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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
Case No. 39576

**SUBCASES: 55-10288B, 55-10289B,
55-10290B, 55- 10292B, 55-10293B, 55-10295,
55-10296, 55-10297B, 55-10298, 55-10299B,
55-10300, 55-10301B, 55-10303B, 55-13451,
55-13846 and 55-13844.**

MEMORANDUM DECISION AND ORDER
RE: ATTORNEYS' FEES

A hearing was held in open court on June 15, 2005, on the motion of LU Ranching Co. for attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C. §2412(d). Appearances were as follows:

LU Ranching Co:	Ms. Elizabeth P. Ewens McQuaid, Bedford & VanZandt, LLP
United States of America:	Mr. Larry A. Brown U.S. Department of Justice

The matter was submitted for decision on the day following the hearing. The Court, having considered the argument of counsel, the file in this matter and the memoranda submitted now enters the following:

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MEMORANDUM DECISION

1. Facts and Procedural History.

The relevant facts and the procedural history of this case were set forth in this Court's *Memorandum Decision and Order on Challenge*, Subcases 55-10288B *et al* (LU Ranches) (January 4, 2005) and are restated here for the convenience of the reader.

At issue in this case were thirteen beneficial use claims filed by LU Ranching Company (LU) for instream stockwater rights located on federal public lands within the boundaries of three different grazing allotments for which LU holds grazing permits. The allotments are situated on lands administered by the United States Bureau of Land Management (United States), pursuant to The Taylor Grazing Act of 1934, Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C.A. § 315 (1986))("Taylor Grazing Act").

LU claimed a priority date of May 20, 1872, for each of the subject claims. On July 31, 1997, the Director of IDWR filed a *Director's Report*, recommending each right with the priority date as claimed. The United States filed objections to the recommended priority date for each of LU's claims, asserting that the priority date should be September 23, 1976, which corresponds with the date the LU entity was created and started beneficially using the water.

The subcases were originally referred to Special Master Fritz Hammerle. In the proceedings before Special Master Hammerle, the United States filed a motion for summary judgment asserting that LU had no deeds or other instruments from a predecessor-in-interest conveying any of the subject water rights. LU argued that the water rights were appropriated by its predecessors-in-interest to the patented or "base ranch" properties to which its grazing allotments are attached. LU also argued that the rights transferred as appurtenances to the base ranch properties via the appurtenancy clauses contained in LU's chain of title. Special Master Hammerle granted summary judgment in favor of the United States, holding that because water rights are interests in real property and transfers of real property require a written instrument, the alleged water rights were not properly conveyed. Special Master Hammerle also ruled that without a written instrument the earliest priority date LU could prove was September 23, 1976, the date LU was incorporated. *Order Granting United States' Motion for Summary Judgment*, Subcases 55-10288 *et al.* (Jan 8, 1999).

1 Special Master Hammerle ruled further that instream stock water rights on public land are as
2 a matter of law appurtenant to the public land and therefore could not transfer as an appurtenance to
3 private land. The Special Master's decision incorporated his reasoning from a prior decision in an
4 unrelated consolidated subcase (Joyce Livestock) involving a number of "foundational" issues
5 pertaining to the ability of both the United States and private parties to appropriate beneficial use
6 instream stock water rights on public land. *See Order on Motion to Alter or Amend: Order on*
7 *Motion for Permissive Appeal*, Subcases 57-04028 *et al.* (June 26, 1997). Special Master
8 Hammerle's reasoning and ruling in the Joyce Livestock case was later adopted by Judge Hurlbutt,
9 then presiding judge of the SRBA. ***Order Denying Challenges and Adopting Special Master's***
Reports and Recommendations, Subcases 57-04028B *et al.* (Sept. 30, 1998).

10 LU challenged Special Master Hammerle's *Order Granting United States' Motion for*
11 *Summary Judgment* before Judge Wood, who succeeded Judge Hurlbutt as the Presiding Judge.
12 Judge Wood reversed the Special Master, holding that summary judgment was inappropriate because
13 there were genuine issues of material fact. ***Memorandum Decision and Order On Challenge;***
14 ***Order Denying Motion to File Amicus Curie Brief; Order of Recommitment to Special Master***
Cushman, Subcases 55-10288 A&B *et. al.* (April 25, 2000).

