing preferences awarded to LU Ranching's predecessors and transferred through the chain of title to LU Ranching are conclusive evidence that LU Ranching and its predecessors have been continuously using the claimed water sources since long before 1934. Instead, the District Court erroneously awarded only post-1934 priority dates corresponding with the dates that grazing permits were first issued to LU Ranching's predecessors. *See R. Vol. III p. 429-443* (Memorandum Decision and Order on Challenge). The District Court recognized only government issued grazing permits as sufficient evidence of appropriation of the water and the connection between the water sources and the base ranch properties. *See R. Vol. III p. 444* (Memorandum Decision and Order on Challenge) ("The claimant must demonstrate privity between the claimant and the former permittee(s) either through an actual transfer of grazing privileges to the claimant's base property by a particular permittee or by the claimant's

acquisition of property from a permittee to which grazing privileges are attached ... the claimant must also show what areas were grazed pursuant to the acquired privileges.”) However, the documents, the grazing preferences, upon which the District Court so heavily relied are evidence in and of themselves not only of use after 1934, but they are conclusive evidence that LU Ranching’s predecessors in interest used the specific rangeland and appropriated the water at issue long before the enactment of the Taylor Grazing Act.

When LU Ranching filed its water right claims, it sought, first and foremost, recognition of its private water rights. Beyond that, LU Ranching sought specific decrees covering all claimed elements of those rights, including not only priority, but also source, quantity, points of diversion, purpose of use, periods of use and places of use claimed. *See e.g.* I.C. § 42-1411. From the initiation of this litigation forward, the United States took the position that LU Ranching was not entitled to its claimed water rights at all because the sources were located on BLM land and, the government alleged, no one other than the United States can acquire and maintain water rights on federal land. As a backup to this position, the United States objected to the claimed priority date arguing that, at most, LU Ranching is only entitled to a 1976 priority date representing the date that LU Ranching acquired its ranching operation and the base ranch properties. In the end, even though LU Ranching has appealed the District Court’s priority date determination, LU Ranching stands as the prevailing party. It received the fundamental relief that it sought: recognition of its water rights sited within the federally administered allotments. Further, while LU Ranching did not receive the priority date claimed, it did receive an earlier

priority date than that proposed by the United States. As the prevailing party, and after the years of protracted litigation with the United States over legal issues that United States knew were settled law, LU Ranching is entitled to its attorneys fees. A separate basis for an attorneys fees award is found both in Idaho law and in the federal Equal Access to Justice Act.

II. ISSUES PRESENTED ON APPEAL

LU Ranching raises the following issues on appeal:

- (1) Whether qualified grazing preference rights are evidence of historic use of water sources pre-dating the enactment of the Taylor Grazing Act;
- (2) Whether LU Ranching Co. is entitled to a priority date that pre-dates the enactment of the Taylor Grazing Act by virtue of the grazing preference rights and grazing permits issued to LU Ranching's predecessors in interest;
- (3) Whether the District Court erred by not finding the unrebutted evidence of historic use of the water sources at issue beginning in 1876 precluded a post-1934 priority date as decreed by the District Court;
- (4) Whether the Court's decision to deny LU Ranching's Motion for Attorneys Fees was an abuse of discretion; and
- (5) Whether the Court misinterpreted and misapplied the Equal Access to Justice Act ("EAJA") and the standard for an award of attorneys fees thereunder.

III. ATTORNEYS FEES ON APPEAL

In addition to the attorneys fees requested pursuant to I.C. § 12-121 and pursuant to the

Equal Access to Justice Act [28 USC § 2412(d)], LU Ranching seeks its attorneys fees on appeal pursuant to I.A.R. 41.

IV. ARGUMENT

A. STANDARD OF REVIEW.

While a district court's findings of fact are given deference on appeal, the Court does exercise free review over the lower court's conclusions of law. *See Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761, 764 (2002) ("This (Supreme) Court freely reviews the SRBA district court's conclusions of law.") In addition to addressing whether the lower court correctly stated the applicable law, the Court must determine whether the legal conclusions are sustained by the facts found. *See Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518, 521 (2001). Appellate review of a district court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *See Nampa & Meridian Irrigation District v. Washington Federal Savings, supra* at 521 (2001), *citing Conley v. Whittlesey*, 133 Idaho 265, 269 (1999).

B. AS A MATTER OF LAW, QUALIFIED GRAZING PREFERENCES ARE EVIDENCE OF HISTORIC USE OF WATER SOURCES PRE-DATING THE ENACTMENT OF THE TAYLOR GRAZING ACT.

1. Under the Prior Use Rule, Class One Grazing Preferences Were Only Awarded to Applicants Who Demonstrated They Owned Livestock, Had Private Property Sufficient to Support Their Herds, and Used the Public Range During the Five Years Prior to 1934

At issue is whether the District Court erred in awarding LU Ranching its water rights with

priority dates that post-dated the 1934 Taylor Grazing Act. While the District Court correctly recognized that grazing preferences and grazing permits are probative evidence of historic use of the stockwater *after* 1934, the District Court failed to understand that, as a matter of law, in order to be awarded a Class One grazing preference there must also have been historic use of the water and rangeland in conjunction with the base ranch properties *before* the Taylor Grazing Act was enacted in 1934. In examining the above, it is important to place the grazing preference regulations into historic context, and to understand the legal difference between a grazing permit and a grazing preference.

The years leading to the enactment of the Taylor Grazing Act were ones in which there was increasing competition for range resources, and resulting injury to the once vital range. *See Public Lands Counsel v. Babbitt*, 529 U.S. 728, 732-733 (2000). The Taylor Grazing Act was enacted to protect the lands from further injury from overgrazing due to competition for the limited range resources. *Id.*, citing 48 Stat. 1269. While the Taylor Grazing Act sought to curb use of the range, it also sought to protect ranchers with private lands who were competing for range resources with itinerant herdsmen. For this reason, while the Act was largely supported by ranchers who used the range in conjunction with their base ranch properties, the Act was opposed by “those who do not make their homes on the land, but who own wandering bands of sheep that are driven hither and thither to eat out the land and render it worthless for the real homemaker.” *Public Lands Council*, 529 U.S. at p. 732 (*quoting* President Franklin Delano Roosevelt). Largely for this reason, built into the Act was express protection of the higher rights and interests of those

who made their homes on the land and used the nearby range to support their livestock operations before 1934. The Taylor Grazing Act provided as follows:

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the ranch ... *Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.*

43 U.S.C. § 315b (*emphasis added*). Implicit in the preference grazing scheme was recognition by Congress that livestock owners who, prior to the enactment of the Taylor Grazing Act, had been owners of nearby base ranches or homesteads and had been historically operating the same in conjunction with the public land, had earned the right to the highest degree of protection and continued use of the federal range.

