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DEPARTMENT OF
WATER RESOURCES

10 **IN THE SUPREME COURT OF THE STATE OF IDAHO**
11

12 IN RE: SNAKE RIVER BASIN
13 ADJUDICATION CASE NO. 39576

Supreme Court No. 31994

14 _____
15 LU RANCHING CO.,

LU RANCHING CO.'s BRIEF IN SUPPORT
OF PETITION FOR REHEARING

16 Appellant,

17 v.

18 UNITED STATES OF AMERICA,

19 Respondent.
20 _____

21 **I. INTRODUCTION AND ISSUES ON REHEARING**

22 LU Ranching Co. (hereinafter "Petitioner") hereby enters this brief in support of its Petition
23 for Rehearing pursuant to Idaho Appellate Rule 42(b). Pursuant to that rule, petitioners for
24 rehearing may file a brief in support of the petition itself, discussing why this Court should rehear
25 the matter or particular issues in the matter. *See* I.A.R. 42(b).^{1/} In this brief, Petitioner will present
26 to this Court the reasons why it should reconsider its ruling in the LU Ranching case with respect to

27 _____
28 ^{1/} If this Court grants this Petition for Rehearing, Petitioner will file a second
brief analyzing the substantive legal issues before the Court on rehearing. *See* I.A.R. 42(d).

1 the following issues:

- 2 1. Whether the Court's ruling that state courts lack the authority to award
3 attorneys' fees against the United States under the Equal Access to Justice
4 Act, 28 U.S.C. § 2412 ("EAJA") is contrary to law;
- 5 2. Whether it was proper to disallow attorneys' fees under I.C. § 12-121 when
6 the only "legitimate issue" identified by the Court was never raised by the
7 United States in its appeal;

8 9 II. ARGUMENT

10 A. This Court Should Reconsider Its Ruling that State Courts Lack the 11 Authority to Award Attorneys' Fees Against the United States Under the Equal Access to Justice Act.

12 In its February 9, 2007, ruling in the LU Ranching matter, this Court held that the
13 Equal Access to Justice Act, 28 U.S.C. § 2412, *et seq.* ("EAJA"), does not authorize state
14 courts to award attorney fees against the United States. This Court should reconsider its
15 ruling on this issue because the plain language of the EAJA, case law interpreting the EAJA
16 and other federal statutes, and legislative history of the EAJA support an opposite ruling.
17 Further, if left to stand, this ruling will have a chilling effect on the rights of ordinary
18 citizens to challenge unreasonable government action.

19 1. The Plain Language of the EAJA Provides That State Courts 20 May Authorize An Award of Attorneys' Fees Against The United States.

21 First and foremost, the plain language of the EAJA does not exclude state courts
22 from the statute's provisions, or restrict EAJA authority to award attorneys' fees solely to
23 federal courts. The statute provides that "any court having jurisdiction" over any civil action
24 brought by or against the United States, may award attorney fees to a prevailing party other
25 than the United States, if the position of the United States was not substantially justified. 28
26 U.S.C. 2412(d)(1)(A) (emphasis added). The text of the EAJA attorneys' fees provision
27 provides:
28

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

5 28 U.S.C. 2412(d)(1)(A)(emphasis added). The district court in this matter had jurisdiction over the
6 United States pursuant to the McCarran Amendment, 43 U.S.C. § 666. And the district court in this
7 matter constituted "any court," within the language of the EAJA because, when Congress enacted
8 the EAJA in 1980, state courts existed and the McCarran Amendment was in place. See Pub. L.
9 No. 96-481, 94 Stat. 2325 (1980) (codified at 28 U.S.C. § 2412 and 5 U.S.C. § 504) (EAJA enacted
10 in 1980); McCarran Amendment (July 10, 1952), C. 651, Title II, Sec 208(a)-(c), 66 stnt. 560
11 (McCarran Amendment enacted in 1952). Thus, the United States had already consented to the
12 jurisdiction of state courts in cases involving the adjudication of water rights. And as is also
13 provided by the terms of the EAJA, the district court in this matter should award attorneys fees to
14 Petitioners as prevailing parties that have satisfied the EAJA's statutory requirements.

