

IN THE SUPREME COURT OF THE STATE OF IDAHO

In Re: SRBA Case No. 39576 (Subcase Nos. 55-10135, 55-11061, 55-11385 and
55-12452)

JOYCE LIVESTOCK,
Appellant,
v.

UNITED STATES,
Respondent.

APPELLANT'S REPLY 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

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I. STATEMENT OF THE CASE

In its brief, the United States spends an inordinate amount of space trying to convince this Court that it has never been the position of the United States that private parties cannot own water rights on federal land. Brief of the United States as Respondent, p. 18-33. The United States makes this revisionist argument in order to avoid the inevitable consequences of its positions taken in this litigation. By its attempt to reform its previously taken positions, the United States is tacitly conceding that it was never justified in taking the position that private citizens could not own state based water rights on federal lands. Since there is no justification for such a position, and Joyce Livestock has had to endure over nine long years of litigation over that issue, on that basis alone Joyce Livestock is entitled to its attorneys fees under the Equal Access To Justice Act. 28 U.S.C. § 2412. While the United States argues that it only objected to Joyce Livestock's claims on the basis that the "claimant does not have a valid water right with the elements claimed," the United States only provided the Court with half of the United States' actual objection to Joyce Livestock's water right claim. Brief of the United States as Respondent, p. 20, ft.n. 20. The United States' stated objection to Joyce Livestock's water right claim, stated in full, actually states as follows:

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.

Appendix 1: Domestic and Stock Water Right Objection, Subcase 55-10135, p. 2 (*emphasis*

added). In addition, for further explanation of the United States' objections, the United States' refers to the "attached" document submitted with the Objection. On the attached document, places of use being objected to are circled with the following, notation: "BLM Land." *Id.* The United States objected to Joyce Livestock's claim because the places of use for this private stockwater right are located on federal or BLM administered land. It is that simple.

The United States' entire strategy in this litigation has been to defeat the private water right claims located on federal land, because those water rights are claimed on federal lands, and to secure for itself the sole right to water sources on federally administered land. In pursuit of this goal, the United States has advanced many theories, some of which are discussed in the United States' Brief, none of which have support in state or federal law. The United States examines these theories individually in its brief. However, if you look at the arguments *in toto* the result is that under the United States' theory of how the law should be, only the United States as the self-described "owner" of the land can own water rights on federal land. Such a position has no basis in the law.

The purpose of the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA") is to protect private parties, like Joyce Livestock, who have been forced into litigation to protect their rights as against the unlimited and formidable resources of, United States, when the United States' position lacks substantial justification. Thus, private parties are not deterred from litigation against the United States in the face of the United States resources. As previously briefed at length, and detailed herein, the United States' position that private parties cannot hold water

rights on land “owned” by the BLM, lacks any legal support. Similarly, the United States still today cannot produce a single case for the proposition that management of land equates to physical beneficial use of water under Idaho law or, indeed, under the law of any state in this nation. These are issues that should never have been litigated. Accordingly, under the EAJA and Idaho law, as the prevailing party, Joyce Livestock is entitled to reimbursement of attorneys fees incurred as a result of the United States’ insistence upon pursuing theories and arguments that have no legal or factual basis.¹

II. ARGUMENT

A. The United States’ Litigation Position Is Today and Always Has Been Contrary to Established Law.

The EAJA mandates an award of attorneys fees to a prevailing party meeting basic eligibility requirements under the EAJA when the United States is unable to demonstrate that its position had a substantial justification in law or in fact. EAJA, 28 U.S.C. § 2412(d). In its brief, the United States does not dispute that Joyce Livestock meets the basic eligibility requirements under the EAJA, nor does it dispute the fact that, as the District Court’s Memorandum Decision

¹ The legal and factual issues in this case have been briefed, at great length, in the within appeal and in related Supreme Court Nos. 32278 and 32279. In the interest of economy, in addition to the arguments raised herein and in Joyce Livestock’s Opening Brief in No. 32846, Joyce Livestock refers the Court to, and incorporates herein by reference, Joyce Livestock’s Opening Brief in No. 32278, Joyce Livestock’s Responsive Brief as Respondent in No. 32279, and Joyce Livestock’s Reply Brief in No. 32278. The three appeals, currently pending before this Court, are scheduled to be argued together before the Court on November 8, 2006.