With competing demands on the range, and more users than there were resources available, the Department of Interior began the process of administering the Taylor Grazing Act and developing regulations to define who should be given preference for the use of the range. A preference system was developed, giving the first and highest priority to those who owned private base ranch properties and had used the same in conjunction with the surrounding public range prior to 1934. The United States Supreme Court described the preference grazing scheme as follows:

By 1937, the Department had set the basic rules for allocation of grazing privileges. Those rules recognized that many ranchers had long maintained herds

on their own private lands during part of the year, while allowing their herds to graze farther afield on public land at other times. *The rules consequently gave a first preference to owners of stock who also owned "base property," i.e. private land (or water rights) sufficient to support their herds and who had grazed the public range during the five years just prior to the Taylor Act's enactment. See 2 App. 818-819 (Rules for Administration of Grazing Districts (June 14, 1937)).* They gave a second preference to other owners of nearby "base" property lacking prior use. *Ibid.* And they gave a third preference to stock owners without base property, like the nomadic sheep herder. *Ibid.* Since lower preference categories divided capacity left over after satisfaction of all higher preference claims, this system, in effect, awarded grazing privileges to owners of land or water.

Public Lands Council, supra at p. 734-735 (*emphasis added*). Administrators charged with implementing the "prior use rule" awarded the highest, Class One, grazing preference only to those applicants who could demonstrate that they owned base ranch property and who had grazed the relevant public land prior to 1934. In a Department of Interior decision, the process of evaluation and awarding preferences was described as follows:

If one of the purposes of the Taylor Grazing Act is "to stabilize the livestock industry dependent up on the public range," it is obvious that this purpose is well served by granting grazing privileges to applicants who are and have been operating going concerns in connection with the range ... Clearly, if the standard of selection is to be one of prior use of the public lands in connection with the private property held by the applicants, some definition of the nature and extent of such prior use becomes necessary. I am informed by the Director of Grazing that the 5-year period immediately preceding the enactment of the act has been selected as a period within which an applicant may qualify for grazing privileges by having used the public range for one full grazing season because of its definite relation to the existing economic and climatic conditions.

R. Vol. III p. 497 (Opinion of the Department of the Interior, by T.A. Walters, First Assistant Secretary, dated January 21, 1937). Based on the above preference grazing scheme, early applicants for grazing preferences were concerned, first and foremost, with the task of

demonstrating ownership of base ranch property and use of the surrounding public range prior to 1934.

The earliest grazing applications reflect the prior use rule, and required applicants to define their base ranch properties and identify whether the applicants had used the public range for which a grazing permit was sought prior to 1934. The questions targeted the specific issues implicit in the prior use rule: determining whether the grazing applicants owned base ranch property and whether they utilized the public range at issue before the Taylor Grazing Act was enacted. *See* Trial Exhibit “17”: Application for Grazing Permit filed by Pat O’Keefe (1937). The applicants did not just certify that they used *any* public range prior to 1934, rather, the applicants certified that they used the particular lands covered by the grazing application. The application requested the following information from the applicant: whether the applicant owns any land used on conjunction with the livestock operation (question 3) and whether “the base lands and water described in this application (have) been previously used in the livestock operations *in connection with the public domain involved in this application?* ... How many years?” (question 6). *See* Trial Exhibit 17: Application for Grazing Permit filed by Pat O’Keefe (1937). Based on the responses to these questions the BLM was able to determine whether the applicant owned commensurate base property and whether, prior to 1934, the applicant had used the range for which grazing permits were sought as part of his livestock operation. As evidenced by the plain wording of the applications at issue, grazing preferences and grazing permits were issued covering the same geographic area of range that was historically used by the grazing

applicant. It was a process of ensuring continued use of the same range and range resources by those who had historically used them as part of their on-going livestock operations. *See* Trial Tr. p. 389-390 (Testimony of Dr. Chad Gibson). Dr. Gibson testified as follows:

Q: ... Is it also your understanding – did you have an understanding of whether that (sic) prior grazing would have been in the same basic area as was adjudicated.

A: Generally that's true. The areas that were grazed were fairly uniform., Once the preference was established, those areas – it was tied very closely to those areas.

Q: So that where you see in one of these adjudication records Galo Mendieta's name appearing in connection with a particular allotment, would you infer from that that either Mr. Mendieta or someone he bought a ranch from had previously grazed in that area?

A.: Yes.

...

The two primary things were prior use and commensurate base property. The prior-use rule that was finally adopted was that you had to have grazed there two consecutive years, or three years not consecutively out of the previous five years prior to 1934.

See Trial Tr. p. 389-391 (Testimony of Dr. Chad Gibson) Following a grazing adjudication, if the prior use test was met, grazing applicants were awarded the highest, or class one, grazing preferences and corresponding grazing permits, and thus were able to continue their historic use of the range and the forage and water thereon. *See Public Lands Council, supra* at p. 734-735.