15 Throughout the history of American jurisprudence, courts have interpreted statutory
16 provisions according to their plain meanings. See e.g. *United States v. Missouri Pacific R. Co.*, 278
17 U.S. 269, 278 (1929). Because the text of the EAJA states without limitation that "any court" with
18 jurisdiction may award attorney fees against the United States, this Court should reconsider its
19 ruling that the EAJA does not authorize state courts to award attorney fees against the United States.

20 Other provisions of the EAJA discussing the term "court" in the context of the statute do not
21 detract from the plain meaning of the EAJA attorneys' fee provision. A later provision of the EAJA
22 explains, "'court' includes the United States Court of Federal Claims and the United States Court of
23 Appeals for Veterans Claims." 28 U.S.C. § 2412(d)(2)(F). In its ruling, this Court opined with
24 regards to the "court" provision, "[h]ad the Congress intended the word 'court' also include state
25 courts, it undoubtedly would have expressly included them." See *Joyce Livestock Company v.*
26 *United States of America*, Idaho Supreme Court 2007 Opinion No. 23 (February 9, 2007), page 22.

27 However, the EAJA court provision is not labeled as a definition of the term "court," and
28 certainly should not be construed as a definition. The EAJA court provision uses the term

1 “includes” to list unique types of courts that the statute applies to. *See Ellis v. United States*, 771
2 F.2d 1571, 1573-75 (Fed. Cir. 1983) and *Jones v. Derwinski*, 2 Vet. 231 (1992) (each explaining
3 that addition of U.S. Court of Veterans Appeals and U.S. Court of Federal Claims added to clarify
4 EAJA when Federal Courts Improvement Acts placed these courts in state of transition). In other
5 provisions in the section that are meant to act as definitions, the EAJA uses the term “means” to
6 define the statutory term. *See* 28 U.S.C. § 2412(d)(2)(B) (defining “party”); 28 U.S.C. §
7 2412(d)(2)(D) (defining “position of the United States”); 28 U.S.C. § 2412(d)(2)(G) (defining “final
8 judgment”); 28 U.S.C. § 2412(d)(2)(H) (defining “prevailing party”); 28 U.S.C. § 2412(d)(2)(I)
9 (defining “demand”).

10 Because the provision is not a definition, it is not meant to provide for all possible types of
11 courts that do, or do not, fall within the parameters of the statute. If it were, Congress would have
12 likely used the term “means,” as it did in other EAJA provisions, and specifically listed all of the
13 types of courts that the term “court” is meant to apply to. The EAJA provision this Court relied
14 upon in its prior decision should be regarded as an explanatory provision of the statute, meant to
15 describe courts other than traditional state and federal courts that may award EAJA attorneys’ fees.
16 Because the provision is explanatory in nature, Congress’ omission of state courts from the section
17 has no bearing on whether Congress meant for state courts to award EAJA attorneys’ fees.

18 As this Court emphasized in its prior opinion, “waivers of federal sovereign immunity must
19 be ‘unequivocally expressed’ in the statutory text.” *See Joyce Livestock Company v. United States*
20 *of America*, Idaho Supreme Court 2007 Opinion No. 23 (February 9, 2007), page 21 (citing *United*
21 *States v. Idaho Dept. of Water Resources*, 508 U.S. 1, 6 (1993)). The waiver of sovereign immunity
22 in the EAJA is unequivocally expressed in the text of the EAJA. To determine whether Congress
23 intended for state courts to award EAJA attorneys’ fees, this Court should look to the plain language
24 of the statute, which provides that “any court” with jurisdiction over the matter may issue EAJA
25 attorneys fees. *See Missouri Pacific R. Co.*, 278 U.S. at 278 (where language of statute is clear,
26 words employed by legislature are to be taken as the final expression of the meaning intended).
27 Because the plain language of the EAJA is clear, this Court should reconsider its ruling that the
28 EAJA does not authorize state courts to award attorneys’ fees against the United States.

