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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: SRBA, CASE NO. 39586
SUBCASE NOS. 55-10135 (Joyce Livestock),
55-11061, 55-11385, 55-12452 (BLM)

JOYCE LIVESTOCK'S BRIEF
IN SUPPORT OF PETITION FOR
REHEARING

JOYCE LIVESTOCK COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.

JOYCE LIVESTOCK COMPANY,

Respondent,

vs.

UNITED STATES OF AMERICA, et al.

Appellant.

JOYCE LIVESTOCK COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondent.

Supreme Court No. 32278

Supreme Court No. 32279

Supreme Court No. 32846

1 I. INTRODUCTION AND ISSUES ON REHEARING

2 Joyce Livestock Company (hereinafter “Joyce Livestock” or “Petitioner”) filed a Motion for
3 Rehearing pursuant to I.A.R. 42 on the limited issue of attorneys fees arising from this Court’s
4 Opinion in Idaho Supreme Court No. 32846.^{1/} Pursuant to Idaho Appellate Rule 42(b), Petitioner
5 hereby enters this brief in support of its Petition for Rehearing. Pursuant to that rule, petitioners for
6 rehearing may file a brief in support of the petition itself, discussing why this Court should rehear
7 the matter or particular issues in the matter. See I.A.R. 42(b).^{2/} For the reasons discussed herein,
8 Petitioner requests that the Court grant its Request for Rehearing on the following issues:

- 9 1. Whether the Court’s ruling that state courts lack the authority to award
10 attorneys’ fees against the United States under the Equal Access to Justice
11 Act, 28 U.S.C. § 2412 (“EAJA”) is contrary to law;
12 2. Whether it was proper to disallow attorneys’ fees under I.C. § 12-121 when
13 the only “legitimate issue” identified by the Court was never raised by the
14 United States in its appeal;
15 3. Whether the Court’s denial of attorneys’ fees was contrary to law in light of
16 the history of this litigation and the legal issues presented therein.

17 Petitioner respectfully submits that the Court’s Opinion on these issues is contrary to
18 existing law and, if left to stand, not only will adversely affect the interests of Joyce
19 Livestock but also will have a chilling affect on the rights of ordinary citizens to challenge
20 unreasonable government action.
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24 ^{1/} On February 9, 2007, this Court entered a consolidated Opinion in *Joyce*
25 *Livestock v. United States*, Nos. 32278, 32279, 32846. Joyce Livestock does not seek a
rehearing with respect to the issues presented in Docket Nos. 32278 or 32279.

26 ^{2/} If this Court grants this Petition for Rehearing, Petitioner will file a second
27 brief analyzing the substantive legal issues before the Court on rehearing. See I.A.R. 42(d).
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II. ARGUMENT

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

In its February 9, 2007 Opinion, this Court held that the Equal Access to Justice Act, 28 U.S.C. § 2412, *et seq.* ("EAJA"), does not authorize state courts to award attorney fees against the United States. This Court should reconsider its ruling on this issue because the plain language of the EAJA, case law interpreting the EAJA and other federal statutes, and legislative history of the EAJA support an opposite ruling.

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

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

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 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.

28 U.S.C. 2412(d)(1)(A)(emphasis added). Before this statute was enacted, state courts already were in existence, were known to the United States Congress to be in existence and to have jurisdiction over the United States pursuant to the United States' express waiver of sovereign immunity as expressed in the McCarran Amendment, 43 U.S.C. § 666. See Pub. L. No. 96-481, 94

1 Stat. 2325 (1980) (codified at 28 U.S.C. § 2412 and 5 U.S.C. § 504) (EAJA enacted in 1980);
2 McCarran Amendment (July 10, 1952), C. 651, Title II, Sec 208(a)-(c), 66 stnt. 560 (McCarran
3 Amendment enacted in 1952). Thus, by the time the EAJA was passed into law, the United States
4 had already consented to the jurisdiction of state courts in cases involving the adjudication of water
5 rights. This fact placed state courts squarely within the class of courts automatically covered by the
6 term “any court having jurisdiction of that action.” 28 U.S.C. 2412(d)(1)(A).

