



MCQUAID
BEDFORD &
VAN ZANDT LLP

221 Main Street 16th Floor
San Francisco CA 94105-1936
TEL 415/905-0200
FAX 415/905-0202

May 18, 2006

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

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

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

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

Sue Ellen Wooldridge, Asst. Atty
General
Peter C. Monson, Managing Attorney
Environmental and Natural Resource
Division
1961 Stout Street - 8th Floor
Denver, CO 80294

Re: LU Ranching Co. V. United States
No. 31994

Dear Counsel:

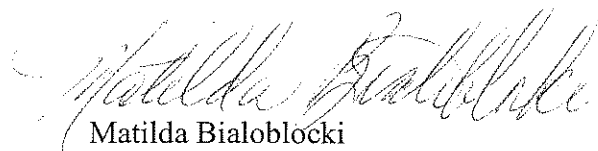
In connection with the above matter, enclosed please find corrected front cover to Appellant-Cross-Respondent's Reply Brief which was filed with the Court on May 17, 2006. We have corrected this with the Court and am forwarding the same to you so that you may replace the same. As you will note, this corrected version correctly identifies the title of our brief.

May 18, 2006
Page 2

If you have any questions, please do not hesitate to contact the undersigned at 530-756-0200.

Thank you for your cooperation in this matter.

Very truly yours,



Matilda Bialoblocki

/mb
Enclosure

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-Cross-Respondent,
v.

UNITED STATES,
Respondent-Cross-Appellant.

**APPELLANT-CROSS-RESPONDENT'S REPLY BRIEF AS APPELLANT
AND RESPONSIVE BRIEF AS CROSS-RESPONDENT**

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-Cross
Respondent*

*Attorneys for Respondent-Cross-
Appellant*

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-Cross-Respondent,
v.

UNITED STATES,
Respondent-Cross-Appellant.

**APPELLANT-CROSS-RESPONDENT'S OPENING BRIEF AS
APPELLANT AND RESPONSIVE PLEADING AS CROSS-RESPONDENT**

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-Cross
Respondent*

*Attorneys for Respondent-Cross-
Appellant*

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
II. ADDITIONAL ISSUES ON APPEAL	4
III. ATTORNEY FEES ON APPEAL	4
IV. ARGUMENT	4
A. Both Federal and Idaho State Law Recognize and Confirm Appropriative Water Rights on the Public Domain or within Federally Administered Grazing Allotments.	4
1. The United States Government Has Unequivocally Conceded State Law Governs Water Rights on Federal Land and Offered Express Protection of Private Rights Acquired under State Law.	4
2. Idaho State Law Recognizes Stockwater Rights Acquired under the Beneficial Use Method of Appropriation.	11
B. Idaho Law Recognizes the Transfer of Water Rights As Appurtenances.	17
1. Water Rights Located on Federal Land Can Be Transferred as Appurtenances to the Base Ranch Properties.	17
2. Historic Evidence, Evidence of the Transfers of the Base Ranching Properties, and Evidence of Grazing Preferences and the Transfer of Grazing Permits, Demonstrate in this Case that the Stockwater Rights on Federal Land Transferred as Appurtenances to the Base Ranch Properties.	26
C. The District Court Incorrectly Denied LU Ranching's Motion for Attorneys Fees.	34
1. The United States Waived Its Sovereign Immunity as to An Award of Attorneys Fees.	34

APPELLANT-CROSS RESPONDENT'S REPLY BRIEF

2.	LU Ranching Meets All Tests for the Award of Attorneys Fees under the Equal Access to Justice Act.	38
----	--	----

V. CONCLUSION	39
---------------------	----

TABLE OF AUTHORITIES

Cases

<i>Anthony Wilkinson Live Stock Co. v. McIlquam</i> , 83 P. 364 (Wyo. 1905)	8
<i>Azarte v. Ashcoft</i> , 394 F.3d 1278, 1285 (9 th Cir. 2005)	37
<i>Broder v. Water and Mining Company</i> , 101 U.S. 274 (1879)	6
<i>Buford v. Houtz</i> , 133 U.S. 320 (1890)	8
<i>California Oregon Power Co. v. Beaver Portland Cement Co.</i> , 295 U.S. 142, 155 (1935)	2
<i>Camfield v. United States</i> , 167 U.S. 518 (1897)	8
<i>Cottonwood Water and Light Co. v. St. Michael's Monastery</i> , 29 Idaho 761 (1916)	12, 16
<i>Crow v. Carlson</i> , 107 Idaho 461 (1984)	14, 20, 25
<i>Hage v. United States</i> , 51 Fed. Cl. 570 (2002)	12, 16, 20
<i>Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.</i> , 619 P.2d 1130, 1132-1133 (Idaho 1980)	11
<i>Hunter v. United States</i> , 388 F.2d 148, 153 (S.D. Cal. 1967)	12, 16
<i>Hutchinson v. Watson Slough Ditch Co.</i> 101 P. 1059 (1909)	10, 14, 15, 18
<i>In Re SRBA Case 39576 (Minidoka National Wildlife Refuge v. United States)</i> , 996 P.2d 806, 811 (Idaho 2000)	11, 18
<i>Light v. United States</i> , 220 U.S. 523, 535 (1911)	8
<i>McGinnis v. Frieman</i> , 17 P.635 (Idaho 1888)	8
<i>Parke v. Bell</i> , 97 Idaho 67, 69 (1975)	19, 26

<i>Pierce v. Underwood</i> , 487 U.S. 522, 564 - 566 (1988)	39
<i>Public Lands Council v. Babbitt</i> , 529 U.S. 728 (2000)	22, 23, 24, 30
<i>R.T. Nahas v. Hulet</i> , 674 P.2d 1036, 1044 (Ct. App. 1983)	13
<i>Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark</i> , 720 F.2d 1475, 1481 (9 th Cir. 1983)	38
<i>Stephoe Livestock Co. v. Gulley</i> , 295 P. 772, 775-776 (1931)	12, 16, 20
<i>Stevenson v. Steele</i> , 93 Idaho 4, 11 (1969)	12, 16
<i>United States v. Idaho ex re. Director, Idaho Dept. Of Water Resources</i> , 508 U.S. 1 (1993)	35, 37
<i>United States v. Missouri Pacific R. Co.</i> , 278 U.S. 269, 278 (1929)	37
<i>United States v. New Mexico</i> , 438 U.S. 696, 716-717 (1973)	6
<i>United States v. State</i> , 959 P.2d 449 (1998)	8, 9

Statutes

43 C.F.R. §4100.0-5 (1998)	21
Equal Access to Justice Act [28 USC § 2412(d)]	4, 34, 36, 37, 38, 39, 40
28 U.S.C. 2412(d)(1)(A)	36, 37
28 U.S.C. § 2412(d)(2)	34
28 U.S.C. § 2412(a)(1)	34, 35
28 U.S.C. § 2412(a), <i>citing</i> 28 U.S.C. § 1920	34
28 U.S.C. § 2412(d)(2)(A)	34

The Act of 1870, ch. 235, §17, 16 Stat. 217, 218, <i>codified at</i> 30 U.S.C. §52 (1986)	5, 25
McCarren Amendment, 43 U.S.C. 666 (2002)	35, 37
43 U.S.C. § 315b	21, 22
The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316	1, 3, 5, 9, 12, 16, 18, 21, 22, 25, 27, 30, 40
The Desert Land Act of 1877, ch. 107, §1, 19 Stat. 377, <i>codified at</i> 43 U.S.C. §321 (1986)	2, 6, 26
The (Mining) Act of July 26, 1866, C. 262, Section 9, 14 Stat. 251, 43 U.S.C. § 661(a)	2, 6, 25
Federal Land Policy Management Act (“FLPMA”), 43 U.S.C. §1752(h)	7, 26
I.A.R. 41.	5
I.C. § 12-121	5
I.C. 42-113(1)	14
I.C. § 42-113(2)	14, 15
I.C. §25-901 (2000)	22
 <i>Other</i>	
Const. Art. 15 § 3	11, 18
<i>Kinney on Irrigation and Water Rights</i> , Vol. 2, sec. 997, 1000, 1005 (1912)	20, 27
Water Rights Law in the Nineteen States, Wells A. Hutchins, J.D., Vol. I, p. 485	14