1 2. **Case Law Supports That State Courts May Authorize An Award of**
2 **Attorneys' Fees Against The United States.**

3 This Court should also reconsider its ruling that the EAJA does not authorize state courts to
4 award attorneys' fees against the United States because case law supports a ruling to the contrary.
5 First, the case law this Court cited in favor of its ruling on the EAJA attorneys' fee issue itself cites
6 authority providing that the statutory phrase "any court of competent jurisdiction" "has long been
7 construed in the federal statutes as including both state and federal courts." *See Kennecott Copper*
8 *Corp. v. State Tax Comm'n*, 327 U.S. 573, 578 (1946)(citing *Shoshone Mining Co. v. Rutter*, 177
9 U.S. 505, 506 (1900)). Consistent with this United States Supreme Court authority, Petitioners
10 cited federal and state case law providing that the "any court" phrase in the EAJA applies to both
11 state and federal courts. *See e.g. O'Connor v. United States Dept. of Energy*, 942 F.2d 771, 773-74
12 (10th Cir. 1991) (EAJA "any court" phrase not limited to federal or constitutional courts); *Essex*
13 *Electro Engineers, Inc. v. United States*, 757 F.2d 247, 250-51(Fed. Cir. 1985) (application of EAJA
14 is not limited to constitutional courts of the United States); *Federal Deposit Insurance Corp. v.*
15 *Cheney*, 1986 WL 1283 (Ohio App. 8 Dist. 1996) (Ohio Court of Appeals did not question that state
16 court had authority to award EAJA attorneys' fees).

17 Additionally, the case law this Court cited in favor of its ruling on the EAJA attorney fee
18 issue, *Kennecott Copper Corp. v. State Tax Comm'n*, does not analyze a federal statute and is not
19 authoritative on federal sovereign immunity waivers in federal statutes. *Kennecott Copper Corp.*
20 analyzes a state tax statute. The ultimate holding of the court in that case turned on the right of a
21 state to conduct its own tax litigation with its own taxpayers in its own courts because of the direct
22 implication of such litigation on a state's finances. *Kennecott Copper Corp.*, 327 U.S. at 577-78.
23 State waivers of sovereign immunity in tax statutes cannot be analogized to federal sovereign
24 immunity waivers in a federal attorney fee statute. State waivers of sovereign immunity are based
25 on states' rights to sovereign immunity from federal oversight and review, guaranteed in the
26 Eleventh Amendment of the United States Constitution. State sovereign immunity principles are
27 governed by a distinct body of case law based on Eleventh Amendment rights of the states to
28 operate free from federal interference. *See College Savings Bank v. Florida Prepaid Postsecondary*

1 *Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (discussing State sovereign immunity principles)
2 (cited in *Joyce Livestock Company v. United States of America*, Idaho Supreme Court 2007 Opinion
3 No. 23 (February 9, 2007), page 22). State waivers of sovereign immunity, and case law analyzing
4 those waivers, are not closely analogous enough to federal waivers of sovereign immunity for this
5 Court to rule opposite existing case law interpreting the EAJA. This Court should reconsider its
6 ruling that the EAJA does not authorize state courts to award attorneys' fees against the United
7 States because authoritative case law supports that a state court may award EAJA attorneys' fees.

8 **3. A Ruling That the EAJA Does Not Authorize State Courts to Award**
9 **Attorneys' Fees Against the United States Runs Counter to the EAJA's**
10 **Intended Purpose.**

11 This Court should also reconsider its ruling that the EAJA does not authorize state courts to
12 award attorneys' fees against the United States because the legislative history and purpose of the
13 EAJA confirm that Congress intended any court with jurisdiction over an action against the United
14 States to award EAJA attorneys' fees. The primary purpose of the EAJA is:

15 to ensure that certain individuals, partnerships, corporations, businesses, associations
16 or other organizations will not be deterred from seeking review of, or defending against,
17 unjustified governmental action because of the expense involved in securing the
18 vindication of their rights. The Act reduces the disparity in resources between
19 individuals, small business and other organizations with limited resources and the
20 federal government.