stands, Joyce Livestock is the prevailing party in this litigation.² Instead, the United States argues that it was justified in taking the position that Joyce Livestock's claims should be denied because "[t]he United States of America, through the Bureau of Land Management, is the owner of the land upon which use is claimed." Appendix 1: Domestic and Stock Water Right Objection, Subcase 55-10135, p.2. The United States also believes that it was justified in arguing that it satisfied the requirements for a beneficial use water right even though the United States has taken no action to beneficially use (either *in situ* or by diversion to another place of use) the stockwater at issue. The United States' theories of stockwater right ownership result in riparian system for the administration of water rights on federal land, which is decidedly not the law in the state of Idaho. The United States' theories also contradict all established federal precedent recognizing the rights of private parties to appropriate and own water rights on federal land. As briefed previously and herein, these arguments have no substantial basis in either law or in fact, and, accordingly, Joyce Livestock is entitled to its reasonable attorneys fees incurred as a result of having defend itself against the United States' baseless arguments.

Individually and collectively, the United States arguments have no basis in the law, nor has the United States presented any reasonable basis on which to argue for a material change in the law. The United States has made and continues to make arguments that a water claimant

² The District Court in its Memorandum Decision and Order on Challenge denied the United States' beneficial use claims in their entirety and awarded Joyce Livestock its claimed water rights with a 1935 priority date. That ruling, as it stands today, leaves Joyce Livestock as the sole and therefore senior water right holder and, subject to this Court's review, the prevailing party in this litigation.

must have a possessory interest in the place of use in order to have a water right and that there must be “unity of title” between the land designated as a place of use and the water right. United States Responsive Brief in No. 32846, p. 24; United States’ Responsive Brief in Opposition to Joyce Livestock’s Challenge, p. 17 (March 31, 2005); Appendix 1: Domestic and Stock Water Right Objection, Subcase 55-10135. Moreover, in its briefs on the merits, the United States advocates for a reversal of the water rights decreed to Joyce Livestock because, under the United States’ version of the law, private parties cannot have a property interest in federal land and the United States considers ownership of water rights on federal land to be such a prohibited property interest. United States’ Answering Brief as Respondent in No. 32278, p. 4-5, 20. However, the United States’ argument that private parties cannot own a property interest in water located on federal land flies in the face of U.S. Congressional direction on this issue and is contrary to over 100 years of court precedent. As previously briefed at length, federal law specifically recognizes the right of private parties to own water rights even when those water rights are located, as the United States identified it in its Objection, on “BLM land.” 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). Moreover, the practical result of the United States’ argument would be that only the riparian “owner”, in this case the United States, can own water rights on federal land. This is contrary to the law in Idaho and decisions of this Court which have held that “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.” See *Hutchinson v. Watson Slough Ditch Co.* 101 P. 1059, 1062 (1909).

The United States also has argued throughout this litigation and continues to argue today that the use of water in common defeats a beneficial use water right claim under Idaho law. Brief of the United States as Respondent, p. 23-24; United States’ Responsive Brief in Opposition to Joyce Livestock’s Challenge, p. 26-27, 31-32 (March 31, 2005). The United States argues that in order to have a water right under the laws of Idaho, the claimant must demonstrate that it had exclusive use of the water source. Again, this is not the law in the state of Idaho and it never has been. The state of Idaho is a prior appropriation state, and the definition of the prior appropriation doctrine assumes from the start that there can and will be multiple appropriators on a single source and that water rights acquired by those appropriators will be administered with priority given to the first or senior appropriator. Idaho Const. art. XV, § 3; *Village of Peck v. Denison*, 92 Idaho 747, 749-750 (Idaho 1969); *Crow v. Carlson*, 690 P.2d 916 (1984) (water rights in Idaho are administered “first in time, first in right”).

The United States also argues that the overt act of watering livestock from the source by Joyce Livestock does not evidence an intent to beneficially use the water and appropriate a water right, but somehow the United States’ management of surrounding land does. The United States’ arguments ignore settled law recognizing that the overt act of watering livestock from the stockwater source evidences intent to appropriate a water right and accomplishes the act of

appropriation of a water right under the beneficial use method of appropriation. *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072, 1074 (1919); *Cantlin v. Carter*, 88 Idaho 179, 186 (1964); I.C. § 42-113(2); *Stevenson v. Steele*, 93 Idaho 4, 11 (1969); *Hunter v. United States*, 388 F.3d 148, 153 (9th Cir. 1967); *Steptoe Livestock Co. v. Gulley*, 295 P. 772 (Nev. 1931); *Hage v. United States*, 51 Fed. Cl. 570 (2002). In contrast, the United States has failed to point to a single act of the United States placing the water to beneficial use *in situ* or otherwise, and has failed to cite to a single case holding that management of land equates to a beneficial use of water.³