I. STATEMENT OF THE CASE

In defense of its position in this litigation, in its Brief the United States resorted to using distortions of the issues, facts, and law in an attempt to divert the Court's attention from what is really at issue in this case. The United States would have this Court believe that this case is about grazing rights or access rights to the federal range. *See e.g.* U.S. Brief p. 8-9. It is not. This case is about state water rights, not federal range rights. The United States also would have this Court believe that if LU Ranching prevails, it will threaten the federal rangeland. *See* U.S. Brief at p. 42-43. The relevance of this argument is highly questionable. But the simple answer is that LU Ranching is still be subject to the same grazing laws and regulations as every other permittee making use of the federal grazing allotments, and Lu Ranching and its predecessors have cared for these grazing lands for as long as they have owned these water rights - since 1876. Finally, the United States argues that no one other than the United States can hold water rights on the public domain or on what are now federally administered allotments. *See* U.S. Brief at p. 38-40. The United States is wrong, and as proof the Court need look no further than the United States' own laws that recognize and protect private parties' ability to perfect and hold water rights pursuant to state law even when the water is sited on federal land. *See* The Mining Act of 1866, 43 U.S.C. § 661; *see also* The Desert Land Entry Act of 1877, 43 U.S.C. §§ 321-323; The Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-316; *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935) (the effect of these statutes is to approve and

confirm the policy of appropriation for a beneficial use as the test and measure of private rights in and to the non-navigable waters on the public domain).

In addition to misrepresenting what is actually at stake in this litigation, the United States also misrepresents that the record contains no evidence of use of the water at issue prior to 1934. *See* U.S. Brief at p. 28. This is incorrect. Documentary evidence of prior use included certification by LU Ranching's predecessors in interest that prior to 1934 they had used the same rangeland for which they sought a grazing permit as part of their pre-1934 livestock operations. By way of example, Mr. O'Keefe represented that the base ranch had been used in connection with the same "public domain involved in this (grazing) application for 30 years." *See* Trial Exhibit "Y": April 7, 1937 Application for Grazing Permit, p. 2009. Frank and Amy Maher certified as to the use of the same rangeland that was the subject of the application since 1930. *See* Trial Exhibit 4: Maher Application. Mr. Clyde Foster certified to the use of the same public range covered by the grazing application for 25 years, placing the beginning of his use of the same range and water thereon to 1912. *See* Trial Exhibit 5: Application of Clyde C. Foster. Mr. W. Duncan certified that he used the same public range prior to 1934, dating back to 1916. *See* Trial Exh. 7: Grazing Application of Wn. A. Duncan. Mr. Galo Mendieta certified to his use of the same range during the 18 years prior to his application, taking the beginning of his use of the range and water thereon to 1917. *See* Trial Exh. 10. In a series of applications filed by Bill Shea, Mr. Shea certified to his use of various portions of the range covered by his permits since 1915,

1920, 1917 and 1914, respectively. *See* Trial Exh. 12, 11, 14 and 15 : Shea Grazing Applications. The grazing permits issued after 1934 were a mechanism to assure the continued use of the *same* rangelands but under the new regulations established under the Taylor Grazing Act. Permits were issued to O’Keefe, Duncan, Maher, Foster, Duncan, Mendieta, and Shea for the continued use of the same rangelands that they had historically been using prior to 1934, and those permits remain active today. There is, indeed, in this case not only an uninterrupted chain of title but documentation maintained in the files of the United States which demonstrates the continued use of these rangelands, and the water thereon, long prior to 1934 and continuing to LU Ranching’s use today. *See* Exhibit “X”: Chain of Title.

As detailed in LU Ranching’s Opening Brief and herein, testimony from witnesses at trial corroborated the documentary evidence of the historic, continued use of the same rangeland, and the water thereon, at least as early as 1876 and continuing today. *See* Trial Tr. Vol. I, p. 282-304 (Testimony of Mr. William Lowry); Trial Tr. Vol. I, p. 425-4436 (Testimony of Mr. Tim Lowry); Trial Tr. Vol. I, p. 461-512 (Testimony of Mr. Thomas Skinner). Such evidence, evaluated in full by the Special Master who sat as the trial judge in this case, resulted in the finding that “LU has ... been able to show that their predecessors in interest were using open federal land and the water thereon from the dates that their original patent holders occupied and commenced working their homesteads.” *See* R.Vol. II p. 306 (Special Master’s Report and Recommendation). Importantly, the United States failed at trial, and fails today, to present any evidence to rebut

evidence of continued use of these water sources by LU Ranching and its predecessors in interest, and in fact has relied on LU Ranching's predecessors early use of the water in these proceedings.¹

II. ADDITIONAL ISSUES ON APPEAL

No additional issues on appeal are presented.

III. ATTORNEY FEES ON APPEAL

As outlined in LU Ranching's Opening Brief, 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 all of its attorneys fees on appeal pursuant to I.A.R. 41.

IV. ARGUMENT

A. Both Federal and Idaho State Law Recognize and Confirm Appropriative Water Rights on the Public Domain or within Federally Administered Grazing Allotments.

1. The United States Government Has Unequivocally Conceded that State Law Governs Water Rights on Federal Land and Offered Express Protection of Private Rights Acquired under State Law.

Contrary to the position taken by the United States in this litigation, the laws of the

¹ It should also be noted that use of these water sources by LU Ranching's predecessors in interest already has been tacitly admitted by the United States. As referenced in the United States' Brief, p. 9, ft.n. 7, the United States filed its own claims to these water right sources. When initially claimed, the United States claimed a priority date based on the date of the original appropriations by LU Ranching's predecessors in interest.

United States expressly recognize the ability of private parties to acquire water rights located on the public domain or on federally administered lands in a manner prescribed by state law. Federal law also states that water rights so acquired will be recognized and protected by the United States. Far from recognizing or protecting private water rights on federal lands, the United States is doing everything in its power in this litigation to squash those rights in direct violation of governing United States' statutory law.

Water rights are rights created under state law, and confirmed by federal law.² The plain language of the Mining Act of 1866 protects the right to the use of water on federal land for mining, agricultural, manufacturing, or other purposes. It states:

Whenever, by priority of possession, right to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

The (Mining) Act of July 26, 1866, C. 262, Section 9, 14 Stat. 251, 43 U.S.C. § 661(a).

Subsequent federal statutes similarly protect and preserve private water rights on public land or on federally administered allotments. *See* The Act of 1870, ch. 235, §17, 16 Stat. 217, 218, *codified at* 30 U.S.C. §52 (1986); *see also* The Desert Land Act of 1877, ch. 107, §1, 19 Stat. 377, *codified at* 43 U.S.C. §321 (1986). Especially relevant to the instant litigation, the Taylor

² A discussion of applicable Idaho law is included, below.

Grazing Act provides the following:

Nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law.

43 U.S.C. §315 (1934)(*emphasis added*). The appropriation and use of water on federal lands by private citizens was additionally preserved in the Federal Land Policy Management Act (“FLMPA”), 43 U.S.C. §1752(h).