7 Throughout the history of American jurisprudence, courts have interpreted statutory
8 provisions according to their plain meanings. *See e.g. United States v. Missouri Pacific R. Co.*, 278
9 U.S. 269, 278 (1929). Because the text of the EAJA states without limitation that “any court” with
10 jurisdiction may award attorney fees against the United States, this Court should reconsider its
11 ruling that the EAJA does not authorize state courts to award attorney fees against the United
12 States.^{3/}

13 Other provisions of the EAJA discussing the term “court” in the context of the statute do not
14 detract from the plain meaning of the EAJA attorneys’ fee provision. A later provision of the EAJA
15 explains, “‘court’ includes the United States Court of Federal Claims and the United States Court of
16 Appeals for Veterans Claims.” 28 U.S.C. § 2412(d)(2)(F). In its ruling, this Court opined with
17 regard to the “court” provision, “[h]ad the Congress intended the word ‘court’ also include state
18 courts, it undoubtedly would have expressly included them.” *See Joyce Livestock Company v.*
19 *United States of America*, Idaho Supreme Court 2007 Opinion No. 23 (February 9, 2007), page 22.
20 However, there was no need to clarify whether state courts fell within the definition of “any court.”
21 As briefed, above, at the time the EAJA was enacted in 1980, state courts already were in existence
22 and already had jurisdiction over the United States in certain cases including cases involving water
23 adjudications pursuant to the McCarran Amendment which was enacted in 1952. Accordingly, in

25 ^{3/} Had Congress intended to limit the scope of the EAJA to federal court
26 proceedings, it could have and would have used the term “federal court” rather than “any
27 court” when drafting the EAJA.

1 1980, when the Congress used the term “any court having jurisdiction of that action” that language
2 was meant to and did include “any court” including state courts having jurisdiction over the United
3 States. In contrast, when the EAJA was enacted in 1980, the Tax Court and the U.S. Court of
4 Federal Claims were not yet formed. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub.L.
5 No. 97-248; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).
6 Therefore, clarification of the EAJA was necessary to ensure that these subsequently created courts
7 were covered by the EAJA so that litigants would not be divested of the opportunity to pursue and
8 award of fees and costs. Importantly, Congress has never taken action to restrict the ability of
9 private parties to request fees pursuant to the EAJA, but has only acted to ensure that such recourse
10 under the EAJA would be available to any private party litigant in cases against the United States in
11 all courts having jurisdiction over the matter involving the United States.

12 It additionally should be noted that the EAJA court provision is not labeled as a definition
13 of the term “court,” and certainly should not be construed as a definition. The EAJA court
14 provision uses the term “includes” to list unique types of courts that the statute applies to. *See Ellis*
15 *v. United States*, 771 F.2d 1571, 1573-75 (Fed. Cir. 1983) and *Jones v. Derwinski*, 2 Vet. 231
16 (1992) (each explaining that addition of U.S. Court of Veterans Appeals and U.S. Court of Federal
17 Claims added to clarify EAJA when Federal Courts Improvement Acts placed these courts in state
18 of transition). In other provisions in the section that are meant to act as definitions, the EAJA uses
19 the term “means” to define the statutory term. *See* 28 U.S.C. § 2412(d)(2)(B) (defining “party”); 28
20 U.S.C. § 2412(d)(2)(D) (defining “position of the United States”); 28 U.S.C. § 2412(d)(2)(G)
21 (defining “final judgment”); 28 U.S.C. § 2412(d)(2)(H) (defining “prevailing party”); 28 U.S.C. §
22 2412(d)(2)(I) (defining “demand”).

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

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

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

18 This Court also should reconsider its ruling that the EAJA does not authorize state courts to
19 award attorneys' fees against the United States because case law supports a ruling to the contrary.
20 First, the case law this Court cited in favor of its ruling on the EAJA attorneys' fee issue itself cites
21 authority providing that the statutory phrase "any court of competent jurisdiction" "has long been
22 construed in the federal statutes as including both state and federal courts." See *Kennecott Copper*
23 *Corp. v. State Tax Comm'n*, 327 U.S. 573, 578 (1946)(citing *Shoshone Mining Co. v. Rutter*, 177
24 U.S. 505, 506 (1900) (emphasis added). Consistent with this United States Supreme Court
25 authority, Petitioner cited federal and state case law providing that the "any court" phrase in the
26 EAJA applies to both state and federal courts. See e.g. *O'Connor v. United States Dept. of Energy*,

1 942 F.2d 771, 773-74 (10th Cir. 1991) (EAJA “any court” phrase not limited to federal or
2 constitutional courts); *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 250-51 (Fed.
3 Cir. 1985) (application of EAJA is not limited to constitutional courts of the United States); *Federal*
4 *Deposit Insurance Corp. v. Cheney*, 1986 WL 1283 (Ohio App. 8 Dist. 1996) (Ohio State Court of
5 Appeals did not question that state court had authority to award EAJA attorneys’ fees).