Joyce Livestock has met each and every requirement under the EAJA entitling it to attorneys fees. Joyce Livestock's Opening Brief in No. 32846, p. 9-23. This includes a demonstration that it is eligible under the statute as the prevailing party at every stage in litigation. The final hurdle is actually a burden that must be met by the United States and that is a demonstration that the United States' arguments in litigation were substantially justified. *Garcia v. Bowen*, 702 F. Supp. 409, 410 (S.D.N.Y. 1988). This is a burden the United States has not met and still cannot meet. It is a basic premise of the United States' position that Joyce Livestock cannot own water rights because "the United States of America, through the Bureau of

³ It is ironic that with respect to Joyce Livestock's claims, the United States argues the private claims fail because "[a] valid appropriation of a water right ... requires intent, diversion, and application of water to beneficial use. Where an appropriator does not apply for a permit, intent *must (be) manifested by some physical act.*" United States' Answering Brief as Respondent in No. 32278 (*emphasis added*). But with respect to its *own* beneficial use water right claims, the United States fails to satisfy this definition of intent to appropriate and specifically fails to identify even a single instance of a "physical act" by the United States placing the claimed water to a beneficial use.

Land Management, is the owner of the land upon which use is claimed.” This is evident in all of the United States’ arguments, from the filing of its initial objections through the appeals at issue today. It’s theory that private parties cannot own water rights on federal land, and that only the United States as the “owner” of that land can own water rights, finds no support in the law. Moreover, as discussed at length in Joyce Livestock’s Opening Brief in No. 32846, the United States *knew* and knows that these arguments have no basis in law but decided to pursue the theories anyway.⁴ Under such circumstances, and pursuant to the mandatory provisions of the EAJA and Idaho law, Joyce Livestock has earned its right to an award of attorneys fees in this case.

B. The Fact that The District Court Awarded a Different Priority Date Than That Claimed by Joyce Livestock Does Not Serve to Defeat Joyce Livestock’s Attorneys Fees Claim.

Presumably to rebut the District Court’s conclusion that Joyce Livestock was the prevailing party in this case, or that the United States’ was substantially justified in objecting to Joyce Livestock’s claims, the United States argues that the fact that the District Court awarded a different priority date to Joyce Livestock than that originally claimed is a basis on which to deny Joyce Livestock’s attorneys fees claims. The United States also argues that because the Idaho

⁴ Joyce Livestock’s Opening Brief, p. 1-2, citing *In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Missouri River Basin Drainage Area*, Case No. 40E-A Opinion, p.19. The United States’ Assistant Attorney General, Department of Justice, advised his client the United States that, “the mere assignment of land management functions to a federal agency, without more, does *not* create any federal rights to unappropriated water necessary to carry out those functions.”

Department of Water Resources (“IDWR”) originally recommended the United States’ claimed rights, the United States’ claims were justified. However, neither of these arguments serve to rehabilitate the United States’ baseless position in this litigation.

A party need not prevail on all issues to be a prevailing party under the EAJA and will qualify as a prevailing party under the EAJA when the relief granted modifies the other party’s behavior in a way that directly benefits the party seeking relief. *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1481 (9th Cir. 1983); *F.J. Vollmer Co. V. Magaw*, 102 F.3d 591, 594 (D.C. Cir. 1996). In this case, the relief granted to Joyce Livestock places it as the sole and senior water right holder, materially altering the relationship and priorities as between Joyce Livestock and the United States with respect to the waters of Jordan Creek. The fact that the District Court awarded Joyce Livestock a priority date later than that claimed by Joyce Livestock does not alter Joyce Livestock’s prevailing party status, nor does it justify the United States’ pursuit of other arguments, detailed above, that have no basis in the law.

Similarly, the fact that the United States’ claims were recommended by the IDWR also does not serve to justify the United States’ position in this litigation. First, if the United States is going to rely on the IDWR recommendations in support of its claims and believes that the IDWR is so infallible, then the United States must also recognize and give credence to the decision by the IDWR to recommend Joyce Livestock’s claimed private water rights with a priority date of April 1, 1865. The mere fact that the IDWR recommended the United States’ claims does not

bolster the United States' claims.