21 H.R. Rep. 99-120(I), 1985 U.S.C.C.A.N. 132 (May 15, 1995).

22 Authorizing only federal courts to award EAJA attorneys' fees would vitiate the EAJA's
23 basic premise – assuring individuals and organizations with limited resources the ability to litigate
24 opposite the federal government in cases of unjustified governmental action. A substantial number
25 of individuals and organizations with limited financial means are involved in comprehensive water
26 rights adjudications in state court in the American west. Often these individuals and small
27 businesses are procedurally opposed to the United States, which is joined in state court water rights
28 adjudications pursuant to the McCarran Amendment.

Contrary to the basic purpose of the EAJA, this Court's original course of action deters
individuals and small businesses with limited financial means involved in water rights adjudications
against the United States from seeking review of, or defending against, unjustified governmental

1 action or unreasonable governmental positions. It also increases the disparity in resources between
2 individuals and small organizations and the federal government in water rights adjudications.
3 Contrary to the intent of the EAJA, these individuals and small businesses would be better served to
4 abandon legitimate claims against the United States because they cannot afford to pursue the
5 litigation. Accordingly, this Court should reconsider its ruling that the EAJA does not authorize
6 state courts to award attorneys' fees against the United States. Ruling that the EAJA does not
7 authorize state courts to award attorneys' fees against the United States runs counter to the purpose
8 under which Congress enacted the EAJA – to level the financial playing field between individuals
9 and small organizations and the federal government, and give smaller organizations an opportunity
10 to litigate their claims against the United States despite their limited financial resources and the
11 likelihood of great litigation expense.

12 **B. This Court Should Reconsider Its Ruling on Attorneys Fees Pursuant to State**
13 **Law.**

14 Idaho Code § 12-121 provides for attorneys fees if an action was brought or defended
15 frivolously, unreasonably or without foundation. If no legitimate issue has been raised and there is
16 no legal or factual foundation for a party's arguments, attorneys fees should be awarded pursuant to
17 this statute. Such is the case here.

18 Under Idaho law, where settled law clearly precludes a legal claim, it is both unreasonable
19 and frivolous to pursue that claim and an award of attorneys fees to the prevailing party is
20 appropriate. I.C. 12-121; *Needs v. State*, 118 Idaho 207, 208-209 (Ct. App. 1990). In this case, the
21 Court rejected the claim for attorneys fees based on a determination that the United States raised a
22 legitimate arguments with respect to the issue of appurtenancies. Opinion p. 7. However, the
23 Court's decision on this issue rested not on new or controverted law, but rather on the settled law in
24 this state. Opinion p. 7-8 citing *Joyce Livestock v. United States*, Idaho Supreme Court Nos. 32278,
25 32279, 32846, Opinion p. 14-17 (February 9, 2007). Accordingly, Petitioner requests that this Court
26 grant the request for rehearing and reconsider, in light of the fact that the United States pursued
27 arguments that were contrary to established law, whether attorneys fees should have been awarded
28 in this case pursuant to Idaho statute.

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III. CONCLUSION

The Court's ruling with respect to attorneys fees presumes that it does not have jurisdiction to award attorneys fees under the EAJA. The plain language of the EAJA and consistent supporting authority overwhelmingly supports a different conclusion. In light of this, and the scope of the issues at stake, Petitioner respectfully requests that the Court grant its Petition for Rehearing on the issues of the applicability of the EAJA to this action and an appropriate award of attorneys fees pursuant to both federal and state law given the facts and law surrounding this case.

Dated this 14 day of March, 2007.

Respectfully submitted,

McQUAID BEDFORD & VAN ZANDT, LLP

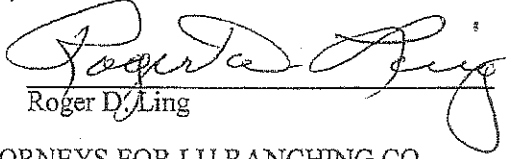
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CERTIFICATE OF SERVICE

I certify that on March 14, 2007, I served a true and correct copy of foregoing **LU RANCHING CO.'s BRIEF IN SUPPORT OF PETITION FOR REHEARING** upon the following individuals by placing the document in the United States Mail, postage paid, and addressed as follows:

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