6 Additionally, the case law this Court cited in favor of its ruling on the EAJA attorney fee
7 issue, *Kennecott Copper Corp. v. State Tax Comm’n*, does not analyze a federal statute and is not
8 authoritative on federal sovereign immunity waivers in federal statutes. *Kennecott Copper Corp.*
9 analyzes a state tax statute. The ultimate holding of the court in that case turned on the right of a
10 state to conduct its own tax litigation with its own taxpayers in its own courts because of the direct
11 implication of such litigation on a state’s finances. *Kennecott Copper Corp.*, 327 U.S. at 577-78.
12 State waivers of sovereign immunity in tax statutes cannot be analogized to federal sovereign
13 immunity waivers in a federal attorney fee statute. State waivers of sovereign immunity are based
14 on states’ rights to sovereign immunity from federal oversight and review, guaranteed in the
15 Eleventh Amendment of the United States Constitution. State sovereign immunity principles are
16 governed by a distinct body of case law based on Eleventh Amendment rights of the states to
17 operate free from federal interference. *See College Savings Bank v. Florida Prepaid Postsecondary*
18 *Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (discussing State sovereign immunity principles)
19 (cited in *Joyce Livestock Company v. United States of America*, Idaho Supreme Court 2007 Opinion
20 No. 23 (February 9, 2007), page 22). State waivers of sovereign immunity, and case law analyzing
21 those waivers, are not closely analogous enough to federal waivers of sovereign immunity for this
22 Court to rule opposite existing case law interpreting the EAJA. This Court should reconsider its
23 ruling that the EAJA does not authorize state courts to award attorneys’ fees against the United
24 States because authoritative case law supports that a state court may award EAJA attorneys’ fees.

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

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

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

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

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

22 Contrary to the basic purpose of the EAJA, this Court's Opinion deters individuals and small
23 businesses with limited financial means involved in water rights adjudications against the United
24 States from seeking review of, or defending against, unjustified governmental action or
25 unreasonable governmental positions. It also increases the disparity in resources between
26 individuals and small organizations and the federal government in water rights adjudications.
27 Contrary to the intent of the EAJA, these individuals and small businesses would be better served to
28 abandon legitimate claims against the United States, no matter how baseless the United States' position is in the litigation, simply because the individuals cannot afford to defend their rights

1 against the United States. Accordingly, this Court should reconsider its ruling that the EAJA does
2 not authorize state courts to award attorneys' fees against the United States. Ruling that the EAJA
3 does not authorize state courts to award attorneys' fees against the United States runs counter to the
4 purpose under which Congress enacted the EAJA – to level the financial playing field between
5 individuals and small organizations and the federal government, and give smaller organizations an
6 opportunity to litigate their claims against the United States despite their limited financial resources
7 and the likelihood of great litigation expense.

8 **B. Rehearing Is Appropriate to Address Whether Attorneys Fees Should Have**
9 **Been Awarded Under I.C. § 12-121 Because the Court Could Not Identify A**
10 **Single Legitimate Issue Raised by the United States in Support of the United**
11 **States' Water Right Claims.**

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

16 This case involved two sets of water right claims: water rights claims filed by Joyce
17 Livestock and water right claims filed by United States. Petitioner's motion for attorneys fees were
18 analyzed by this Court separately, first in relation to Petitioner's water right claims and appeal, and
19 second in relation to the United States' water right claims and appeals. Opinion, p. 20-21 and p. 26-
20 27. In the case of the United States' beneficial use claims, the United States failed to raise, and this
21 Court failed to identify, a single legitimate issue supporting the United States' water right claims.
22 Indeed, in ruling on the issues presented in the United States' appeal of the District Court's decision
23 to deny the United States water right claims, the Court rejected each of the United States' claims
24 outright and went so far as to note that one "argument of the United States reflects a
25 misunderstanding of water law." Opinion, p. 25.