The fact that private parties entered into settlement agreements similarly does not mean that the United States' position in the instant litigation was justified. As briefed previously, the fact that other parties entered into settlement agreements merely evidences the fact that the other parties, when faced with the option of litigating against the United States, chose not to engage in protracted, expensive litigation against the United States. The deterrent effect of the prospect of litigating against the United States is well recognized and actually led to the enactment of the EAJA. The EAJA was enacted for the purpose of encouraging people to defend their rights as against the United States as opposed to giving up at the outset because of the expense of litigating against the United States. H.R. Rep. No. 96 - 148, at 14 (1980) ("Congress originally enacted the EAJA in response to its concern that persons might be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights.")

Whether Joyce Livestock is entitled to its attorneys fees is not to be determined by whether similar cases arising out of the SRBA have been appealed, or from the fact that the IDWR originally recommended the United States' claims, and it certainly is not a determination that can be made based on the fact that when faced with litigation against the United States other private parties opted to settle out of the litigation. Under the EAJA, the only proper inquiry is whether the United States' objections to Joyce Livestock's claims and pursuit of its own beneficial use claims based on its management of the rangeland, were substantially justified

under the law. Because the United States' arguments have no justification in the law or facts of this case, an award of attorneys fees is both just and mandated by the EAJA.

C. The United States *Has* Waived Sovereign Immunity for an Award of Attorneys' Fees under the Equal Access to Justice Act.

1. The Plain Terms Of The EAJA Provide A Clear, Unambiguous, Unequivocal Waiver Of Sovereign Immunity.

Just as a court should not extend a waiver of sovereign immunity beyond that which Congress intended, neither should a court assume the authority to narrow the waiver that Congress intended. *United States v. Idaho ex re. Director, Idaho Dep't of Water Resources*, 508 U.S. 1, 7 (1993). The United States has asked this Court do just that.

Through the EAJA, the 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. There cannot be a more clear and unambiguous waiver than enacting a federal statute into law, the sole purpose of which is to mandate an award of attorneys' fees against the United States in cases brought or pursued by the United States without substantial justification. When the EAJA was enacted the McCarran Amendment was already in effect, thus state courts already had jurisdiction over the United States in cases involving the adjudication of water rights. *See* McCarran Amendment (July 10, 1952), C. 651, Title II, Sec. 208(a)-(c), 66 stnt. 560. Furthermore, the United States has expressly consented to the jurisdiction of Idaho state courts in this water adjudication and has expressly waived sovereign

immunity for an award of attorneys' fees under the terms of the EAJA. Accordingly, this SRBA Court has jurisdiction over this case and, under the plain language of the EAJA, has jurisdiction and authority to award attorneys' fees against the United States.

Courts addressing the waiver of sovereign immunity are, with good reason, alert to require a specific waiver before the United States may be held liable for monetary exactions. In this case the plain terms of the EAJA provide just such a waiver of sovereign immunity:

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, is whether this case qualifies as "any civil action" pending in "any court having jurisdiction of that action." As demonstrated in the following section, this is a civil action over which this Court has jurisdiction.

The United States' lead argument in its Opposition Brief that the McCarran Amendment does not include a waiver of sovereign immunity or authorize an award of attorneys' fees against the United States is not the relevant inquiry. *See* United States' Brief, Part II, Section A, pp. 8-10. Joyce Livestock does not rely on the McCarran Amendment in support of its appeal. As discussed below, the McCarran Amendment only addresses this Court's jurisdiction over the United States for purposes of the state water rights adjudication, not the attorneys' fee issue. As

set forth herein, the EAJA provides clear statutory authority for a waiver of sovereign immunity and an award of attorneys' fees in this case.

2. This Court Has Jurisdiction Over The United States To Award Attorneys' Fees And Expenses Under The EAJA

The EAJA provides that parties have a right to attorneys' fees in any court having jurisdiction over the matter. Under the provisions of the McCarran Amendment in effect at the time the EAJA was enacted, the SRBA has jurisdiction over this case. The McCarran Amendment states, in relevant part, that:

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 . . .

43 U.S.C. § 666 (emphasis added); *see also United States v. Idaho, supra*, 508 U.S. at 1 (recognizing the SRBA Court's jurisdiction over the United States pursuant to the McCarran Amendment).

It is a basic tenet 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. *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) ("The starting point for [the] interpretation of a

statute is always its language, and courts must presume that a legislature says in a statute and means in a statute what it says there.") (internal citations omitted). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed."⁵

Ardestani v. INS, 502 U.S. 129, 135-136 (1991) (internal citations omitted).