15 Judge Wood ruled that the instream rights appropriated on public land by a private party
16 were not necessarily deemed appurtenant to the public land because a private individual could
17 appropriate a water right on public land without having an ownership interest in the land on which
18 the water was located. In such a situation, the water right would not be "appurtenant" to the public
19 land at least for purposes of a conveyance because no unity of title existed between the land and the
20 water right; as one cannot convey what one does not own. Judge Wood also ruled that given the
21 customary practices surrounding livestock grazing, depending on the particular circumstances and
22 nexus between the instream stockwater right and the adjacent private ranch property, it was
23 conceivable that instream rights could transfer as an appurtenancy to the ranch base property,
24 particularly if a ranching operation was sold in its entirety as a going concern.

25 Judge Wood ruled that for purposes of conveying the water right, the statute of frauds would
26 be satisfied without a separate writing conveying the water rights under the general rule that unless
expressly reserved, water rights appurtenant to land transfer with the conveyance of the land. Judge

1 Wood ruled that the issue of whether a water right transferred as an appurtenance via the
2 appurtenance clause in the deed would depend on the intent of the grantor and was an issue of fact.
3 The matter was then recommitted to Special Master Tom Cushman, who succeeded Special Master
4 Hammerle, for a trial on the merits.

5 Special Master Cushman held a trial on the merits and issued a *Special Master's Report and*
6 *Recommendation; Findings of Fact and Conclusions of Law*, subcases 55-10288B *et al.* (Feb. 27,
7 2003). Special Master Cushman held that, in accordance with Judge Wood's reasoning, LU proved
8 an 1876 priority date for each of the claims instead of the claimed 1872 priority date. The *Special*
9 *Master's Recommendation* was based on the finding that LU's predecessors-in-interest to the
10 respective patented parcels, which now comprise some of LU's base ranch property, grazed and
11 watered cattle on the adjacent public domain in the general areas where the claimed rights are
12 located as early as 1876. However, Special Master Cushman ruled that LU was unable to prove that
13 grazing and watering existed as early as the claimed 1872 priority date. Special Master Cushman
14 also found that the appropriated rights were conveyed as appurtenances in LU's chain of title to
15 those lands. Both the United States and LU filed motions to alter or amend the *Recommendation*.

16 On challenge LU only raised issues pertaining to certain recommended places of use for
17 some of its claims. LU did not challenge the recommended priority date. The United States on
18 challenge raised a legal issue regarding the inability of a private party to perfect a water right on land
19 to which the party does not hold a possessory interest. The United States also raised a legal issue
20 regarding the ability to transfer a water right as an appurtenance to the private ranch property,
21 particularly prior to 1934 when the concepts of base ranch property and grazing allotments did not
22 exist. Factually, the United States challenged the sufficiency of the evidence supporting the Special
23 Master's recommended 1876 priority date for each of the rights even assuming the rights could
24 legally be appropriated on the public domain and transferred as appurtenances to the private
25 property. The United States also challenged certain legal descriptions of the water rights.

26 A hearing was held on November 10, 2004. The Court issued a ***Memorandum Decision*** on
January 4, 2005, ruling that the Special Master erred as a matter of law in failing to trace the chain of
title in the mesne conveyances in accordance with Judge Wood's prior ruling for purposes of
establishing priority dates for the claims, and that the Special Master erred by recommending a 1876

1 priority date for each of the claims based upon a lack of evidence in the record to support that
2 priority date. The Court's priority date ruling was based primarily on the inability of LU to show that
3 its predecessors intended to transfer a water right. This Court ordered, based upon the evidence in
4 the record, that Partial Decrees would be issued to LU as follows:¹