Federal statutes have consistently and clearly expressed the United States’ intent to protect and preserve private water rights on the public domain and within federally administered allotments. The language expressing this intent could not be clearer. Indeed, in examining federal statutes on this issue, Courts from the United States Supreme Court to the SRBA District Court have consistently held that water rights may be appropriated on federal lands by private parties, and that these rights, once acquired, will be afforded all protection. *See United States v. New Mexico*, 438 U.S. 696, 716-717 (1973); *see also Broder v. Water and Mining Company*, 101 U.S. 274 (1879) (these vested rights “are rights which the government had, by its conduct, recognized and encouraged and was bound to protect”); *In re SRBA Case No. 39576, Order Denying Challenges and Adopting Special Master’s Reports and Recommendations*, Subcases 57-04028B, *et al.*, p. 3-4 (September 30, 1998).

Even in the face of the above, the United States argues in its brief that federal law

precludes private property rights, and specifically water rights, on federal land. The United States is not justified in any manner in taking this position. First, the United States argues that federal law including regulations and case law relevant to the management of the rangeland, prohibit private ownership of water rights on federal land or “monopolization” of the rangeland. Second, the United States argues that no one other than the “riparian owner”, the United States, can hold water rights on federal land. Both of these arguments are wrong as a matter of law.

Faced with the above unambiguous recognition of private water rights on federal lands found in federal statutes and case law, the United States has turned to theories of “monopolization” of federal grazing lands and arguments that a ruling in favor of LU Ranching will “fundamentally disrupt the law governing property ownership by allowing a mere permittee or licensee on lands used for grazing ... nonetheless to acquire a critical ‘stick’ in the ‘bundle’ of rights in the land”, water rights. *See* U.S. Brief p. 5-6, 43. In short, in an attempt to counter the plain language of the federal statutes, the United States tries to apply authority limiting private parties’ ability to obtain a property right to the *land* in this case even though this case deals not with the rangeland or grazing rights, but *water* rights. Such attempts cannot and do not trump the plain language of the federal statutes and case law, which recognize and protect private water rights on federal lands.

The United States cites to a string of cases that prohibit private ownership of public land. *See* U.S. Brief, p. 5-6, *citing Light v. United States*, 220 U.S. 523, 535 (1911); *Buford v. Houtz*,

133 U.S. 320 (1890); *Camfield v. United States*, 167 U.S. 518 (1897); *McGinnis v. Frieman*, 17 P.635 (Idaho 1888); *Anthony Wilkinson Live Stock Co. v. McIlquam*, 83 P. 364 (Wyo. 1905).

Absolutely none of these cases hold that a private party cannot acquire water rights on the public domain. Indeed, water is not even at issue in these cases, rather these cases are about property interests in land. Nonetheless, the United States attempts to bootstrap law regarding use and ownership of land to this water rights case by arguing that “acquisition of a water right under state law does not carry with it a right to use federal land to exercise the water right.” *See* U.S. Brief, p. 6. The problem is, this case is not about ownership of public lands and it is not about use of the land to access to water, this case is about whether private parties have acquired water rights that today are located within federally administered allotments. On this point, the United States has pointed to no authority that rebuts the plain language of the federal statutes which specifically recognize the right of private parties to own water rights on the public domain or within federally administered allotments.

The United States also argues that if water rights on federal land are awarded to private parties, then individuals would monopolize the water rights thereby precluding stock watering access to those who hold grazing permits. *See* U.S. Brief, p. 33, citing *United States v. State*, 959 P.2d 449 (1998).³ This argument is unavailing. The United States Congress voluntarily chose to

³ It also should be noted that *United States v. State* addresses federal reserved water rights, and PWR 107 reserved water rights are not at issue in this case.

rely on local law and customs and delegated to the states responsibility for determining how water rights would be perfected and used. The Congress went on to decree that once water rights were acquired under state law, they would be recognized and protected by the United States government even if those water rights were located on federal land. If the United States was concerned about “monopolization” or the effect private water rights would have on those holding grazing preferences, then the United States Congress could have drafted different language in the Taylor Grazing Act. Today, however, no arguments or rhetoric concerning fears of “monopolization” can change the fact that federal law recognized that private water rights can be appropriated, held, and transferred on federal land.

The United States also turns to arguments relating to its management of the rangeland, and grazing regulations. As a preliminary matter, it should be noted again that this case is not about management of the rangeland, nor use of the surrounding land for grazing. Nor is it about the administration of grazing permits. It is about water rights. Whether the United States can “modify, fail to renew, or cancel” a grazing permit has no bearing on the issue of whether LU Ranching’s predecessors appropriated a water right.

The United States also argues that stockwater rights on the federal land can only be appurtenant to the federal land on which they are located. *See* U.S. Brief, p. 33-34, 40-43. This is a riparian theory of ownership that is contrary to Idaho law and has been rejected by Idaho Courts. *See Hutchinson v. Watson Slough Ditch Co.* 101 P. 1059, 1062 (1909). In *Hutchinson*,

the Idaho Supreme Court rejected theories of riparian ownership. The Court held:

A riparian proprietor in the state of Idaho has no right in or claim to the waters of a stream flowing by or through his lands that he can successfully assert as being prior or superior to the rights and claims of one who has appropriated or diverted the water from the stream and is applying it to a beneficial use ... *As we have before seen, the common-law doctrine of riparian proprietorship, whenever it comes in conflict with a water right acquired by appropriation, is at once in conflict with and repugnant to both the Constitution and statutes of this state.*

*Id. (emphasis added).*⁴ Under Idaho law, those who actually are appropriating the water to beneficial use, in this case LU Ranching and its predecessors, are the ones who acquire the water right under Idaho law. In this state, there simply is no recognized riparian right to water whereby one can claim a right to water by virtue only of ownership of the land. *Id.*

The United States' argument that stockwater rights can only be appurtenant to the federal land on which they are located, and thereby held only by the United States as the owner of the land, also conflicts with federal law. As discussed at length above, federal law recognizes private water rights on federally administered lands. The United States simply cannot have it both ways: it cannot allow persons to appropriate water rights under state law in accordance with congressional enactments, and then in litigation argue that private parties cannot hold valid water rights on federal land because the private parties do not own the federal range.

In both its arguments as respondent and in its arguments as cross-appellant, the United States contends that because water rights are "appurtenant" to the land on which they are located,

⁴ The *Hutchinson* case is cited as authority in the brief of the United States.

the water rights cannot be held by any other party or appropriator, but instead must be held by the United States. There is no possible justice for such argument. Such arguments must be rejected as they violate the plain wording of federal statutes recognizing the right of private parties to hold water rights on the public domain or on federal land. As outlined further, below, such arguments also must be rejected because they are adverse to Idaho water rights law.

2. Idaho State Law Recognizes Stockwater Rights Acquired under the Beneficial Use Method of Appropriation.

The United States assigned responsibility for the administration of water rights to the individual states. As previously briefed, the state of Idaho, consistent with other western states, chose to administer its water rights under the prior appropriation doctrine. Pre-statutory water rights acquired in Idaho are done so under the “Constitutional” or “beneficial use” method of appropriation, pursuant to which water rights are acquired and given priority based on the date the water is first diverted and put to beneficial use. *See* Const. Art. 15 § 3; *see also In Re SRBA Case 39576 (Minidoka National Wildlife Refuge v. United States)*, 996 P.2d 806, 811 (Idaho 2000). As recognized by the United States, in order to establish a beneficial use water right, one must demonstrate an intent to divert water for a beneficial use. *See Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 619 P.2d 1130, 1132-1133 (Idaho 1980).