The Court erred when it failed to recognize the legal significance of the grazing applications and grazing preference rights awarded and to apply it to the facts of this case. This error is rooted, at least in part, in the District Court's misunderstanding of the difference between a grazing preference and a grazing permit. In its Order on LU Ranching's Motion for Reconsideration, the Court opined, "LU first argues that the grazing *permits* are conclusive

evidence that LU Ranching's predecessors in interest made use of the rangeland and water prior to 1934. LU argues that the Department of Interior would not have awarded a *grazing permit* unless the applicant had shown prior use before 1934." *See* R. Vol. III p. 500 (Order on Motion for Reconsideration). Later in its Order, the District Court states, "[t]he regulations certainly gave preference who did not show prior use could also gain a grazing permit, as could a nomadic herder (which was not the case here)." *See* R. Vol. III p. 501 (Order on Motion for Reconsideration). The District Court is partially correct that one who did not have prior use could still get a *grazing permit*. However, without prior use, one could not get a Class One *grazing preference* and that was what was awarded to LU Ranching's predecessors in this case. *See* Trial Exh. W (Lowry Dependent Property and Adjudication Record). The award of a Class One grazing preference is conclusive proof that the preference holder had commensurate base ranch property and used the same in conjunction with the public range prior to 1934. *See Public Lands Council*, 529 U.S. 728, 734 (2000) ("The rules consequently gave a first preference to owners of stock who also owned "base property," i.e. private land (or water rights) sufficient to support their herds *and* who had grazed the public range during the five years just prior to the Taylor Act's enactment") (*emphasis in original*).

It is notable that it was the United States who, in the first instance, recognized the fact that LU Ranching's predecessors in interest used the claimed water sources and surrounding rangeland prior to 1934, a factual determination that in this litigation the United States chose to ignore. LU Ranching's predecessors were only granted grazing preference rights after they

demonstrated to the satisfaction of the United States that they used the claimed rangeland in connection with their base ranch properties, and by definition the water sources on the claimed rangeland, prior to 1934.

The fundamental legal error with the District Court's Order was the Court's failure to correctly characterize the legal effect of a Class One grazing preference. By law, a Class One grazing preference means that the preference holder, or his predecessors-in-interest, used the area of the federal range at issue and appropriated the water thereon prior to the enactment of the Taylor Grazing Act. The District Court's failure to correctly recognize and apply the law in this regard constitutes reversible error.

2. The Fact that an Applicant Did Not Specify Each of His Private Water Rights on the Public Domain Does Not Mean that Those Rights Did Not Exist.

The District Court placed much emphasis on the issue of whether the grazing applicants specifically identified private water rights on the public domain in the grazing applications. However, this conclusion is inconsistent with the evidence at trial. Moreover, while there is a place on the grazing applications to identify water rights used and owned by applicants, identification of water rights on the public domain was not a prerequisite to receiving a grazing preference. Accordingly, even in instances where LU Ranching's predecessors did not identify private water rights on the public domain, this fact cannot be construed as a waiver or forfeiture of those rights because a waiver of a property right must be both knowing and voluntary.

While the District Court found that LU Ranching's predecessors did not identify water rights on the grazing applications, this finding is incorrect. In fact, although each of LU

Ranching's predecessors relied on their base ranch properties to qualify for preference grazing rights, some also identified, by common name, creeks and other waters owned and used by them. Many of the named water sources are the same as claimed in the instant litigation. They include the following: Juniper Creek,⁴ Jordan Creek,⁵ Spring Creek,⁶ Trout Creek,⁷ and Cabin Creek.⁸ Even in instances where the specific water sources were not identified by name or legal description, this does not defeat the validity of LU Ranching's water right claims, nor does it mean that these water rights were not used prior to 1934. As detailed herein, all of the grazing applicants certified that they used the federal lands and, therefore, both the forage and the water thereon, prior to 1934. Under the constitutional method of appropriation, when the ranchers beneficially used and appropriated these waters for stockwatering, they acquired a valid water right under Idaho law. *See Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 619 P.2d 1130, 1132-1133 (1980).

It also must be remembered that these are grazing applications, and not water right applications and the focus of the grazing application was on demonstrating that the applicant owned commensurate base property and used the same in conjunction with the public land prior

⁴ See Trial Exh. 5 (Grazing Application of Clyde Foster); *see also* Trial Exh. 15 (Shea Grazing Application)

⁵ See Trial Exh. 11 (Meyer Grazing Application)

⁶ See Trial Exh. 15 (Shea Grazing Application)

⁷ See Trial Exh. H, 17 and 18 (O'Keefe Grazing Applications)

⁸ See Trial Exh. H and 18 (O'Keefe Grazing Applications)

to 1934. The primary method of acquiring a grazing preference under the Taylor Grazing Act was to demonstrate the ownership of base ranch property, not water. *See* Taylor Grazing Act, 43 U.S.C. §315b (“Preference shall be given in the issuance of grazing permits to those within or near a district who are *landowners* engaged in the livestock business.”) (*emphasis added*).

Because of this, the grazing applicants would have focused, and did in fact focus, on the identification of commensurate base ranch property (private land) as opposed to the appurtenant water rights. This would have been the simplest and easiest way to demonstrate entitlement to a preference grazing right. This does not mean, however, that the applicants did not own water rights on the federal public land. To the contrary, the fact that applicants described the public range for which they were applying, and certified that they had used that particular range in the years prior to 1934 as part of their stock operations, by definition also means that the applicants were acquiring water rights on that range through the Constitutional or beneficial use method of appropriation. Given the above, it was error for the District Court to find that the water rights were somehow waived or abandoned by virtue of a failure to specifically describe the water rights on a grazing application. As correctly noted by the Special Master, the trier of fact assigned to this case, grazing applications “are ambiguous and legally insufficient to transfer or waive preexisting water rights obtained under the Idaho Constitution ... (and) are insufficient to result in abandonment of a water right.” *See* R. Vol. II p. 305-306 (Special Master’s Report and Recommendation).

While there is a place on the grazing application for applicants to identify water rights

owned by them, the District Court erred in determining that a failure to identify water rights on the public range means that they did not exist. Identification of water rights was not a prerequisite to receiving a grazing preference. Further, failure to identify a water right on a grazing application cannot be construed as a waiver, abandonment, or forfeiture of that right. *See e.g. Dovel v. Dobson*, 122 Idaho 59, 63 (1992) (abandonment and forfeitures are not favored and clear and convincing proof is required to find forfeiture); *see also State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 731 (1997) (abandonment requires intent to abandon and an actual surrender of a water right).

C. THE EVIDENCE CONCLUSIVELY ESTABLISHES THAT LU RANCHING'S WATER RIGHTS WERE FIRST APPROPRIATED PRIOR TO THE ENACTMENT OF THE TAYLOR GRAZING ACT.

