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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

The STATE OF IDAHO; the IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho; and GARY SPACKMAN, in his official capacity as the Director of the Idaho Department of Water Resources,

Defendants,

v.

IDAHO HOUSE OF REPRESENTATIVES; MIKE MOYLE, in his official capacity as Majority Leader of the House; IDAHO

Case No. 1:22-cv-00236-DCN

STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate,

Intervenor-Defendants.

Defendants the State of Idaho, the Idaho Department of Water Resources, and Gary Spackman, in his official capacity as Director of the Idaho Department of Water Resources ("State Defendants"), by and through their counsel of record and pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Rule 7.1, and this Court's Scheduling Order (Dkt. 32) and Order Amending Scheduling Order (Dkt. 33), hereby move for summary judgment. The United States' claims in this case should be dismissed as a matter of law pursuant to the doctrine of *res judicata* (claim preclusion); the "Rooker-Feldman doctrine"; the doctrine of prior exclusive jurisdiction; and the *Burford* abstention doctrine. Even if this Court were to reach the merits of the United States' claims, the State Defendants are entitled to summary judgment that these claims fail as a matter of law.

The United States was joined as party to the Snake River Basin Adjudication ("SRBA") pursuant to 43 U.S.C. § 666 (the "McCarran Amendment") and is bound by SRBA decrees, which conclusively define the nature and extent of the United States' water rights. The relief the United States has requested in this case seeks to fundamentally alter the nature and extent of those water rights. The arguments the United States makes in this case could have been made in the SRBA and often

actually were, only to be rejected. The United States' claims and argument in this case are therefore collateral attacks on SRBA decrees.

The United States' claims are thus precluded by the doctrine of *res judicata* and the "Rooker-Feldman doctrine," which bars federal court from exercising jurisdiction over a case that is in substance an appeal of a state court judgment. In addition, the Twin Falls District Court of Idaho's Fifth Judicial District, which presides over the SRBA and Idaho's other general water right adjudications, has prior exclusive jurisdiction over the United States' claims in this case. These claims also should be dismissed pursuant to the *Burford* abstention doctrine because they seek to disrupt the State of Idaho's efforts to develop coherent policy on a complex matter of vital interest to the State—water rights claimed and decreed under Idaho law—and with respect to which the Idaho Department of Water Resources and the Twin Falls County District Court have special competence and extensive experience.

In the alternative, the State Defendants are entitled to summary judgment that all of the United States' claims fail as a matter of law under the undisputed facts and the applicable legal standards.

These arguments are fully explained in the State Defendants' Memorandum in Support of Cross-Motion for Summary Judgment and Response to the United States' Motion for Summary Judgment, filed herewith.

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Respectfully submitted this 17th day of March, 2023.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiffs, v. The STATE OF IDAHO; the IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho; and GARY SPACKMAN, in his official capacity as the Director of the Idaho Department of Water Resources, Defendants, v. IDAHO HOUSE OF REPRESENTATIVES; MIKE MOYLE, in his official capacity as Majority Leader of the House; IDAHO	Case No. 1:22-cv-00236-DCN **STATE DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT and RESPONSE TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT (Dkt. 34)**

SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate,

Intervenor-Defendants.

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Ann. Y. Vonde, *et al.*, *Understanding the Snake River Basin Adjudication*,
52 IDAHO L. REV. 53 (2016) 3

INTRODUCTION

This case is a direct challenge to the State of Idaho's sovereign authority to allocate and administer Idaho's water resources pursuant to Idaho law. It challenges water right decrees issued years ago in the Snake River Basin Adjudication ("SRBA"). It attempts to make Idaho water rights and Idaho water law subservient to federal land management decisions.

Federal agencies are subject to state water law, as Congress has clearly and repeatedly stated for well over a century. The United States Supreme Court consistently re-affirms this principle. The only exceptions—the reserved rights doctrine and the federal navigation servitude—are not at issue in this case. This case is about water rights claimed by the United States and decreed in the SRBA based on Idaho law. In this case, the United States seeks to immunize those state law-based water rights from forfeiture for non-use pursuant to Idaho law, based on a litany of injuries the United States alleges it will suffer if Idaho water law applies to the United States' state law-based stockwater rights.