The United States argues that one cannot appropriate a stock watering right by merely exercising his grazing privilege. *See* U.S. Brief at p. 15. The United States goes on to argue that

grazing does not constitute an appropriation of water *per se*. U.S. Brief at p. 20. LU Ranching has never argued that grazing, or the consumption of forage, constitutes an appropriation of water. However, evidence of grazing in the area surrounding the water sources, and evidence of the recognition of grazing preferences by the United States based upon historic grazing are relevant because they provide probative, historic evidence that LU Ranching and its predecessors had livestock, that the cattle utilized that particular range at issue in this case, and watered directly from the sources at issue. Such evidence of grazing in the area surrounding the water sources at issue provides evidence sufficient to satisfy the legal requirements for an appropriation of a stockwater right under Idaho law. *See Stevenson v. Steele*, 93 Idaho 4, 11 (1969), *citing Cottonwood Water and Light Co. v. St. Michael's Monastery*, 29 Idaho 761 (1916); *Steptoe Livestock Co. v. Gulley*, 295 P. 772, 775-776 (1931); *Hage v. United States*, 51 Fed. Cl. 570 (2002), *citing Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967). Whether these appropriations of a water right occurred prior to the enactment of the Taylor Grazing Act or after the Taylor Grazing Act was passed, the effect is the same. When LU Ranching and its predecessors turned out their livestock upon the public domain or federal land where these water sources are located, and the livestock drank from the water thereon, an appropriation of a stockwater right occurred. *See Steptoe Livestock Co. V. Gulley*, 295 P.2d, at 775-776 (mere turning out of livestock upon the public domain carrying streams held to be an appropriation of water for stockwatering purposes).

The United States has taken the position that the only way to appropriate water is by physical diversion. *See* U.S. Brief at p. 17-18. However, as demonstrated, above, in the case of stockwatering, the physical diversion is accomplished by watering livestock directly from the source. The rationale behind this is well explained by the Idaho Court of Appeals in *R.T. Nahas v. Hulet*, in which the Court stated:

We must also consider the practical realities of raising livestock in this state. We think it unlikely that a rancher would divert water from a stream running through his property for livestock watering when the same result is achieved without effort simply by allowing livestock to drink directly from the stream. To link recognition of an appropriation for livestock watering to the existence of a diversion could very well jeopardize stock watering rights of ranchers who have watered stock directly from streams or springs for decades.

R.T. Nahas v. Hulet, 674 P.2d 1036, 1044 (Ct. App. 1983); *See* also R. Vol.3, p. 422-424 (Memorandum Decision and Order on Challenge). Such a position taken by the United States would undermine the hundreds of stockwatering rights the SRBA Court has already adjudicated in favor of Idaho ranchers.

As noted, above, the United States also has taken the position that one can only obtain an appropriative stockwater right if he is the owner of the riparian property. *See* U.S. Brief at p. 33-34, 40-43. As briefed, above, there is no support for a riparian theory of water right ownership in the state of Idaho and, indeed, the United States' theory is rebutted outright by Idaho statutory law which recognizes the right of private parties to obtain an appropriative or beneficial use water rights on federal land. Idaho Code section 42-113(2) states as follows:

APPELLANT-CROSS RESPONDENT'S REPLY BRIEF

(2) For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, *established under the diversion and application to beneficial use method of appropriation*, the priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code.

I.C. 42-113(2) (*emphasis added*). This statute recognizes and confirms that in Idaho, appropriative water rights acquired by private parties on federal land are recognized and that the priority date assigned to these rights will relate back to the first date of beneficial use. *See* Water Rights Law in the Nineteen States, Wells A. Hutchins, J.D., Vol. I, p. 485; *See also* *Crow v. Carlson*, 107 Idaho 461 (1984). It also recognizes, under Idaho law, that there is a clear connection between livestock grazing and the concomitant appropriation of stockwater rights. *See* I.C. 42-113(1) and (2).

The United States also cites to a string of cases, including one Idaho case, claiming that the cases hold that watering livestock from a stream does not amount to an appropriation. *See* U.S. Brief at p. 18, 20, *citing* *Hutchinson v. Watson Slough Ditch Co.*, 101 P. 1059 (Idaho 1909). The United States argues that under Idaho law, as set forth in the *Hutchinson* case, “the use of a stream for livestock watering ... does not amount to appropriation” and then goes on to argue that: “In 1909, this (Idaho Supreme) Court expressly held that an individual who had watered his livestock directly out a stream even on his *own* property for 17 years had no right to the continued flow of the stream ... *a fortiori*, there is no basis for concluding that the mere grazing of cattle on lands owned by the United States ... conferred such a right on an individual livestock

owner.” See U.S. Brief at p. 18, 20, citing *Hutchinson v. Watson Slough Ditch Co.*, *supra* (*emphasis in original*). The United States has fundamentally misrepresented the holding in *Hutchinson*. Contrary to the United States’ characterization, the holding in *Hutchinson* has absolutely nothing to do with whether livestock watering results in an appropriation of water. See U.S. Brief at p. 18. Rather, the Court in *Hutchinson* did not award a water right because the respondent did not make a claim for an appropriative water right. The Court held:

In the further discussion of the case, it must be remembered that the respondent has not alleged or established any appropriation or diversion of the waters of this stream for any useful or beneficial purpose. He makes no claim to the water by reason of any appropriation or diversion in accordance with the statute, but rather bases and asserts his right on the fact that he is a riparian proprietor, and that as such he has for more than 17 years been using the water for “domestic, culinary and household purposes and for the use of his live stock, and that the waters of the stream have continuously flowed through is lands, “moistening the same.” Whatever rights, therefore, respondent has established, are wholly dependent upon his proprietary rights as a riparian owner of lands through which this stream flows.

Hutchinson, 101 P. 1059, 1061 (Idaho 1909) (*emphasis added*). The Court goes on to reject the respondent’s riparian water right claim, holding that the riparian doctrine is “in conflict with and repugnant to both the Constitution and the statutes of this state.” *Id.* at p. 1062. The Court rejected the claims because what was asserted was a riparian theory of ownership. A claim for constitutional or appropriative stockwater rights simply was not made in the *Hutchinson* case, and it was wrong for the United States to so insinuate.

Without citation, the United States also argues that “The district court correctly held that

an appropriation of stock water cannot be presumed from mere evidence that livestock used the range.” See U.S. Brief at p. 17. To the contrary, the District Court actually and correctly held that evidence of the customary and routine use of public lands in connection with a homesteaded property, and the United States’ acknowledgement of prior grazing use in awarding grazing preferences, can be sufficient to establish the requisite intent to appropriate a stockwater right. See R. Vol. III, p. 424. Under the applicable law in the state of Idaho, evidence of the customary and routine use of federal lands in connection with homestead property to sustain a livestock operation satisfies the legal requirements for an appropriation of a stockwater right. *Id.*; See also *Stevenson v. Steele*, 93 Idaho 4, 11 (1969), citing *Cottonwood Water and Light Co. v. St. Michael’s Monastery*, 29 Idaho 761 (1916); *Steptoe Livestock Co. v. Gulley*, 295 P. 772, 775-776 (1931) (mere turning of livestock upon the public domain carrying streams held to be an appropriation of water for stockwatering purposes); *Hage v. United States*, 51 Fed. Cl. 570 (2002), citing *Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967).

In response to LU Ranching’s appeal, and in support of its own cross-appeal, the United States has argued that watering livestock from a source does not satisfy the requirements for an appropriation of a water right. For the reasons outlined, above, the United States’ arguments should be rejected outright. The District Court correctly held that under applicable Idaho law, private parties can appropriate beneficial use stock water rights that are located on federal lands, both prior to and subsequent to the enactment of the Taylor Grazing Act. See R. Vol. III p. 403-

429 (Memorandum Decision and Order on Challenge). The District Court's Memorandum Decision should be upheld in this regard, and the United States' arguments on cross-appeal that private parties cannot own stockwater rights on federal land should be rejected because the United States' arguments are completely meritless, having no support in either Federal or Idaho state law.