1. Under Idaho Law and the Doctrine of Prior Appropriation, the Priority Date of a Water Right is Determined by the Date the Water Was First Diverted and Put to a Beneficial Use.

The State of Idaho is a prior appropriation state and gives its citizens the constitutional right to use unappropriated water of any natural stream. *See* ID. Const. Art. 15 § 3. To acquire a constitutional or beneficial use water right, what is required is a demonstration of an intent to appropriate, a physical diversion from a natural water course, and the application of water to a beneficial use. *See Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 619 P.2d 1130, 1132-1133 (1980). Water rights are thus acquired and given priority based on the date that the water is first diverted and put to beneficial use. *Id.*; *see also In Re SRBA Case 39576 (Minidoka National Wildlife Refuge v. United States)*, 996 P.2d 806, 811 (Idaho 2000).

The analysis for determining the existence of a beneficial use water right and the priority date assigned thereto is no different when what is at issue is the appropriation of a stockwater right. Similar to other appropriative water rights, for purposes of stockwatering, the intent to appropriate is evidenced by diversion of water from its natural source or by watering livestock directly from the source. *See Hage v. United States*, 51 Fed. Cl. 570 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967). Like other western states, Idaho views the watering of livestock from a source as an act sufficient to constitute an appropriation of water and protects both the stockwater rights acquired and the priority date attendant thereto. *See Stevenson v. Steele*, 93 Idaho 4, 11 (1969), *citing Cottonwood Water and Light Co. v. St. Michael's Monastery*, 29 Idaho 761 (1916) (the “decree distributed water among various appropriators who had claimed water for beneficial purposes such as irrigation, domestic use and watering livestock ... under both the decree and the law of (Idaho), respondents’ appropriation of Warm Springs water for winter watering of stock is entitled to the protection afforded by law.”). In the present case, the stockwater rights at issue were appropriated pursuant to the constitutional method of appropriation and are entitled to the full protection accorded by Idaho law.

Regarding the priority date or the priority of possession, a water right acquired in Idaho may be transferred and will carry with it all elements of the water right including a priority date representing the first date that the water was put to beneficial use. *See Water Rights Law in the Nineteen Western States*, Wells A. Hutchins, J.D., Vol. I, p. 485. In sum, the priority date of the transferred water right “relates back” to the first act of beneficial use, and the full water right,

with the early priority date, will transfer even absent specific mention of the water right in the instrument of conveyance. *See In Re SRBA Case No. 39576, (Subcases 55-10288b) Memorandum Decision and Order on Challenge*, p. 18 (April 25, 2000), *citing Crow v. Carlson*, 107 Idaho 461 (1984). Based on the relation back doctrine, LU Ranching is entitled to a priority date representing the first date that the stockwater was appropriated to a beneficial use by LU Ranching's predecessors-in-interest. The issue, then, is determining the date that LU Ranching's predecessors first placed the stockwater at issue to a beneficial use, and whether the District Court erred in only awarding post-1934 priority dates to LU Ranching.

In part, the District Court recognized that a pre-Taylor Grazing Act priority date can be established, and that grazing applications and grazing preferences awarded are relevant to the determination of the priority date. However, there is a fundamental disconnect between the District Courts's general analysis of evidence that would support a historic water right claim, and the District Court's eventual ruling in the LU Ranching case. The error in the Court's analysis stems from the fact that the Court failed to recognize that, as a matter of law, a Class One grazing preference conclusively demonstrates use of the stockwater rights prior to 1934 and failed to apply this legal principle to the facts of the case. In addition, the District Court ignored the evidence of the date on which the LU Ranching's predecessors first placed the water to beneficial use.

The District Court generally held that the following evidence supports a stockwater right claim on the public domain:

[A]s with any other type of water right, if a chain of title does not particularly describe a water right, a claimant must present proof that a water right was in fact appropriated by a predecessor-in-interest. In the case of instream stock water rights on the public domain, a claimant must show that a predecessor grazed livestock on the public domain and where on the public domain the predecessor grazed the livestock ... Homestead applications and proofs, applications for grazing permits, grazing permits and other historic documents typically memorialized historic uses. Lastly, a claimant must show that the rights were conveyed as an appurtenance to the patented or base ranch property, based on the intent of the grantor. Intent can be inferred by showing the property and adjacent public land on which the rights are located was used consistent with the use of the original appropriator.

See R. Vol. III p. 428 (Memorandum Decision and Order on Challenge). As part of its historic analysis, the District Court also recognized that even before the enactment of the Taylor Grazing Act, there was an established relationship between the base ranch properties and the water rights on the public lands, and that these rights and the connection to the base ranch properties could be proven via the content of the grazing applications:

Prior to the implementation of the Taylor Grazing Act, and prior to the concept of 'base property,' many livestock owners nonetheless depended on the use of adjacent public rangeland in conjunction with their patented property to support a viable livestock operation. The livestock owner held no possessory interest in the rangeland itself but could still appropriate a water right. It can be reasonably concluded that both the rangeland as well as the water right benefitted the livestock owners patented property. Later, after the implementation of the Taylor Grazing Act, and after the patented property could be considered 'base property,' the United States characterized the relationship between the base property and adjacent rangeland as one of dependence and acknowledged this dependence in awarding grazing preferences. The regulations implementing the Taylor Grazing Act then made the grazing preference expressly appurtenant to the base ranch property.

R. Vol. III p. 426 (Memorandum Decision and Order on Challenge). The District Court correctly recognized the connection between the historical use of the public rangeland and water thereon in

and the patented property, and the continuation of this connection as demonstrated by the issuance and later transfers of grazing preferences that were tied to the operation of the base ranch properties. However, the Court failed to apply the above principles to the evidence at issue in this case. In each instance, with respect to all of the water sources at issue, LU Ranching's predecessors depended on the use of the federal rangeland and the specific water sources at issue to support their livestock operation. The unrebutted historic evidence at trial, including the grazing applications and documentation that LU Ranching's predecessors were each awarded Class One grazing preferences, all combine to memorialize the historic use of the claimed water sources beginning prior to the enactment of the Taylor Grazing Act through to the present day. In light of applicable law and the evidence in this case, the District Court erred with it failed to assign pre-1934 priority dates to LU Ranching.