5	55-10288B	04/01/1950
6	55-10289B	04/01/1950
7	55-10290B	07/01/1938
8	55-13844	04/01/1950
9	55-10292B	07/01/1938
10	55-13846	04/01/1950
11	55-10293B	04/01/1950
12	55-10295	04/15/1937
13	55-10296	04/15/1937
14	55-10297B	04/15/1937
15	55-10298	04/15/1937
16	55-10299B	04/01/1950
17	55-10300	04/01/1950
18	55-10303B	07/01/1937
19	55-13451	07/01/1937

20 LU filed a timely *Motion for Reconsideration and/or Motion to Amend*. A hearing on the
21 motion was held, and on May 2, 2005, this Court entered an order denying that motion. On January
22 18, 2005, LU filed a *Motion for Attorneys' Fees and Memorandum of Points and Authorities* under
23 IRCP 54(e)(1), I.C. §12-121 and the Equal Access to Justice Act, 28 U.S.C. §2412(d). The motion,
24 though premature under the rule, was considered to be timely. *Crowley v. Lafayette Life Ins. Co.*,
106 Idaho 818, 683 P.2d 854 (1984); IRCP 54(d)(5). The United States filed a *Motion to Disallow*
25 *Costs*, which the Court will treat as an *Objection to Costs* pursuant to IRCP 54(d)(5). Thereafter, LU
26 filed a *Reply to the Objection*.

¹ While 13 claims were filed, 15 Partial Decrees were issued because of splitting of certain claims as set forth in the *Memorandum Decision*.

1
2 **2. Applicable Law**

3 LU seeks an award of attorneys' fees pursuant to IRCP 54(e)(1), I.C. §12-121 and 28 U.S.C.
4 §2412(d). Idaho follows the "American Rule" which requires parties to litigation to pay their own
5 attorney fees absent statutory authority or contractual right. *Owner-Operator Indep. Drivers Assoc.*
6 *of Idaho v. Idaho Public Util. Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994); *Great Plains Equip.*
7 *Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999); IRCP 54(e).

8 I.C. §12-121 provides a statutory basis for an award of attorney fees in civil cases as
9 follows:

10 **Attorney's Fees.** --- In any civil action, the judge may award reasonable attorney's
11 fees to the prevailing party or parties, provided that this section shall not alter, repeal
12 or amend any statute which otherwise provides for the award of attorney's fees. The
13 term "party" or "parties" is defined to include any person, partnership, corporation,
14 association, private organization, the state of Idaho or political subdivision thereof.

15 I.C. §12-121 is, however, modified by IRCP 54(e)(1) which provides:

16 **Attorney Fees.** In any civil action the court may award reasonable attorney fees,
17 which at the discretion of the court may include paralegal fees, to the prevailing party
18 or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or
19 contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded
20 by the court only when it finds, from the facts presented to it, that the case was
21 brought, pursued or defended frivolously, unreasonably or without foundation; but
22 attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a
23 default judgment.

24 Plainly, therefore, attorney fees can only be awarded under I.C. §12-121 if the Court finds that the
25 party seeking attorney fees was the prevailing party and that the case was brought, pursued or
26 defended frivolously, unreasonably or without foundation by the opposing party. The term
27 *prevailing party* is defined in IRCP 54(d)(1)(B) as follows:

28 **Prevailing Party.** In determining which party to an action is a prevailing party and
29 entitled to costs, the trial court shall in its sound discretion consider the final
30 judgment or result of the action in relation to the relief sought by the respective
31 parties. The trial court in its sound discretion may determine that a party to an action
32 prevailed in part and did not prevail in part, and upon so finding may apportion the

1 costs between and among the parties in a fair and equitable manner after considering
2 all of the issues and claims involved in the action and the resultant judgment or
3 judgments obtained.

4 Thus, a determination of the prevailing party is addressed to the Court's discretion guided by the
5 provisions of IRCP 54(d)(1)(b) and cases decided applying that rule.

6 LU also seeks attorney fees pursuant to 28 U.S.C. §2412(d). In relevant part, §2412 provides:

7 **§ 2412. Costs and fees**

8

9 **(d)(1)(A)** Except as otherwise specifically provided by statute, a court shall award to
10 a prevailing party other than the United States fees and other expenses, in addition to
11 any costs awarded pursuant to subsection (a), incurred by that party in any civil action
12 (other than cases sounding in tort), including proceedings for judicial review of
13 agency action, brought by or against the United States in any court having jurisdiction
14 of that action, unless the court finds that the position of the United States was
15 substantially justified or that special circumstances make an award unjust.