B. Idaho Law Recognizes the Transfer of Water Rights As Appurtenances.

The United States argues that stockwater rights on federal lands cannot be appurtenant to any other property other than the federal rangelands on which they are located. *See* U.S. Brief at p. 36-44. In the alternative, the United States argues that neither the documents transferring the base ranch properties nor the grazing preferences evidence the appropriation of the water rights or the conveyance of water rights as appurtenances to the base ranch properties. *See* U.S. Brief at p. 22-30. Each of these arguments should be rejected. The District Court, and prior District Court Judges in the SRBA have correctly ruled, based on the settled law of appurtenances, that stockwater rights on federal land can be transferred as appurtenances to the base ranch properties provided there is a nexus between the water right and the base ranch property, and the parties to the transfer of the base ranch intended the subject water rights to be part of the transfer. *See* R. Vol. III p. 424-429; *see also Memorandum Decision and Order on Challenge*, Judge Wood (April 25, 2000).

1. Water Rights Located on Federal Land Can Be Transferred as Appurtenances to

the Base Ranch Properties.

The United States argues that stockwater rights cannot be appurtenant to any other property other than the federal rangelands on which they are located. As discussed at length above, such a riparian theory has been properly rejected by the Courts and goes against settled law regarding appurtenances. Because there is a nexus between the stockwater rights on federal land and the base ranch property, the water rights can and do transfer as appurtenances with the base ranch property. This connection, this nexus, is evidenced in part by the United States' own laws and regulations and its adjudication of grazing preferences.

The United States argues, “[i]nstream stock watering rights on rangelands are appurtenant to those lands because they are physically necessary to the land’s use for livestock grazing.” U.S. Brief at p. 39. First, this is a riparian argument that has been rejected by Idaho courts. *See* Const. Art. 15 § 3; *see also In Re SRBA Case 39576 (Minidoka National Wildlife Refuge v. United States)*, 996 P.2d 806, 811 (Idaho 2000) (Idaho is a prior appropriation state); *Hutchinson v. Watson Slough Ditch Co.* 101 P. 1059, 1062 (Idaho 1909) (rejecting riparian theories of ownership). Second, the United States’ argument conflicts with federal law. Federal law recognizes private water rights on federally administered lands. If, indeed, the United States believed that no one other than the United States could hold water rights on federal rangeland, then it would not have, in enacting legislation, given specific protection to those private water rights. Further, if the United States believed that water rights must be held in the name of the

United States in order to accomplish the purposes of the Taylor Grazing Act, then the United States could have statutorily created reserved rights on this land. The United States did not, however, and therefore cannot use riparian and reserved rights theories to support its case.

Under Idaho law, the proper identification of land to which stockwater rights are appurtenant depends on the question of what property is benefitted or improved by the use of the water. *See Parke v. Bell*, 97 Idaho 67, 69 (1975); *see also Kinney on Irrigation and Water Rights*, Vol. 2, sec. 997, 1000, 1005 (1912) (“a water right, which secures to the owner of a tract of land water for irrigation of the same, or for some other purpose, necessary to the beneficial enjoyment of the land, the title to which is also in the owner of the land, becomes appurtenant to such land.”). Stockwater rights sited on public lands or within today’s federally administered allotments are necessary to the beneficial use and enjoyment of the base property and are necessary to sustain the viability and value of the base ranch property. *See Trial Tr.* p. 385-387 (Testimony of Dr. Chad Gibson). Simply, absent the water rights on federal land, the base ranch operation would cease to exist. Within this framework, Idaho courts have held that stockwater rights on federal land will be held to be appurtenant to base ranch properties so long as a sufficient nexus is demonstrated between the water right and the base ranch and the parties to the transfer of the base ranch property intended the subject water rights to be part of the transfer as appurtenances. *See Memorandum Decision and Order on Challenge*, Judge Wood, p. 18-21 (April 25, 2000); *see also In the Matter of the Determination of the Relative Rights in and to the*

Waters of Monitor Valley – Southern Part (140-B), Nye County, Nevada, Fifth Judicial District of the State of Nevada in and for the County of Nye, Case No. CV 14906, Findings of Fact and Conclusions of Law (October 8, 1999) (“Monitor Valley Decision”); *Steptoe Livestock Company v. Gulley*, 295 P.2d 772 (Nevada 1931); *Crow v. Carlson*, 690 P.2d 916 (Idaho 1984). No unity of title between the water right and the designated place of use is required. *Id.*

One court described the nexus between the base ranch property and the appurtenant stockwater rights on federally administered lands as follows:

While the BLM might commission a genetically engineered cow that will drink only where preprogrammed, until then it is highly unlikely that you will be able to make a cow differentiate between water they can drink because it is on base property and water that it is attached to public land. For centuries, no one has been able to lead the cow without it drinking at will. In a sense, the point of use for the water is the cow’s head, which is an extension of the base ranch.

Hage v. United States, 51 Fed.Cl. 570, 586 (2002).⁵ Both the water on the federal range and the water on the private base property are necessary to sustain the livestock and to sustain the livestock operation. They are connected. Accordingly, the nexus between the stockwater rights and the base ranch properties is found in practical realities associated with the historic use of the public range in conjunction with the base ranch property and it is found the fact that the value of

⁵ The United States attempts to discount the effect of *Hage* by identifying that order as a “preliminary” decision. *See* U.S. Brief at p. 10. However, a final opinion regarding property rights, and specifically stockwater rights within federally administered allotments, has been issued. *See Hage v. United States*, 51 Fed.Cl. 570 (2002). The only portion of that case which is outstanding is on the issue of damages to be awarded.

the base ranch property is inextricably intertwined with the stockwater rights located on federal land. The undeniable connection between the base ranch property and range resources, including water, also is demonstrated through the United States' own statutory and regulatory scheme which specifically ties range activities within federal allotments to the private base ranch properties.

The relationship between instream stockwater rights on federal land and base ranch properties is recognized and confirmed in the Taylor Grazing Act, which provides that preference for the grazing allotments would be given only if the applicant could demonstrate historic use of the range in question. This prior use, would, by definition, include not only use of the forage but the use of stockwater as well. *See* 43 U.S.C. §315b. As correctly recognized by the District Court, in implementing the Taylor Grazing Act, the government enacted regulations that made the grazing preferences expressly appurtenant to the base ranch property. *See* 43 C.F.R. §4100.0-5 (1998) (preferences attach to the base property owned or controlled by the permittee or lessee); *see also* I.C. §25-901(2000)(recognizing that grazing preferences are appurtenant to the base ranch property). There is an undeniable connection between the resources on the range, and the base ranch property. This is a connection, a nexus, that cannot be denied by the United States in light of its own laws.

In an attempt to save itself from its own laws and regulations, the United States argues that Class One grazing preferences recognized under the Taylor Grazing Act (a) do not exist, (b)

do not demonstrate prior use, and (c) cannot be used to convey any “right title, interest, or estate in or to the lands.” *See* U.S. Brief at p. 25-26. Such arguments go against the plain language of the Taylor Grazing Act, regulations interpreting that Act, and United States Supreme Court precedent. These arguments also rely on the false presumption that what is at stake is an interest in land when, in fact, the only issue presented is ownership of private water rights on federally administered lands that already have been recognized as valid under applicable federal law.

The United States argues that neither the record nor the regulations governing the issuance of grazing permits refer to a “Class One Preference” or first grazing preference. The United States is wrong. The preference grazing scheme is explicitly recognized in the Taylor Grazing Act and by the United States’ Supreme Court in interpreting that statute. *See* 43 U.S.C. § 315b. In *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000), the Supreme Court described the law as it relates to the preference grazing scheme as follows:

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*).