2. The Priority Dates Awarded by the District Court Are Contrary to Law and Contrary to the Unrebutted Evidence at Trial.

The grazing preferences awarded define the location and dates of use of the water on the federal lands, but this proof of historic use does not stand in isolation, but instead is backed by significant additional evidence of appropriation of the water rights at issue. For each of the claimed water rights at issue, LU Ranching presented an uninterrupted chain of title backed by other evidence of continued use of the water sources at issue by LU Ranching's predecessors in interest, from the date that the original patent holders first settled the land and appropriated the water through today's use by LU Ranching.

LU Ranching holds Class One grazing preferences for the South Mountain, Cow Creek

and Cliffs Allotments. *See* Trial Exh. W (Lowry Dependent Property Record); *see also* Trial Exh. 3 (Grazing Application filed by LU Ranching); Trial Exh. V (Documents relating to transfer of grazing preferences from Lowry to LU Ranching); Trial Tr. p. 370-391 (Testimony of Dr. Chad Gibson); Trial Exh. A, C, D, E, F, G, H, I, M, P, S, V (demonstrating BLM recommendations for preferences on federal allotments, grazing permits, and transfers of grazing permits involving LU Ranching and its predecessors in interest). As discussed at length, above, by definition, in accordance with the prior use rule in the administration of grazing preferences, Class One preferences were only awarded to those who owned base property and who had grazed the public range during the five years prior to the Taylor Grazing Act's enactment. *See Public Lands Council*, 529 U.S. 728, 734 (2000). Given the above un rebutted evidence of use of the range and water in the nearly three decades prior to the enactment of the Taylor Grazing Act, and the law which conclusively states that Class One preferences were only awarded to applicants who had used the range prior to 1934, it was in error for the Court to award a post-1934 priority date.

The fact that Class One grazing preferences were awarded is evidence that the claimed water rights within the South Mountain, Cow Creek and Cliffs allotments were appropriated prior to 1934; therefore, they are entitled to priority dates predating the enactment of the Taylor Grazing Act. However, this evidence does not stand in isolation. LU Ranching's predecessors who filed the first grazing preference applications after 1934 each certified, as to the public range that became the South Mountain, Cow Creek and Cliffs Allotments, that they used that public

range, and by necessity the water sources thereon, in the years long prior to 1934. These original applicants included applications filed by O’Keefe, Maher, Foster, Staples, Duncan, Flora, Stafford, Mendieta, Meyer, and Shea.

The District Court’s failure to recognize the prior use of the range and water thereon by LU Ranching’s predecessors is well exemplified by the application of Mr. Patrick O’Keefe. At the time the Taylor Grazing Act went into effect, LU Ranching’s predecessor, Patrick O’Keefe, owned the ranching operation that stemmed from the original Duncan homestead. It was, therefore, Mr. O’Keefe who filed the original grazing applications relating to the South Mountain Allotment. While the Court concluded that the earliest priority date that the evidence establishes for sources within the South Mountain Allotment is for the 1938 grazing season for which Mr. O’Keefe received a permit, the actual grazing application and the grazing preferences awarded after a grazing adjudication tell another story. *See* Trial Exh. Y (O’Keefe Grazing Application). Mr. O’Keefe’s grazing application specifically states that the base lands (the Duncan property) and water had been used in connection with the public domain for the past 30 years. *See* Exhibit Y: O’Keefe. Moreover, the place use during this thirty year period was the same place of use, the South Mountain Allotment, for which O’Keefe sought grazing permits so that he could continue to use that particular range and the water thereon as part of his on-going livestock operation. The grazing application asked Mr. O’Keefe to describe the lands on for which he sought a grazing permit. *See* Trial Exhibit Y: June 24, 1935 Application for Grazing Permit. The application goes on to ask whether Mr. O’Keefe previously had used those lands. *See* Trial Exhibit Y: June

24, 1935 Application for Grazing Permit, question 8. In response, Mr. O’Keefe answered in the affirmative. Similarly, in a subsequent grazing application, Mr. O’Keefe applied to graze upon lands of the United States “customarily used by me within Grazing District 1.” *See* Trial Exhibit Y: April 7, 1937 Application for Grazing Permit. In the application, Mr. O’Keefe was asked the following:

6. Have the base lands and water described in this application been previously used in livestock operations *in connection with the public domain involved in this application*? (Answer) Yes. Number of stock (Answer) 20 to 100 head. How many years? (Answer) 30 years.

Trial Exhibit Y: April 7, 1937 Application for Grazing Permit, p. 2009. The above application places O’Keefe’s use of this the South Mountain Allotment, and the water sources thereon, back to 1907. The fact that these sources were used prior to 1934 also is evidenced by the fact that O’Keefe was awarded a Class One grazing preference for these rights. *See* Trial Exhibit Y: O’Keefe Board Action Recommended, bsn 2077 (“Recommend full class 1”).

The same pattern of prior use of the areas covered by the South Mountain, Cow Creek and Cliffs allotments is found in nearly all of the grazing applications filed by LU Ranching’s predecessors. In a grazing application filed by Frank and Amy Maher in 1937, they certified that they used public lands covered by the application for seven years, beginning in 1930. *See* Trial Exh. 4 (Grazing application of Frank A. Maher). Also in 1937, Clyde Foster certified to the use of the public range in conjunction with his livestock operation for 25 years, placing the beginning of his use of the range and water thereon in 1912. *See* Trial Exh. 5 (Application of Clyde C. Foster). In 1934, a grazing application was filed by W. Duncan in which he certified that he had

“previously used the lands covered by this application for grazing permit” for 18 years, putting his personal use of that range to 1916. *See* Trial Exh. 7 (Grazing Application of Wn. A. Duncan). In 1935, Galo Mendieta testified to his use of the applicable range for 18 years, putting his use of the range and water thereon beginning in 1917. *See* Trial Exh. 10 (Application of Grazing Permit for Galo Mendieta). In 1940, Bill Shea certified to his use of the public range at issue in the grazing application as part of his livestock operation dating back 25 years, to 1915. *See* Trial Exh. 12 (Grazing Application of B. Shea). In another application, his use of a different portion of the public lands, had been used dating back to 1920. *See* Trial Exh. 11 (Grazing Application of B. Shea). W.J. Shea certified in two grazing applications that he had been using the public range that was the subject of the grazing applications as early as 1917 and 1914, respectively. *See* Trial Exh. 14 and 15 (Grazing applications of W.J. Shea). In a final application by Pat O’Keefe, he certified to use dating back 30 years from the date of the application, or 1907. *See* Trial Exh. 17 (O’Keefe Grazing Application).