These are arguments the United States could have made in the SRBA, and actually did make in the *Joyce Livestock* case, which was an appeal of an SRBA decision.[1] The sweeping relief the United States seeks would re-define the nature and extent of water rights decreed in the SRBA—and not just "stockwater rights." The requested relief would apply to *all* of the United States' state law-based water rights. If this relief is granted, these water rights will no longer be defined and

[1] *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007).

administered according to Idaho water law, but rather will be defined and administered according to federal agencies' land management decisions.

Granting the requested relief would undercut decisions of the SRBA District Court and the Idaho Supreme Court. It would fatally undermine the finality of the SRBA and Idaho's other general water right adjudications,[2] by allowing the United States to seek rulings in federal courts that re-adjudicate the nature and extent of decreed water rights. The State of Idaho and its citizens have invested decades and many millions of dollars in the SRBA and Idaho's other water right adjudications. The United States should not be allowed to undermine Idaho water law and Idaho's enormous investment in its water adjudications by seeking relief in federal courts that re-defines the nature and extent of decreed water rights.

BACKGROUND

I. The Snake River Basin Adjudication.

In 1987, the Twin Falls District Court of Idaho's Fifth Judicial District issued an order commencing the "Snake River Basin Adjudication," or "SRBA." Decl. of Counsel in Support of State Defendants' Cross-Motion for Summary Judgment and Response to the United States' Motion for Summary Judgment ("Counsel Dec.") ¶ 3, Ex. 2 at 1 of 27. The SRBA is an action under Chapter 14 of Title 42 of the Idaho Code for the adjudication and administration of all rights arising under state and

[2] Four other general water right adjudications are also pending in Idaho: the Coeur d' Alene-Spokane River Basin Adjudication ("CSRBA"), the Palouse River Basin Adjudication ("PRBA"), the Clark Fork-Pend Oreille River Basins Adjudication ("CFPRBA"), and the Bear River Basins Adjudication ("BRBA"). Decl. of Craig L. Saxton ("Saxton Dec.") ¶ 4.

federal law to the use of the surface and ground waters of the Snake River Basin in Idaho. *Id.* The United States was joined as a party to the SRBA pursuant to 43 U.S.C. § 666 ("McCarran Amendment"). *Id.* ¶ 3, Ex. 2 at 4, 7 of 27.[3]

The SRBA is one of five general water right adjudications currently underway in Idaho. Decl. of Craig L. Saxton ("Saxton Dec.") ¶ 4. All of these adjudications are in the Twin Falls County District Court, which is known as the "SRBA District Court," and the same District Judge (the "Presiding Judge") presides over all of them. *Id.* ¶ 5.[4] The SRBA is the oldest and by far the largest adjudication and covers the vast majority of the State of Idaho. *Id.* ¶ 4, Ex. 1.

"The sheer magnitude of the SRBA cannot be overstated." Ann. Y. Vonde, *et al.*, *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, 56 (2016). Approximately 160,000 water rights have been decreed in the SRBA to date. Saxton Dec. ¶ 7. The SRBA District Court and the Idaho Supreme Court have issued more Idaho water law decisions in the SRBA than had been issued in the prior 97 years of Idaho's existence as a State. Vonde, *et al.*, 52 IDAHO L. REV. at 56. As of 2016, the cumulative administrative and judicial costs of the SRBA to the State of

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[3] Unless otherwise noted, citations to pages within exhibits and appendices refer to the pagination in green font in the lower right-hand corners of the pages in the exhibit or appendix.

[4] Several District Judges have presided over the SRBA during its long history. The current Presiding Judge, who also signed the *Final Unified Decree*, is the Honorable Eric J. Wildman. The former Presiding Judges are the Honorable John M. Melanson, the Honorable Roger S. Burdick, the Honorable R. Barry Wood, and the Honorable Daniel C. Hurlbutt, Jr. In addition to presiding over all of Idaho's water right adjudications, Judge Wildman hears all petitions for judicial review of IDWR decisions regarding the administration of water rights. Counsel Dec. ¶ 14, Ex. 13.