The United States argues that the “Class One” preference ratings relate only to the rating

of the base ranch properties. The United States argues that it was the “base property” that was rated and therefore, no other meaning can be derived from an award of a Class One Preference. *See* U.S. Brief, at p. 8, 22. However, this argument defies reason because there exist Class Three grazing preferences, and because no base property is required for a Class Three grazing preference, a Class Three “ranking” could not be assigned to a base ranch property. The concept of a “Class Three” preference can only make sense in the context of a preference grazing scheme whereby the livestock operations are rated and given preference based on their historic use of the rangeland and whether they own commensurate base property. *See Public Lands Council, supra*, at AT 734-35.

The United States argues that what was assigned were designations as “Class One Base Property” and “Class Two Base Property.” *See* U.S. Brief, at p. 8. However, the United States’ own evidence entered into the record identifies not “Class One Base Property” but class one or first class grazing preferences. *See* Trial Exh. W. The United States’ Dependent Property and Adjudication Record for the South Mountain, Cow Creek and Trout Creek Allotments (William Lowry) clearly rebuts the United States’ argument that the “ranking” system applied to the base ranch properties or that there was no broader preference scheme. The Dependent Property Record states “Qualifications for Federal Range; Class One” and then proceeds to identify how many Class One AUs and AUMs have been adjudicated to William Lowry within the Cow Creek, Trout Creek, and South Mountain Allotments. *See* Trial Exh. W (Lowry Dependent

Property Adjudication Record). This was not a ranking of base property, but part of the preference scheme to determine who would receive first preference to the continued use of the rangeland, and to define extent of the use that would be permitted. *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).

The United States next argues that class one preferences do not evidence prior use. As briefed at length in LU Ranching's Opening Brief on Appeal, such a finding goes against the United States' own laws and regulations which required grazing applicants to prove prior use of the range and resources thereon as a condition precedent to receiving a class one grazing preference. *See Public Lands Council, supra*. As explained by Dr. Chad Gibson at trial, "[i]n order to have a grazing preference in 1962, the person that had that would have to have grazed those livestock prior to 1934, or purchased property from someone who had grazed livestock prior to 1934. *See* Trial Tr., page 375 (Testimony of Dr. Chad Gibson).

Finally, the United States argues that a grazing permit or grazing preference cannot be used to convey any right title, interest, or estate in or to the lands. However, rights to the land are

not at issue in this case, water rights are at issue. These water rights, appropriated by private parties pursuant to Idaho state law, are recognized as valid and are given specific protection under federal law. *See* The (Mining) Act of July 26, 1866, C. 262, Section 9, 14 Stat. 251, 43 U.S.C. § 661(a); *see also* The Act of 1870, ch. 235, §17, 16 Stat. 217, 218, *codified at* 30 U.S.C. §52 (1986); The Desert Land Act of 1877, ch. 107, §1, 19 Stat. 377, *codified at* 43 U.S.C. §321 (1986). The Taylor Grazing Act; 43 U.S.C. §315 (1934); The Federal Land Policy Management Act (“FLMPA”), 43 U.S.C. §1752(h). These water rights are recognized property rights and can be transferred as such. *See Crow v. Carlson*, 107 Idaho 461 (1984) (A water right can be conveyed without expressly mentioning the water right by way of the same instrument that conveys the real property to which the water right is appurtenant.)

Also in an attempt to circumvent the practical and legal connection between stockwater and the base ranch property, the United States argues that in applying the law of appurtenances, LU Ranching is attempting to “transfer” its claimed stockwater rights to its base ranch property. *See* U.S. Brief at p. 36-37, 42. LU Ranching has not sought to transfer or change the place of use of its water rights.

The United States attempts to apply a different standard of Idaho law regarding appurtenances to LU Ranching’s claims because the place of use is located within federally administered lands . What is at issue is a plain stockwater right, beneficially used by LU Ranching and its predecessors for over a century. Those rights are necessary to the beneficial use

and enjoyment of the base ranch properties, are used solely in conjunction with the base ranch properties, and are essential to the value of the base ranch properties. Accordingly, these water rights are appurtenant to and transfer with the base ranch properties pursuant to applicable Idaho law. *See Parke v. Bell*, 97 Idaho 67, 69 (1975); *see also Kinney on Irrigation and Water Rights*, Vol. 2, sec. 997, 1000, 1005 (1912).

2. Historic Evidence, Evidence of the Transfers of the Base Ranching Properties, and Evidence of Grazing Preferences and the Transfer of Grazing Permits, Demonstrate in this Case that the Stockwater Rights on Federal Land Transferred as Appurtenances to the Base Ranch Properties.

As previously briefed, the District Court cited numerous examples of the type of evidence relevant to a determination of whether a stockwater right was appropriated, when it was appropriated, and whether it was transferred as an appurtenance to the base ranch properties. The District Court opined:

[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). In its Brief, the United States principally challenges the effect of the grazing applications and grazing preferences on LU Ranching's claims. First, the United States challenges the conclusion that early settlers and owners of property on or near federal range lands regularly used public grazing lands and stockwater thereon. Second, the United States challenges whether Taylor Grazing permits "conclusively" establish use by the permittee or his predecessor-in-interest of the specific lands and waters on the public lands for which they are issued that necessarily predates the statute's enactment. The evidence at trial, including documentary offered by the United States, supports the conclusion that early settlers, including LU Ranching's predecessors in interest, used the rangeland and water sources at issue both prior to and after the enactment of the Taylor Grazing Act.

While the United States disputes the fact that the earliest settlers, including LU Ranching's predecessors in interest, used the public lands and stockwater thereon as part of their livestock operations, the un rebutted evidence at trial demonstrated that they did so out of necessity as testified to by Dr. Chad Gibson, "in order to make a ranch a viable operation, you have to be able to have access to lands around the base property." *See* Trial Tr., p. 386. This testimony was un rebutted at trial.

The United States also challenges the effect of grazing preferences and grazing applications on the issue of whether LU Ranching's predecessors grazed and watered their cattle,

and when that first occurred. As a general matter, the grazing applications and grazing preferences awarded conclusively answer questions of “where” and “when” the livestock watering occurred. Specific to LU Ranching, the grazing preference applications and grazing preferences awarded establish that LU Ranching’s predecessors used the same range and water used by LU Ranching today and that the first use, the first appropriations, occurred long prior to 1934.

The grazing application forms specifically required applicants to identify the range for which they were applying for a permit and, second, to identify how long the applicant had been using the *same range* as part of the applicant’s livestock operation. By way of example, the Maher application states and asks the following:

I, Frank A. Maher, Amy Ethel Maher, of Cliffs, Idaho, hereby apply for a permit to graze the following livestock, for the period states, upon the lands of the United States *customarily used by me* within Idaho Grazing District No. 1... in common with the other users or on an individual allotment and described as follows: South Mountain Allotment... 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*? Yes... How may years, seven. *See U.S. Exh. 4, bsn 3505-3507 (emphasis added).*

Other forms of the grazing preference applications in this case similarly, as a matter of form, ask the applicants to identify the public lands that are applied for, have the applicants certify that they have used the same public lands historically, and identify specifically how long they have used those lands. *See U.S. Exh. 4-18.*

Despite the above, the United States disputes whether LU Ranching and its predecessors have been able to identify where the historic grazing took place because the applicants did not provide “metes and bounds” descriptions of the places of use. However, the information provided by the applicants and the subsequently issued grazing preferences accurately describe the historic places of use within the same grazing allotments used today. As explained by Dr. Chad Gibson:

Q: Do the adjudication records typically include - or does the information in the adjudication typically include the boundaries of the allotment?

A: In general terms, some of them list a metes and bounds description, and obviously those areas weren't fenced in at that time, so it was a general area that was recognized as to where livestock would run...

Q: ...Did you have an understanding of whether that prior grazing would have been on 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.