The above documentary evidence is corroborated by the direct testimony of an individual who witnessed, first hand, the O’Keefe ranching operation. At trial, the Court was fortunate enough to have Mr. Thomas Skinner as a witness. Based on his personal knowledge, Mr. Skinner testified regarding cattle grazing and watering prior to 1934 on what would become the South Mountain Allotment and additionally testified that Mr. O’Keefe was engaged in the livestock industry and before 1934 grazed and watered cattle on what later became BLM administered land. *See* Trial Transcript, p. 491-494, 498-499 (Mr. Skinner’s testimony regarding

O’Keefe livestock grazing within what would become the South Mountain Allotment).

The grazing preferences awarded to each of LU Ranching’s predecessors in interest, together with evidence of prior use found in the grazing applications and through direct testimony at trial, conclusively prove use of the same range, and the water thereon, prior to 1934. Importantly, this evidence of historic use was unrebutted by the United States at trial. Accordingly, based on the applicable law, the District Court erred in failing to assign pre-1934 priority dates to LU Ranching’s water rights.

D. THE DISTRICT COURT’S DECISION TO DENY LU RANCHING ITS CLAIMED ATTORNEYS FEES WAS AN ABUSE OF DISCRETION.

1. The Equal Access to Justice Act as Applied to the Facts of this Case Mandates an Award of Attorneys Fees to LU Ranching.

The Equal Access to Justice Act (“EAJA”) and Idaho law provide independent grounds for awarding attorney fees in this case. One significant difference is that, unlike Idaho law, an award of attorneys fees under the EAJA is not discretionary. Rather, fees must be awarded to the private party if: (1) it is the prevailing party; (2) the party meets certain eligibility requirements; and, (3) the United States’ position in the litigation was not substantially justified. *See* 28 U.S.C. § 2412(d). Because the District Court applied the wrong legal standard and the wrong standard of review with respect to the EAJA motion, and because LU Ranching met all criteria for an award of attorneys fees under this statute, the District Court’s ruling should be reversed.

As a preliminary matter, the standard applied by the District Court in evaluating LU Ranching’s Motion for Attorneys Fees was in incorrect. The District Court reviewed the Motion

for Attorney's Fees under an "abuse of discretion standard." See Supp. R bsn 59, 69 (Memorandum Decision and Order Re: Attorneys' Fees).⁹ The abuse of discretion standard is not what is to be applied by a district court evaluating an EAJA motion in the first instance, but rather is the standard by which a subsequent appellate court reviews an order on a motion for attorneys fees. If an award or denial of a motion for attorneys fees is appealed subsequent to the decision of the trial court or district court, then that initial decision on the issue of attorneys fees is reviewed by the appellate court using an abuse of discretion standard. See e.g. *Shettel v. Bamesberger*, 130 Idaho 217, 222 (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.")

The EAJA mandates an award of attorneys fees to a private, prevailing party when certain criteria are met. The statute states:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil 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.

28 U.S.C. § 2412(d)(1)(A) (*emphasis added*). The issues, then, before the District Court were whether LU Ranching was the prevailing party, whether LU Ranching met the qualifications

⁹ "Supp. R." refers to the Supplemental Record on Appeal.

under the EAJA, and whether the United States demonstrated that its position throughout the whole of the litigation was substantially justified.

While the District Court made findings with respect to the issue of whether LU Ranching was a prevailing party in its analysis of an award of attorneys fees under Idaho law,¹⁰ the Court did not base its EAJA decision on the issue of whether LU Ranching was the prevailing party. Nor did the Court dispute the fact that LU Ranching met the jurisdictional requirements of the EAJA. Instead, the Court based its decision on the issue of whether the United States' position was substantially justified. *See* Supp. R. bsn 67-69 (Memorandum Decision and Order Re: Attorneys' Fees).

As evidenced by the legislative history of the EAJA, "substantial justification" means more than mere reasonableness. As explained in H.R. 99-120(I):

Part of the problem in implementing the (EAJA) has been that agencies and the courts are misconstruing the act. Some courts have construed the "position of the United States" which must be "substantially justified" in a narrow fashion which has helped the federal government escape liability for awards. H.R. 2378 clarifies both of these points ... Courts have been divided on the meaning of "substantial justification." Several courts have held correctly that "substantial justification" means more than merely reasonable. Because in 1980 Congress rejected a standard of "reasonably justified" in favor of "substantially justified" the test must be more than mere reasonableness.

H.R. Rep. 99-120(I) (May 15, 1985). The crux of the substantial justification criteria is that the United States must prove that its arguments had a reasonable basis in law and fact. *See Pierce v.*

¹⁰ *See* discussion, below, regarding the District Court's holding on the issue of prevailing party.

Underwood, 487 U.S. 552, 564-566 (1988). Moreover, to avoid liability for attorney fees under the EAJA, the government must take a substantially justified position at each and every stage of the litigation. *See Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998); *see also United States v. Real Property at 2659 Roundhill Drive, Alamo California* 283 F.3d 1146, 1151-1152 (9th Cir. 2001) (“*United States v. Real Property*”).