16 **(B)** A party seeking an award of fees and other expenses shall, within thirty days of
17 final judgment in the action, submit to the court an application for fees and other
18 expenses which shows that the party is a prevailing party and is eligible to receive an
19 award under this subsection, and the amount sought, including an itemized statement
20 from any attorney or expert witness representing or appearing in behalf of the party
21 stating the actual time expended and the rate at which fees and other expenses were
22 computed. The party shall also allege that the position of the United States was not
23 substantially justified. Whether or not the position of the United States was
24 substantially justified shall be determined on the basis of the record (including the
25 record with respect to the action or failure to act by the agency upon which the civil
26 action is based) which is made in the civil action for which fees and other expenses
are sought.

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23 Finally, the Court notes that the Snake River Basin Adjudication is a comprehensive stream
24 adjudication pursuant to the McCarran Amendment, 43 U.S.C. §666, which provides, in relevant
25 part:

26 **Suits for adjudication of water rights**

(a) Joinder of United States as defendant; costs

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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 amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) . . .

3. Analysis and Decision.

a. Attorney Fees Under I.C. 12-121 and IRCP 54(e)(1).

1. Determination of Prevailing Party.

The threshold issue for an award of attorney fees under Idaho law is a determination of the prevailing party. This determination is committed to the discretion of the court. *See Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991) (setting forth parameters of court's discretion). Here, LU claimed a priority date for its water rights of May 20, 1872. The United States initially objected to the priority date but not to LU's water right. Ultimately, this Court ruled that LU was not entitled to the claimed 1872 priority date but that the evidence supported priority dates ranging from 1937 to 1950. LU has appealed this decision. The elements of a water right are: source, quantity, date of priority, point of diversion, purpose of use, period of use and place of use. I.C. §42-1411. Here, only the date of priority was contested at first. Late in the litigation, the United States asserted that a water right with a place of use on BLM lands could not transfer as an appurtenance to base ranch property. Even then, however, the United States argued in the alternative that LU was not entitled to the early priority dates claimed. Plainly, LU did prevail on the question of whether a stockwater right could transfer as an appurtenance of patented or base ranch property. LU was not the prevailing party, however, on the priority date issue. Because Idaho follows the prior

1 appropriation doctrine, the relative priority date of a water right is of paramount importance.
2 The United States argued that LU's water rights had priority dates junior to the United States'
3 water rights, which corresponded to the date of the enactment of the Taylor Grazing Act of
4 1934. The Court eventually found that LU's rights were junior to 1934. The most that can be
5 said, therefore, is that LU prevailed only in part in this case.

6
7 2. The case was not brought, pursued or defended frivolously, unreasonably or without
8 foundation.

9 As set forth above, the two issues of importance decided in this case were whether a
10 water right on public land could transfer as an appurtenance to base ranch property and
11 whether LU was entitled to the early priority dates claimed. The later issue necessarily
12 required a determination by the Court of the evidentiary standard to be applied in such cases
13 when determining intent. None of these issues has been squarely addressed by our Supreme
14 Court. Regarding the appurtenance issue, the United States cited and argued decisions from
15 other jurisdictions holding that water rights claimed on public lands are not appurtenant to
16 other privately owned property. *Robinson v. Schoenfeld*, 218 P. 1041, 1042-1043 (Utah 1923)
17 and that appropriation may not be made by a temporary possessor of land. *Tattersfield v.*
18 *Putnam*, 41 P.2d 228 (Ariz. 1935). In addition, the United States made a good faith argument
19 for an extension of the holding in *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1980)
20 (water right claimant must have a possessory interest in the land designated as a place of use),
21 to include claims such as those made by LU. As to the priority date issue, an issue on which
22 the United States prevailed in part, the United States correctly noted certain deficiencies in the
23 evidence supporting LU's claims. This Court has found no instance in this case in which the
24 United States has asserted or defended any matter frivolously, unreasonably or without
25 foundation. It would be an abuse of the Court's discretion to award attorney fees under these
26 circumstances.