See Trial Tr. P. 373-374; 389-390. This testimony was un rebutted by the United States.

The applications and grazing preferences awarded to Lu Ranching's predecessors establish, as a matter of fact and law, that prior to 1934, LU Ranching's predecessors used the

same range and water sources that are at issue today. *See* Public Lands Council, *supra*, at p. 734-735; *see also* R. Vol. III, p. 497 (Opinion of the Dept. Of Interior, by T. A. Walters, January 21, 1937) As adeptly analyzed by the District Court, the grazing preferences and grazing permits also conclusively evidence consistent use of these water sources by LU Ranching and its predecessors after the enactment of the Taylor Grazing Act and continuing to today. *See* R. Vol. III, p. 432-442.

The documentary evidence of historic appropriations of water from the claimed water sources, and the transfer of these appropriative rights, is found in the chain of title, the grazing applications and the grazing preferences awarded to LU Ranching and its predecessors. It is corroborated by an expert historian who put these documents into context based on the applicable laws affecting public lands and federally administered allotments. *See* Trial Tr., p. 368-391 (Testimony of Dr. Chad Gibson). It is corroborated by eye witness testimony by Mr. Thomas Skinner. *See* Trial Tr., p. 459-513. It is also corroborated by the testimony of Mr. Tim Lowry and Mr. William Lowry. *See* Trial Tr., p. 262 - 318 (Testimony of Mr. William Lowry); *see also* Trial Tr., p. 321 - 367 (Testimony of Mr. Tom Lowry).

The United States specifically asserts that with respect to the O’Keefe and Mendieta class one preferences, transferred through the chain of title to LU Ranching, that there is “no record of

any livestock use of O’Keefe’s Trout Creek property in the record.”⁶ First, if there is an absence of supporting documentation of adjudication records, it is a result of the United States’ failure to maintain and produce the same. Second, the absence of all supporting documents is not enough to overcome the fact that at the end of the grazing adjudications for O’Keefe and Mendieta, the United States awarded a class one grazing preference on the Trout Creek and Cow Creek units. Under prevailing United States laws and regulations, class one grazing preferences would not have been awarded absent prior use by LU Ranching’s predecessors, including O’Keefe and Mendieta. Finally, while the United States asserts that “there is no record of any livestock use of O’Keefe’s Trout Creek property in the record,”⁷ that evidence can be found simply by looking at one of the United States’ own exhibits. *See* U.S. Exh. 17 (Application for Grazing Permit filed by Pat O’Keefe for Trout Creek).

In Mr. O’Keefe’s grazing application, he not only certifies to the use of the Trout Creek area by his livestock prior to 1934, he also claims ownership to the waters of Trout Creek located on public land. The waters of Trout Creek are at issue today in LU Ranching claim numbers 55-10297, 55-10298 and 55-10300, and these claims are based on original appropriations made by LU Ranching’s predecessors, including Mr. O’Keefe and Mr. Mendieta. Mr. O’Keefe’s grazing

⁶ The Trout Creek Allotment is located within the Cow Creek Allotment. *See* R. Vol. III, p. 437.

⁷*See* U.S. Brief, at p. 27

application states, in part, as follows:

5. Describe and locate all water or water rights owned or leased by you and used in your livestock operations on the public domain:

Kind (Spring, well, reservoir, etc.) - *Trout Creek*...Name of Owner - Pat O'Keefe....

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? Yes

How many years - 30 yrs. Number of stock - 20 to 100 head.

Kind of stock - Range Cattle.

See U.S. Exh. 17.

The United States goes on to doubt Mr. Mendieta's continued use and states that "[a]ssuming, therefore, that Mr. Mendieta purchased stock watering rights from Mr. O'Keefe, Mr. Mendieta may or may not have continued to put the water appropriated by Mr. O'Keefe to beneficial use." The United States forgets that there is direct evidence regarding O'Keefe and Mr. Mendieta's continued use of the same range and water. Indeed, Mr. Mendieta physically toured Mr. William Lowry throughout the South Mountain and the Cow Creek Allotment, and showed Mr. Lowry the water sources used thereon as part of the Mendieta livestock operation. Mr. Lowry testified as to the continued use of the land and water by livestock owned by Mendieta, Lowry, and today's LU Ranching. *See Trail Tr.*, p. 263-302.⁸ In addition, direct

⁸ Mr. Lowry gave similar testimony with respect to use the Cliffs allotment and water thereon. *See Trail Tr.*, p. 303 - 307.

testimony on point as to use of Trout Creek and Cow Creek allotments and the water thereon is found in grazing applications and grazing adjudication records for Mr. O'Keefe and Mr. Mendieta. *See* U.S. Exh. 10; *see also* LU Ranching Exh. H and I. In its responsive brief on appeal, the United States fails to rebut evidence of continued use of any other claimed water sources.

While the United States performed no similar analysis with respect to the other claims, the United States does assert that "nothing on the record connects any predecessor in-interest with any water source on the range." *See* U.S. Brief, at p. 28. To the contrary, as detailed in LU Ranching's Opening Brief, LU Ranching's predecessors specifically identified by name water sources that were historically used by them as part of their livestock operations, and many of those same water sources are the same as are at issue before the Court today, including Juniper Creek, Jordan Creek, Spring Creek, Trout Creek, and Cabin Creek. *See* LU Ranching's Opening Brief, p. 20 - 21.

The District Court's factual analysis with respect to post-1934 appropriations and transfers is well reasoned and supported by the record and the law. However, as briefed herein and in LU Ranching's Opening Brief on appeal, the record and the law support recognition of LU Ranching's claimed water rights with priority date of 1876 or, at a minimum, a priority date reflecting pre-1934 use and appropriations by LU Ranching's predecessors who filed the original grazing preference applications.

In all respects, the United States' objections to LU Ranching's appeal should be rejected,

and the United States' cross-appeal denied.

C. The District Court Incorrectly Denied LU Ranching's Motion for Attorneys Fees.

1. The United States Waived Its Sovereign Immunity as to An Award of Attorneys Fees.

In an attempt to avoid liability for attorneys fees, the United States' attempts to re-frame LU Ranching' Motion as a motion for costs. LU Ranching, however, is not asking this Court to award it its costs in this litigation, only attorneys fees as allowed by statute. Under application of the Equal Access to Justice Act, ("EAJA"), attorneys fees awards against the United States are permissible and not barred by application of the sovereign immunity doctrine.

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

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

See 28 U.S.C. § 2412(d)(2)(A) (*emphasis added*). LU Ranching does not seek costs under the EAJA, only its reasonable attorneys fees.

The United States relies on the McCarran Amendment to shield it from liability from an award of attorneys fees, but at stake are not costs but fees. The McCarran Amendment solely limits the shifting of litigation costs, and does not address attorneys fees. The applicable portion of the McCarran Amendment states as follows:

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

See 43 U.S.C. 666 (2002) (*emphasis added*). Had Congress intended to exempt the United States from both exposure for the payment of costs and attorneys fees, then Congress would have said so explicitly in the text of the McCarran Amendment. As it stands, pursuant to the plain language of the statute, the McCarran amendment addresses a judgment for costs against the United States, but does nothing to relieve the United States from potential obligations for the payment of attorneys fees.