In this case, the plain words and clear meaning of the EAJA are self evident: "*any* court having jurisdiction of that action" has the authority to award attorneys' fees to a private litigant under the EAJA. 28 U.S.C. § 2412(d)(1)(A). If the Congress wanted to limit the authority to Article III Courts it could have done so, but it did not. If the United States Congress wanted to exclude state courts specifically from this provision of the EAJA it could have, but it did not. What the Congress did do was to draft legislation specifically waiving the United States' sovereign immunity and subjecting it to liability for attorneys fees in *any* civil action in *any* court having jurisdiction over the matter.

The United States' position that the District Court of the Fifth Judicial District of the State of Idaho does not fall within the definition of "a court" is flat wrong. It not only contradicts the plain meaning of the words in the EAJA, it also contradicts the established case law whereby appellate courts have held that "any court" within the meaning of the EAJA is not

⁵ The United States has not provided this Court with any "rare and exceptional circumstances," much less any legislative history which expresses a contrary legislative intent that is sufficient to rebut the plain meaning of either the McCarran Amendment or the EAJA. *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991).

limited to federal or Article III courts; the United States' argument also runs afoul of state court decisions which have actually awarded attorneys' fees to a private litigant under the EAJA.

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

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

Id. (emphasis added).

In *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247 (Fed.Cir. 1985), the Federal Circuit held that the Claims Court had jurisdiction to award fees and expenses under the EAJA even though the Claims Court did not fall within the definition of "courts of the United States." Similar to the United States in the present case, the United States in *Essex* argued that only a court of the United States, or a constitutional or Article III court, has jurisdiction to award

attorneys' fees and expenses under the EAJA. *Essex*, 757 F.2d at 250-251; *see also* United States' Brief, pp. 11-14. The Court in *Essex* rejected the United States' analysis and held that application of 28 U.S.C. § 2412(d) is not limited to constitutional courts of the United States. *Essex*, 757 F.2d at 252. It also rejected the holding in the case *Bowen v. Commissioner of IRS*, 706 F.2d 1087 (11th Cir. 1983) (holding, incorrectly, that the EAJA authorizes an award of attorneys' fees only by an Article III court).

The specific mention of the Court of Claims in the EAJA and in the legislative history of the same also should be put into context. The United States relies heavily on the fact that there are specific provisions in the EAJA specifying that the U.S. Court of Veterans Appeals and the U.S. Court of Federal claims are included in the definition of courts. *See* United States' Brief, pp. 13-14. The reason for the clarifying position in the statute should be put in historic context. The language was inserted at a time when the courts, and specifically the Claims Court, were in a state of transition. When the Federal Courts Improvement Act of 1982 became effective on October 1, 1982, it designated a new Claims Court to be the forum for the resolution of cases then pending in the Court of Claims. Through these transitions, it was important to ensure that litigants would not be divested of the opportunity to pursue an award of fees and costs because of the transfer provisions relating to the creation of the Claims Court. *Ellis v. United States*, 711 F.2d 1571, 1573-1575 (Fed.Cir. 1983). Specific mention, then, of the Claims Court or the Tax Court⁶ does not undermine or contradict the plain language of the statutory provision at issue:

⁶ *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248.

"any court having jurisdiction of that action" has the authority to award attorneys fees to a private litigant under the EAJA. 28 U.S.C. 2412(d)(1)(A); *see also Essex, supra*, 757 F.2d at p. 251-253.

Likewise, the mention of the Veteran's Court was in response to a specific case that had held the Veteran's Court could not award attorneys fees under the EAJA. *Jones v. Derwinski*, 2 Vet. 231 (1992). This decision was specifically disavowed in the Federal Courts Improvement Act of 1992, as recognized in *Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992). In contrast to the courts specifically mentioned in amendments to the EAJA, the state courts already had jurisdiction over the United States pursuant to the McCarran Amendment at the time the EAJA was initially enacted. There was, therefore, no need to clarify that those courts were "courts having jurisdiction of that action" under the EAJA.

Moreover, it should be noted with respect to amendments to the EAJA that any time a question has been raised as to whether a newly created court is within the purview of the EAJA, Congress has enacted amendments to show that the EAJA does apply. Such an amendment was not necessary with respect to Idaho state courts. This Court can take judicial notice of the fact that Idaho state courts were in existence long before the enactment of the EAJA.