24 **b. Attorneys' Fees under 28 U.S.C. 2412(d).**

25 A decision to award or deny attorneys' fees pursuant to 28 U.S.C. §2412(d), the Equal
26 Access to Justice Act, is reviewed under an abuse of discretion standard. *See Pierce v.*

1 *Underwood*, 487 U.S. 552, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988); *Minor v. United*
2 *States*, 797 F.2d 738, 739 (9th Cir.1986) (per curiam). Pursuant to 28 U.S.C. §2412(d), if the
3 United States shows that its position was substantially justified, the Court may not award
4 attorney's fees. The United States Supreme Court has defined the term "substantially
5 justified" noting that the two common connotations were "justified to a high degree," and
6 "justified in substance or in the main." The Court held:

7
8 We are of the view, therefore, that as between the two commonly used connotations
9 of the word "substantially," the one most naturally conveyed by the phrase before us
10 here is not "justified to a high degree," but rather "justified in substance or in the
11 main"--that is, justified to a degree that could satisfy a reasonable person. That is no
12 different from the "reasonable basis both in law and fact" formulation adopted by the
13 Ninth Circuit and the vast majority of other Courts of Appeals that have addressed
14 this issue. (Citations omitted). To be "substantially justified" means, of course, more
15 than merely undeserving of sanctions for frivolousness; that is assuredly not the
16 standard for Government litigation of which a reasonable person would approve.²

13 *Pierce v. Underwood*, 487 U.S. 552, 564-566, 108 S.Ct. 2541, 2549 – 2550 (U.S. Dist. Col.,
14 1988). The Court further explained, by way of footnote: "...a position can be justified even
15 though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified
16 if a reasonable person could think it correct, that is, if it has a reasonable basis in law and
17 fact." *Id.* 487 U.S. 552, 566, 108 S.Ct. 2541, 2550, fn.2. The United States need not show that
18 it had a substantial likelihood of prevailing. *Bay Area Peace Navy v. United States*, 914 F.2d
19 1224, 1230 (9th Cir. 1990). No presumption is raised that the government's position was not
20 substantially justified because it did not entirely prevail. *Kali v. Bowen*, 854 F.2d 329, 334 (9th
21 Cir. 1988).

22 Here, for the reasons stated in this Court's determination of attorney fees under state law,
23 the United States has shown that its position was, at all times, substantially justified. While the
24 United States did not entirely prevail, its position taken in the case at all times had a
25 reasonable basis in the law and the facts. The United States successfully challenged the Special
26 Master's recommended priority date, which resulted in LU's priority date being found to be at

² Here, the Court is referring to *sanctions*, presumably such as those provided in Rule 11, F.R.C.P.

1 least 60 years junior to the claimed date. The United States also raised reasonable arguments
2 regarding the law of appurtenances, an issue that has not been squarely addressed by our
3 Supreme Court. Accordingly, it would be an abuse of discretion to award attorneys' fees
4 pursuant to 28 U.S.C. §2412(d).

5
6 **c. Sovereign Immunity, Intergovernmental Immunity and the McCarran Amendment.**

7 The Court has ruled that LU is not entitled to an award of attorneys' fees under
8 applicable provisions of either state or federal law. Accordingly, it is not necessary for the
9 Court to decide whether the United States is immune from an award of attorneys' fees under
10 the doctrines of sovereign immunity or intergovernmental immunity. Similarly, the Court need
11 not decide whether the McCarran Amendment's prohibition of an award of costs against the
12 United States also bars an award of attorneys' fees.

13 **ORDER**

14
15 Based upon the foregoing, it is hereby ORDERED that the Motion for Attorneys' Fees of LU
16 Ranching Co. is, in all respects, DENIED.

17 Dated August 2, 2005

18
19 /s/ John Melanson

20 John Melanson
21 Presiding Judge
22 Snake river Basin Adjudication
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