In arguing that the McCarran Amendment prohibits this Court from awarding attorneys' fees against the United States in this case, the government relies on *United States v. Idaho ex re. Director, Idaho Dept. Of Water Resources*, 508 U.S. 1 (1993). However, the "fees and cost-shifting" at issue in *United States v. Idaho* involved the payment of filing fees, and not, as in the case, attorneys fees. *Id.* Filing fees such as those at issue in *United States v. Idaho* are more appropriately characterized as costs under the United States Code. *See* 28 U.S.C. § 2412(a)(1)

(judgment for costs, as enumerated in section 1920 of this title, does not include the fees and expenses of attorneys); *see also* 28 U.S.C. § 1920 (costs include clerk's fees and docket fees). Accordingly, *United States v. Idaho* has little if any probative value on the issue of whether LU Ranching is entitled to attorneys fees in this case.⁹

The United States also specifically waived sovereign immunity for an award of attorneys fees when it enacted the EAJA. Through the EAJA, the United States Congress expressly and unequivocally waived sovereign immunity subjecting the United States to monetary liability for attorneys' fees in *any court* having jurisdiction over the matter. Idaho Courts have had, and continue to have jurisdiction over this case, and under the plain language of the EAJA the Idaho Courts also have has authority to award attorneys fees against the United States in this case. The EAJA states as follows:

Except as otherwise specifically provided by statute, a court *shall award* to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), 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 make an award unjust.

28 U.S.C. 2412(d)(1)(A) (*emphasis added*). The crux of the issue, then, depends on whether this

⁹ As discussed herein, below, *United State v. Idaho, supra*, does have relevance on the issue of the jurisdictionof the SRBA Court over the United States pursuant to the McCarran Amendment.

case qualifies as "any civil action" pending in "any court having jurisdiction of that action." This is a civil action, and this Court most decidedly has jurisdiction over this case.

The EAJA provides that parties have a right to attorneys fees in any court having jurisdiction over this matter. Under the provisions of the McCarran Amendment, the SRBA has jurisdiction over this case. The McCarran Amendment states as follows:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amendable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction ...

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

It is a basic tenant of statutory construction that where the language of a statute is clear, the words employed by the legislature are to be taken as the final expression of the meaning intended. *See United States v. Missouri Pacific R. Co.*, 278 U.S. 269, 278 (1929); *see also Azarte v. Ashcoft* , 394 F.3d 1278, 1285 (9th Cir. 2005). In this case, there could be no plainer words and no clearer meaning than when the United States Congress wrote that "any court having jurisdiction of that action" has the authority to award attorneys fees to a private litigant

under the EAJA. *See* 28 U.S.C. 2412(d)(1)(A).

2. LU Ranching Meets All Tests for the Award of Attorneys Fees under the Equal Access to Justice Act.

As previously briefed, the District Court did not base its decision on attorneys fees on whether or not LU Ranching was the prevailing party, but rather on the issue of whether the United States' arguments were substantially justified. In its brief, however, the United States claims that LU Ranching was not the prevailing party and separately argues that its position in this litigation has been reasonable and "consistent with settled law." *See* U.S. Brief at p. 33. Contrary to the United States' arguments, LU Ranching substantially prevailed on all issues and, far from being "consistent with settled law," the United States' arguments contradict and ignore settled law in Idaho as well as federal statutory law.

The United States argues that LU Ranching is not the prevailing party because it was not awarded its claimed priority date. However, a party need not prevail on all issues to be a prevailing party under the EAJA. *See Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983). In this case, LU Ranching is the prevailing party. It prevailed on the two most significant issues in this case: whether as private parties LU Ranching's predecessors could perfect water rights on what are now federally administered grazing allotments and whether those rights could be transferred as appurtenances to the base ranch properties. Ultimately, as outline below, the arguments advanced in this litigation by the United States were rejected, and LU Ranching was awarded water rights for its claimed places of

use.

The other issue raised is whether the United States' position in this case was subsequently justified. Substantial justification means that the United States must prove that its arguments had a reasonable basis in law and fact. *See Pierce v. Underwood*, 487 U.S. 522, 564 - 566 (1988). In the face of almost 140 years of federal legislation confirming private parties' right to acquire and maintain water rights on public land and federally administered grazing allotments, the United States in this litigation from the filing of its initial Objections through its brief on appeal continues to maintain that private parties like LU Ranching and its predecessors could not acquire or transfer water rights on the public domain or BLM lands. As briefed at length herein and in LU Ranching's Opening Brief on appeal, the United States' arguments in this regard are completely opposite of well settled Idaho law and the United States' own federal laws. Accordingly, the United States arguments do not meet the substantial justification test.

By way of the EAJA, the United States specifically waived its sovereign immunity and authorized "any court having jurisdiction of that action" to award attorneys fees to a private party. Under the EAJA and applicable Idaho law, because the United States' objections to LU Ranching's claimed water rights have no basis in either law or fact, attorneys fees should have been awarded, and under the EAJA were required to be awarded, to LU Ranching.

V. CONCLUSION

The District Court's Memorandum Decision holding that the intent to appropriate an

instream stockwater right can be inferred from the stock drinking from a source, and that such a beneficial use stockwater right can be perfected on the public domain both prior to and subsequent to the enactment of the Taylor Grazing Act should be upheld.

However, because both the law regarding grazing preferences and the unrebutted evidence of historic use of the water rights support the conclusion that the priority date for these water rights relates back to the first appropriations by LU Ranching's predecessors in interest, LU Ranching requests that the District Court's ruling with respect to the priority date to be assigned to LU Ranching's water rights be reversed, and that a June 10, 1876 priority date be assigned to these rights. In the alternative, a pre-1934 priority date should be awarded, representing the dates that the original grazing applicants certified that they used the rangeland, and therefore the water thereon, in conjunction with their ongoing base ranch and livestock operations. In sum, 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 on appeal, and an 1876 or pre-1934 priority date should be assigned to each of the claimed rights.

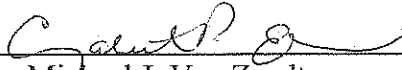
LU Ranching also respectfully requests that the Court reverse the District Court's ruling on attorneys fees. Given the history of this litigation, and the United States' persistence in raising arguments that are contrary to existing law, an attorneys fees award is mandated under the EAJA and justified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

Because there is no support in law or in fact for the United States' cross-appeal, it should

Dated this 17th day of May, 2006.

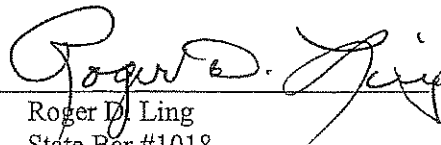
Respectfully submitted,

McQUAID BEDFORD & VAN ZANDT LLP

By: 
Michael J. Van Zandt
Elizabeth P. Ewens
Attorneys for LU Ranching Co.

Dated this 17 Day of May, 2006

LING ROBINSON & WALKER

By: 
Roger D. Ling
State Bar #1018

Attorneys for LU Ranching Co.

APPELLANT-CROSS RESPONDENT'S REPLY BRIEF

CERTIFICATE OF MAILING

I certify that I on May 17, 2006, I served a true and correct copy of the foregoing **Appellant-Cross-Respondent's Reply Brief** upon the following persons by mailing the original and/or copies, postage paid and addressed as follows:

1. Original and nine copies to:

Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, ID 83702

2. Two Copies Each to:

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

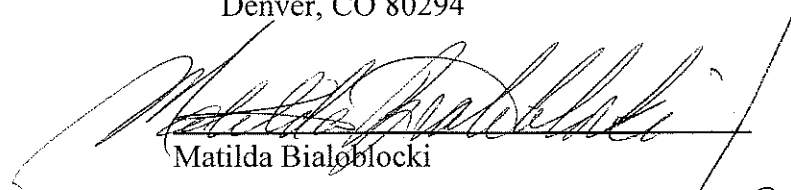
Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

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

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

Mr. Tim Lowry
LU Ranching Company
Box 415
Jordan Valley, OR 97910

Sue Ellen Wooldridge, Asst. Atty
General
Peter C. Monson, Managing Attorney
Environmental and Natural Resource
Division
1961 Stout Street - 8th Floor
Denver, CO 80294


Matilda Bialoblocki