Not only have federal courts recognized that when Congress stated that "any court having jurisdiction of the action" truly means "any court" for purposes of application of the EAJA, in practice, state courts also have recognized their jurisdiction to award attorneys' fees to a private litigant under the EAJA. An example of this is found in a case brought by the Federal

Deposit Insurance Corporation in state court in Ohio in connection with several negotiable notes. In an unpublished opinion, *Federal Deposit Insurance Corp. v. Chaney*, 1986 WL 1283 (Ohio App. 8 Dist. 1996), the Court of Appeals of Ohio reversed the lower court's opinion awarding over \$34,000 in attorneys fees under 28 U.S.C. § 2412(d), because the Ohio Court of Appeals had reversed the judgment for Mr. Chaney on the merits. The lower court, however, found the government's position to be substantially unjustified and had awarded Mr. Chaney his attorneys fees. The Ohio Court of Appeals never questioned whether it had jurisdiction, nor apparently did the United States raise the issue (Applicants shall lodge a copy of this opinion with the court upon request to do so).

The United States argues that the absence of a congressional cost estimate for payment of attorneys' fees resulting from EAJA proceedings in state courts suggests that "Congress never intended EAJA to apply to such proceedings." United States' Brief, p. 12. Assuming, *arguendo*, that the text of the EAJA does not adequately express congressional intent, the United States has not offered any legislative history which clearly expresses a contrary legislative intent that is sufficient to rebut the plain meaning of the EAJA. *Ardestani, supra*, 502 U.S. at 135-136. First, the fact that the government does not budget for an expense does not mean that there is no liability for the expense; it only suggests poor planning. Second, there could be many reasons for the omission of this particular cost estimate, and the explanation offered by the United States should be construed as a post-hoc litigation position and not any indication of what Congress intended.

The United States also argues that, because the potential cost to the public for attorneys' fee awards resulting from EAJA proceedings in state courts would be "considerable," the omission of such costs from the budget for the EAJA "reinforces the inference that Congress never intended the EAJA to apply to such proceedings." United States' Brief, p. 12. Again this is a post-hoc litigation rationale, with no support in the legislative history or case law. The costs will only be "considerable" if the United States continues to pursue arguments that have no basis in the law. In this case, against the advice of its own counsel the United States pursued arguments that by its own admission have no basis in the law.⁷

3. There Is No Merit To The United States' Argument That The McCarran Amendment Precludes This Court From Awarding Attorneys' Fees Under The EAJA.

The United States argues that the EAJA does not waive sovereign immunity to claims for attorneys' fees in this case for the following reasons: (1) the United States appears in this proceeding pursuant to the McCarran Amendment; (2) the costs otherwise available under the EAJA are disallowed if another statute prohibits a cost award; (3) the McCarran Amendment disallows costs; (4) attorneys' fees are only allowed "in addition to costs" under the EAJA; and (5) since costs are not available under the EAJA in this case, then attorneys' fees may not be awarded. United States' Brief, pp. 10-11. These arguments are incorrect, lack any support in

⁷ Joyce Livestock's Opening Brief, p. 1-2, citing *In Re Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Underground, Within the Missouri River Basin Drainage Area*, Case No. 40E-A Opinion, p.19.

case law, and result from a strained construction of the McCarran Amendment and the EAJA.

The McCarran Amendment does not work to deny Joyce Livestock's claim for attorneys' fees under the EAJA. By its own terms, the McCarran Amendment restricts the ability of parties to recover costs incurred in litigation, but it is entirely silent with respect to attorneys' fees. The McCarran Amendment states plainly that:

Consent is given to join the United States as defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other sources, 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.

43 U.S.C. § 666 (2002) (emphasis added). Joyce Livestock does not seek costs in this proceeding, thus the United States' reliance on the McCarran Amendment is misplaced.

The distinction between attorneys' fees and costs is significant. In other legislation enacted by Congress, the legislature has been careful to specify whether costs, attorneys' fees, or both costs and attorneys' fees are at issue. Further, the United States Code specifically defines "costs" in other sections and those definitions carefully differentiate between "costs" and "attorneys' fees." *See* 28 U.S.C. § 2412(a)(1) (judgment for costs, as enumerated in § 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).

Only one of the cases cited in support of the United States' McCarran Amendment argument specifically addresses the McCarran Amendment. The inapplicable cases include

United States v. Chemical Foundation, 272 U.S. 1 (1926), which addresses the "Trading with the Enemy Act," *The Antelope*, 25 U.S. (12 Wheat.) 546 (1827), involving the identification of African slaves delivered to Spanish claimants and, specifically, the "expense of keeping, maintaining, etc. of the Africans by the (government) marshals," and *United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992), which interprets the Clean Water Act.