The District Court acknowledged that the “United States did not entirely prevail” in the arguments that it raised in the case. *See* Supp. R. p. 68 (Memorandum Decision and Order Re: Attorney’s Fees). In the District Court’s Memorandum Decision and Order on Challenge which decided the substantive merits of the case, the District Court detailed the ways in which the arguments pursued by the United States in the litigation contradicted well settled law and the law of the case in the SRBA. *See* R. Vol. III p. 411- 428 (Memorandum Decision and Order on Challenge). Summarizing the extent to which the United States’ arguments contradicted well settled federal and state law, the District Court wrote:

Central to LU’s claims is the issue of whether historically a private individual could appropriate a water right on public land. The United States argues that a water user must hold a possessory interest in the land on which the right is used in order to appropriate a water right. This argument is without merit. Idaho’s laws governing water rights coupled with the United States’ historical deference to state water law; the myriad of congressional acts aimed at encouraging settlement of the west acknowledging private ownership of water rights on federal land; and the Taylor Grazing Act’s acknowledgment of private ownership of water rights on federal land as a precondition to the award of a grazing preference, overwhelmingly suggest the contrary.

R. Vol. III p. 412-413 (Memorandum Decision and Order on Challenge).

In ruling on the EAJA Motion, the District Court excuses the United States' position in the litigation by holding that even though many of the United States' arguments failed, these were issues "that (have) not been squarely addressed by our Supreme Court." *See* Supp. R. Vol. I p. 69 (Memorandum Decision and Order Re: Attorney's Fees). As detailed by the District Court in its Memorandum Decision and Order on Challenge, however the legal arguments raised by the United States were arguments that ran contrary to over 140 years of settled federal and state law, including the law of the case in the SRBA. *See* R. Vol. III p. 411-428. The fact that the legal issues had not been addressed by the Idaho Supreme Court in the context of an appeal of an SRBA decision does not alter the fact that the United States raised and pursued arguments that were contrary to long established precedent. Moreover, even if, *arguendo*, these were issues of first impression, there is no *per se* rule that EAJA fees cannot be awarded where the government's litigation position contains issues of first impression. *See Gutierrez v. Barnhart*, 274 F.3d 1255, 1262 (9th Cir. 2001). As explained by the Ninth Circuit, to deny attorneys fees simply because there is an issue of first impression before the court would circumvent the very purpose of the EAJA:

Ultimately, the government "urges that every case of first impression must constitute special circumstances" justifying a refusal to award costs under the EAJA. We disagree ... the government's argument means that whenever it violates its own regulations, or assumably any clear legal rule, for the first time, the private party who succeeds in forcing government compliance nonetheless must be deprived of fees because the government gets an automatic "first impression" free pass. This position contravenes the purpose of the EAJA, a "clearly stated objective of [which] is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority."

Gutierrez, 274 F.3d at p. 1261-1262, *quoting Ardestani v. INS*, 502 U.S. 129, 138 (1991); *see also United States v. Real Property*, 283 F.3d 1146, 1151-1152 (9th Cir. 2002). In *United States v. Real Property*, the government's novel arguments were originally adopted by the District Court, but that decision was later reversed by application of pre-existing, established law. The Ninth Circuit held that the fact that the district court erroneously granted the government's motion for summary judgment and accepted the government's arguments, does not mean that the government's position was substantially justified. *See United States v. Real Property*, 283 F.3d at p. 1152-1153. Because the law was already clear with respect to the United States' arguments, the government was not substantially justified in pursuing arguments that went against established law, and an award of attorneys fees under the EAJA was mandated. *Id.*

Similar to the above, in the present case the United States pursued arguments that went against clear legal precedent that recognized the right of private parties to acquire appropriate water rights on federal land and to transfer those rights as appurtenances to the base ranch properties. The fact that these and other related issues have not been addressed by the Idaho Supreme Court in the context of an appeal from an SRBA ruling does not mean that the government's position in this litigation was substantially justified or that the government is entitled to a "free pass." Because the United States' arguments were made in patent disregard for established law, including precedent within the SRBA, the United States was not substantially justified in this litigation and LU Ranching is entitled to a mandatory award of attorneys fees

under the EAJA. The District Court abused its discretion in holding otherwise.

LU Ranching was forced to expend extraordinary amounts of time and money to defend water rights that the United States should have acknowledged at the outset of this litigation. LU Ranching successfully defended its water rights located on federal land, and although the issue of priority still remains before this Court on appeal, at a minimum LU Ranching stands today as the prevailing party with respect to the most basic issue involved in this litigation: whether a private party can legally appropriate water rights located within federally administered grazing allotments and transfer those rights as appurtenances to the base ranch property. As a qualified prevailing party under the EAJA, and having successfully defended against government arguments that had no reasonable basis in law or in fact, LU Ranching is entitled to a mandatory award of attorneys fees under the EAJA.

2. A Separate Basis for an Award of Attorneys Fees is Found in Idaho State Law.

Idaho law provides for an award of attorneys fees to the prevailing party if the case was “brought, pursued or defended frivolously, unreasonably or without foundation.” *See* I.C. Section 12-121. Such is the case here. The United States’ fundamental position in this litigation was that LU Ranching should be denied its claimed water rights in their entirety because the water rights were located on federal land. *See* R. Vol. I p. 141-196; R. Vol. II p. 202-213 (United States’ Objections to LU Ranching’s claims). The United States pursued this argument from the initiation of this litigation forward, despite clear, pre-existing state and federal legal authority to the contrary. In this litigation, as the prevailing party on the central issue in the litigation,

recognition of LU Ranching's private water rights on federal land, LU Ranching should have been awarded attorneys fees under Idaho law because it was forced to defend against arguments that had no foundation in the law.

The District Court denied LU Ranching's Motion for Attorneys Fees under Idaho law based on the Court's conclusion that LU Ranching was not the prevailing party. However, under both Idaho law and the EAJA, a party need not prevail on all issues to be deemed the "prevailing party" in the litigation.¹¹ Idaho Rule of Civil Procedure 54(d)(1)(B) provides as follows:

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

I.R.C.P. 54(d)(1)(B); *see also Shettel v. Bamesberger*, 130 Idaho 217, 221 (1997). The relief sought by LU Ranching was an order decreeing its water rights with places of use, as described in the claims, within the federal grazing allotments at issue and with a priority date of 1872. The relief sought by the United States was an outright denial of LU Ranching's water rights claims because the claimed places of use are on BLM administered land. The United States' second tier argument in this litigation was that if LU Ranching is decreed its water rights, that they be associated with a priority date no earlier than 1976. Both of the United States' litigation

¹¹ Under the EAJA, a party need not prevail on all issues to be a prevailing party. *See Southern Oregon Citizens Against Toxic Sprays, Inc. V. Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983).

positions were rejected by the Court in their entirety, and while LU Ranching did not, as evidenced by the within appeal, receive the 1872 priority date claimed, it did receive the fundamental relief sought by way of this litigation: decreed private water rights for the sources, quantities, points of diversion, purposes of use, periods of use, and places of use claimed. *See e.g.* I.C. § 42-1411 (defining the elements of a water right).