26 Despite the Court's overwhelming rejection of all of the United States' arguments asserted
27 in support of its claims, the Court denied Joyce Livestock's request for attorneys fees because "[t]he

1 United States has presented a legitimate issue of whether water rights on federal rangeland can be
2 appurtenant to real property owned by the appropriator.” Opinion, p. 26. However, the United
3 States *never* raised the issue of appurtenancy in support of the United States water right claims.^{4/}
4 Accordingly, the Court failed to cite to a single legitimate argument raised by the United States in
5 support of the United States’ beneficial use water right claims. Petitioner would assert that this is
6 because none exist.

7 Under Idaho law, where settled law clearly precludes a legal claim, it is both unreasonable
8 and frivolous to pursue that claim and an award of attorneys fees to the prevailing party is
9 appropriate. I.C. 12-121; *Needs v. State*, 118 Idaho 207, 208-209 (Ct. App. 1990). In this case, the
10 Court could not cite to a single legitimate issue raised by the United States in relation to the United
11 States’ beneficial use claims. Under such circumstances, Petitioner requests that the Court
12 reconsider its ruling with respect to attorneys fees, particularly as to those fees incurred by Petitioner
13 in opposing the United States’ beneficial use water right claims.^{5/} If Idaho Code section 12-121 is to
14 have any meaning, then it must be applied in situations such as this when a party has pursued almost
15 10 years of litigation in pursuit of claims that have no support in the law, and especially must be
16 applied in cases such as this when the United States’ own counsel, prior to the initiation of
17 litigation, issued an opinion that the legal position being pursued by the United States in support of
18 its state-based claims “does not have a sound legal or constitutional basis and does not provide an
19 appropriate legal basis for the assertion of water rights by federal agencies.” Memorandum from
20 Theodore B. Olson, Assistant Atty Gen., Dep’t of Justice, to Carol E. Dinkins, Ass’t Att’y Gen.,
21 Land and Nat. Res. Div., 6 Op. O.L.C. 328,332,383 (June 16, 1982), *cited in In the Matter of the*

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23 ^{4/} The issue of appurtenancy was raised in the context of Petitioner’s claims, in
24 that the United States argued that instream water rights on federal land could not be
appurtenant to the appropriator’s real or base ranch property. Opinion p. 14-16. The United
States’ argument in this regard was rejected by the Court.

25 ^{5/} While Petitioner believes that the whole of the attorneys fees requested are
26 supported by law and the circumstances of this case, Idaho law does permit the Court to
apportion fees. I.R.C.P. 54(e)(1).

1 *Adjudication of the Existing Rights to the Use of All the Water, Both Surface and Under Ground,*
2 *Within the Missouri River Basin Drainage Area, Case No. 40E-A Opinion, p. 19 (In the Water*
3 *Court of the State of Montana 2005).*

4 Because the United States' arguments with respect to its own claims and Joyce Livestock's
5 claims lacked any support in established law, Joyce Livestock requests that this Court grant a
6 rehearing on Joyce Livestock's attorneys fees claim. The United States' relentless pursuit of its
7 arguments for almost 10 years, when the United States knew that the theories being asserted lacked
8 any basis in law or fact, is against the law and policy of this State and is conduct that should result
9 in attorneys fees being imposed. A contrary result merely encourages litigants, like the United
10 States, who have superior resources, to pursue baseless arguments literally at the expense of smaller
11 parties.

12 **III. CONCLUSION**

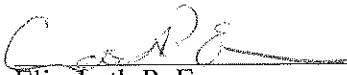
13 The Court's ruling with respect to attorneys fees presumes that it does not have jurisdiction
14 to award attorneys fees under the EAJA. The plain language of the EAJA and consistent supporting
15 authority overwhelmingly supports a different conclusion. In light of this, and the scope of the
16 issues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

19 Dated this 14 day of March, 2007

20 Respectfully submitted,

21 McQUAID BEDFORD & VAN ZANDT, LLP

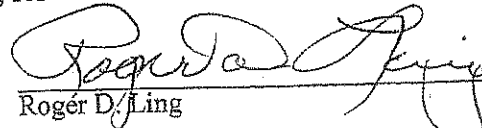
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25 ATTORNEYS FOR JOYCE LIVESTOCK
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1 Dated: 3/14/07

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CERTIFICATE OF SERVICE

I certify that on March 14, 2007, I served a true and correct copy of foregoing **JOYCE LIVESTOCK'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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