The only case cited by the United States that purports to be relevant because it interprets the McCarran Amendment is *United States v. Idaho*, 508 U.S. 1 (1993). That case does not support the United States' argument. The fees and cost-shifting analysis involving the McCarran Amendment in *United States v. Idaho* has nothing to do with attorneys' fees or whether attorneys' fees fall within the definition of costs. Rather, at issue in *United States v. Idaho* is the payment of pre-adjudication filing fees which would clearly fall within the definition of "costs" under 28 U.S.C. § 1920. *Id.*; 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).

The plain language of the McCarran Amendment provides that there will be no judgment for costs entered against the United States in water right adjudications. The statute is purposefully silent on the issue of attorneys' fees, and this Court should not write such language into the statute. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312, 316 (9th Cir. 1988) ("We (the courts) do not rewrite the language . . . an interpreting body may not invent a completely new meaning for a statutory term."); *see also United States v. Missouri Pac.R. Co.*, 278 U.S. 269,

278 (1929) (where the language of an enactment is clear, the words employed are to be taken as the final expression of the meaning intended).

Conspicuously absent from the United States' brief is any authority in support of its argument that: "... attorneys' fees are only awarded [under the EAJA] 'in addition' to any costs awarded." United States' Brief, pp. 10-11. Joyce Livestock is not aware of any cases where a court has reached this conclusion in the context of an adjudication of water rights involving the federal government, or under any other circumstances which are applicable here. As demonstrated above, "costs" and "attorneys' fees" are analytically different in significant respects, and they have been treated as such by Congress and the courts; this Court should do the same.

III. CONCLUSION

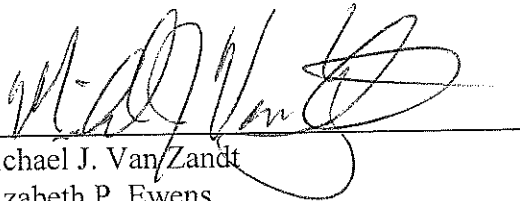
This litigation began over nine years ago because of the United States position that Joyce Livestock, as a private party, could not own water rights because "the United States ... is the owner of the land upon which use is claimed." The United States' own claims and all arguments raised by the United States in opposition to Joyce Livestock's claim arise from the United States' basic premise that only the United States, and not private parties, are entitled to hold water rights located on federal land "owned" by the United States. The United States' position is now and always has been contrary to all applicable federal and state law. Accordingly, under both the mandatory provisions of the EAJA and Idaho law, Joyce Livestock is entitled to its claimed attorneys fees incurred in defending its rights against the United States. Accordingly, Joyce

Livestock respectfully requests that the Court reverse the District Court's Memorandum Decision and Order Re: Attorneys Fees and award Joyce Livestock its reasonable attorneys fees incurred in this case, including this appeal.

Dated: October 19, 2006

Respectfully submitted:

McQUAID BEDFORD & VAN ZANDT, LLP

A handwritten signature in black ink, appearing to read "M. J. VanZandt", is written over a horizontal line.

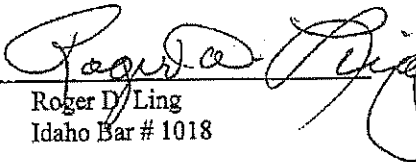
Michael J. VanZandt

Elizabeth P. Ewens

Attorneys for Joyce Livestock

Dated: October 19, 2006

LING, ROBINSON & WALKER

By: 
Roger D. Ling
Idaho Bar # 1018

Attorneys for Joyce Livestock

APPELLANT'S REPLY BRIEF

CERTIFICATE OF SERVICE

I certify that on October 19, 2006, I served a true and correct copy of foregoing **APPELLANT JOYCE LIVESTOCK'S REPLY BRIEF** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

1. Original and ten copies to (via UPS overnight mail):
Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83702
2. Two copies each to:

Via UPS Overnight

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
PHB Mail Room 2121
601 D Street NW
Washington, D.C. 20004

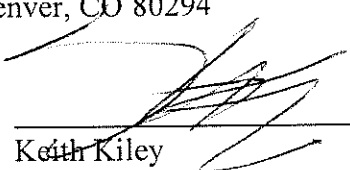
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Environmental and Natural Resource Div.
1961 Stout Street - 8th Floor
Denver, CO 80294