In order to obtain the relief it did, LU Ranching had to defend and overcome a long list of arguments raised by the United States in this litigation. None of these arguments were supported by the law, and all of these argument raised by the government were rejected by the SRBA District Court. The arguments are as follows:

1. “[S]tockwater rights on the federal public land are appurtenant to the federal land.” *See* United States Response to Court’s Request for Additional Information on LU Ranching’s Notice of Challenge, p. 4 (January 14, 2000). This argument ran contrary to established law and was rejected by the District Court. *See* R. Vol. III p. 424-429 (holding, based on pre-existing precedent, that an instream stockwater right appropriated on the public domain can transfer as an appurtenance to the base ranch property).
2. “Congress enacted statutes designed to prevent any individual or private entity from monopolizing the use of the grazing commons by acquiring exclusive rights to public land and water available for livestock

consumption.” See United States Post Trial Memorandum, p. 3 (May 18, 2001). Contrary to the United States’ argument, Congress specifically enacted legislation beginning in 1866 protecting the private water rights of individuals on public lands. See Act of July 26, 1866, ch. 262, §9, 14 Stat. 251, 253 (Mining Act of 1866); see also The Taylor Grazing Act, 43 U.S.C. §315. Based on this pre-existing authority, the United States’ arguments were rejected by the District Court. See R. Vol. III p. 415-416.

3. “[I]n order for a water right to be appurtenant to a tract of land, there must be unity of title between the land designated as POUs and the water right.” See Memorandum in Support of United States’ Challenge, p. 4 (July 29, 2004). Related to this, the United States argued, “[a] water right claimant must have a possessory interest in the land designated as a place of use.” See Memorandum in Support of United States’ Challenge, p. 33 (July 29, 2004). These arguments by the United States are based on a riparian theory of water right ownership, and run counter to the prior appropriation laws in the state of Idaho. See *First Security Bank of Blackfoot v. State*, 49 Idaho 740 (1930); see also *Short v. Praisewater*, 35 Idaho 691 (1922); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967). Accordingly, this argument also was rejected by the District Court. See R. Vol. III p. 413-414 (Memorandum Decision and Order on Challenge).

4. “[T]he Taylor Grazing Act does not expressly recognize those who use water on public lands as owners of a water right.” *See* Memorandum in Support of United States’ Challenge, p. 32 (July 29, 2004). This goes against the plain language of the Taylor Grazing Act, which provides express protection of private water rights on public lands, and was, accordingly, rejected by the District Court. *See* The Taylor Grazing Act, 43 U.S.C. §315; *see also* R. Vol. III p. 416 (Memorandum Decision and Order on Challenge).

The above arguments, and others, raised repeatedly by the United States during the almost nine years of litigation at issue, were contrary to existing, settled law from the time the United States first raised the arguments forward to today. When settled law clearly precludes a legal claim or defense it is, by definition, both unreasonable and frivolous to pursue that claim. *See Needs v. State*, 118 Idaho 518, 525 (2001). In the present case, the United States pursued this litigation and its arguments even though they went against all established federal and state authority regarding the right of private parties to appropriate and hold water rights on the public domain. Because the United States brought and pursued legal arguments in this litigation that lacked any support in existing Idaho law, attorneys fees should have been awarded to LU Ranching in this case.

V. CONCLUSION

The District Court failed to correctly interpret and apply the law in this case. Both the

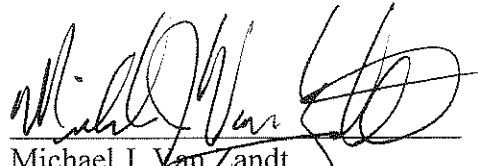
law regarding grazing applications and the un rebutted evidence of historic use of the water rights support the conclusion that the priority date for these water rights relates back to June 10, 1876, the first appropriations by Mills, Ewings, and Duncan, LU Ranching's original predecessors in interest. In the alternative, at a minimum, the grazing preferences awarded to LU Ranching's predecessors support at least a 1929 priority date, representing the date that the original grazing applicants certified that they used the rangeland, and therefore the water thereon, in conjunction with their ongoing livestock operations. Based on the above, the District Court's ruling awarding only post-1934 priority dates was contrary to law and the evidence in this case, and should be reversed.

LU Ranching also respectfully requests that the Court reverse the District Court's ruling on attorneys fees. Given the history of this litigation, and the United States' persistence in raising arguments that were contrary to existing law, an attorneys fees award is mandated under the EAJA and justified under Idaho law.

Dated this 10th day of February, 2006.

Respectfully submitted,
McQUAID BEDFORD & VAN ZANDT, LLP

By:


Michael J. Van Zandt
Elizabeth P. Ewens

Attorneys for LU Ranching Co.

Dated this 8th day of February, 2006.

LING, ROBINSON & WALKER

By:


Roger D. Ling
Idaho State Bar #1018

Attorneys for LU Ranching Co. and
Joyce Livestock Co.

APPELLANTS' OPENING BRIEF

CERTIFICATE OF SERVICE

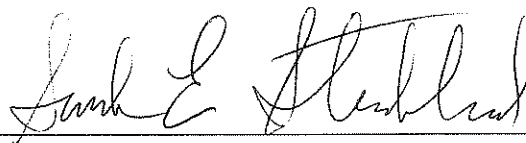
I certify that on February 13, 2006, I served a true and correct copy of foregoing **APPELLANT'S OPENING BRIEF** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795
Washington, D.C. 20026

David L. Negri
Attorney, U.S. Dept. of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

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 Strickland