Keith Kiley

APPENDIX 1

12/15/97

RECEIVED

DEC 10 1997

Department of Water Resources
Adjudication Bureau

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

In Re SRBA

A. Subcase 55-10135

(Insert water right number)

Case No. 39576

DOMESTIC AND
STOCK WATER RIGHT
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: United States of America acting through the Department of Interior,
Bureau of Land Management, Idaho State Office

Address: 1387 South Vinnell Way
Boise, Idaho 83709-1657

Daytime Phone: see below

Name & Address of Attorney, if any:

R. Lee Leininger, 202 305-0242

Paul F. Holleman, 202 305-0494 and

William M. Ferry, 202 334-1911

United States Department of Justice

Environment and Natural Resource Division

General Litigation Section

550 West Fort Street, MSC 033

Boise, Idaho 83724

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Joyce Livestock Co.

Address: Murphy, Idaho 83650

Name: C/O Paul Nettleton

Address:

Name: Address:

Name: Address:

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ Name and Address
Should be: _____
2. ☐ Source
Should be: _____
3. ☐ Quantity
Should be: _____
4. ☒ Priority Date
Should be: See attached
5. ☒ Point(s) of Diversion
Should be: See attached
6. ☐ Instream Flow Description
Should be: _____
7. ☐ Purpose(s) of Use
Should be: _____
8. ☐ Period of Year
Should be: _____
9. ☒ Place of Use
Should be: See attached

11. I object because:

- ☐ This water right should not exist.
- ☐ This water right was not recommended, but should be recommended with the elements described above.

E. 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.

F.

VERIFICATION (Must be Completed)

State of Idaho)

)ss.

County of Ada)

Gary Madenford for

Jay Carlson, BLM Area Manager, duly sworn, upon oath, deposes and says:

(Name of person filing objection)

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

Gary A. Madenford
(Signature of person filing objection)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on: 12-4-97

Janet L. H. H. H.
Notary Public for Idaho
Residing at: Boise
My Commission Expires: 4-7-1999

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. FAX filings will not be accepted. You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on Dec 5, 1997, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

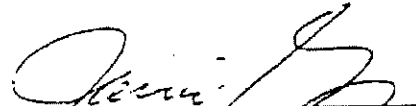
Name: <u>Joyce Livestock Co.</u>	Address: <u>Murphy, Idaho 83650</u>
Name: <u>C/O Paul Nettleton</u>	Address:
Name:	Address:
Name:	Address:

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Signature of Objector or attorney
mailing on Objector's behalf

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

DATE: JUL-30-1997
PAGE: A-364

RIGHTS FROM: SOURCE: JORDAN CREEK TRIBUTARY: Owyhee River

RIGHT NUMBER: 55-10135

NAME & ADDRESS: JOYCE LIVESTOCK CO
C/O PAUL NETTLETON
MURPHY ID 83650

SOURCE: JORDAN CREEK TRIBUTARY: Owyhee River

QUANTITY: 0.02 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000
GALLONS PER DAY.

PRIORITY DATE: 04/01/1865

POINT OF DIVERSION: T05S R03W S19 *BLM Land*
T04S R03W S31 SEWSW (INSTREAM BEGINNING POINT) Within Owyhee County
SWWNW (INSTREAM ENDING POINT)

PURPOSE AND

PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	STOCKWATER	01-01 12-31	0.02 CFS

PLACE OF USE:	STOCKWATER	Within Owyhee County	<i>BLM Land</i>		
T04S R03W S31	<u>SWWNW</u>	<u>SEWSW</u>	SENW	<u>NESW</u>	
	<u>NWSE</u>	<u>SWSE</u>			
T05S R03W S06	<u>NWNE</u>	<u>SWNE</u>	SENE	<u>NESE</u>	
	<u>SESE</u>				
S07	<u>SENE</u>	<u>SENE</u>	NESE		
S08	<u>NWSW</u>	<u>SWSW</u>			
S17	<u>SWWNW</u>	<u>SWNW</u>	NWSW	<u>SWSW</u>	
S18	<u>SESE</u>				
S19	<u>NENE</u>	<u>NWNE</u>	<u>SWNE</u>	<u>SENW</u>	
	<u>NESW</u>	<u>NWSW</u>			

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A
DETERMINATION OF HISTORICAL BENEFICIAL USE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - BENEFICIAL USE

BLM ALLOTMENT 0570

BLM ALLOTMENT 0569

STOCKWATER 1000 RANGE CATTLE

This claim does not plot in 0570.