Idaho stood at $94 million. *Id.* at 56.[5]

The SRBA District Court issued the *Final Unified Decree* in 2014. Counsel Dec. ¶ 3, Ex. 2 at 1 of 27. All claims for water rights existing within the boundaries of the SRBA on the date of commencement have now been adjudicated except for "deferred" claims for *de minimis* domestic and stockwater uses under state law. *Id.* ¶ 3, Ex. 2 at 9-10 of 27; Saxton Dec. ¶ 7.[6] The Idaho Supreme Court has issued a number of decisions confirming the final and conclusive effect of the *Final Unified Decree* and the individual water right decrees incorporated within it.[7]

The United States was joined as a party to the SRBA pursuant to 43 U.S.C. § 666 (the "McCarran Amendment"). Counsel Dec. ¶ 3, Ex. 1 at 4, 7. The United States filed thousands of water right claims, and the SRBA District Court decreed thousands of water rights in the name of the United States. Saxton Dec. ¶ 14. The *Final Unified*

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[5] This figure does not include the substantial amounts that Idaho citizens have invested in filings fees, attorneys fees, and consultant and expert fees to claim and protect their water rights.

[6] Deferred *de minimis* domestic and stockwater claims can still be filed and adjudicated in the SRBA. Counsel Dec. ¶ 3, Ex. 2 at 9 of 27; Saxton Dec. ¶¶ 7, 13. It has been estimated that the number of potential deferred claims may be as large as the number of water rights that have already been decreed, although the total amount of water represented by these claims is comparatively very small. Saxton Dec. ¶ 13.

[7] *First Sec. Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 741, 451 P.3d 446, 454 (2019); *In re SRBA Case No. 39576 Subcase No. 37-00864*, 164 Idaho 241, 252-53, 429 P.3d 129, 140-41 (2018); *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 60-64, 408 P.3d 52, 58-62 (2017); *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 150–55, 408 P.3d 899, 905–10 (2018); *City of Blackfoot v. Spackman*, 162 Idaho 302, 308-09, 396 P.3d 1184, 1190-91 (2017); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 805-10, 367 P.3d 193, 200-05 (2016), *abrogated in part on different grounds by 3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022); *Idaho Ground Water Appropriators, Inc.* ["*IGWA*"] *v. IDWR*, 160 Idaho 119, 126-28, 369 P.3d 897, 904-06 (2016).

Decree is a comprehensive and conclusive determination of the nature and extent of all pre-commencement water rights, including those of the United States. Counsel Dec. ¶ 3, Ex. 2 at 9-10 of 27.

The SRBA and Idaho's other general water right adjudications use special procedures. *See generally* Counsel Dec. ¶ 6, Ex. 5 ("SRBA Administrative Order 1"); Idaho Code §§ 42-1401—42-1428.[8] Claims are filed with the Idaho Department of Water Resources ("IDWR"), which is not a party to an adjudication, but rather is the SRBA District Court's independent expert and technical assistant. Saxton Dec. ¶¶ 6, 8; Idaho Code § 42-1401B.[9] IDWR investigates state law-based claims and files recommendations with the court as to whether and how the claimed water rights should be decreed. Saxton Dec. ¶¶ 8-9 & Ex. 2.[10] If no one objects to IDWR's recommendations, they are "uncontested" and the Presiding Judge generally decrees (or disallows) the claimed water rights as recommended. *Id.* ¶ 11 & Ex. 3; Counsel Dec. ¶ 6, Ex. 5 at 32 of 57.

If an objection is filed to a recommendation, the matter becomes a "subcase" and the Presiding Judge refers it to one of the court's Special Masters for further proceedings, including litigation or settlement. Counsel Dec. ¶ 6, Ex. 5 at 24-29 of

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[8] The following discussion is a brief and simplified explanation of some of the procedures used in the SRBA and Idaho's other general water right adjudications. It is not a comprehensive explanation of general adjudication procedures and does not apply to deferred claims for *de minimis* domestic and stockwater rights.

[9] The State of Idaho and state agencies other than IDWR can and often do appear as parties in the SRBA and Idaho's other water rights adjudications. Idaho Code § 42-1401C.

[10] IDWR does not investigate claims based on federal law, but simply forwards these claims to the SRBA District Court. Saxton Dec. ¶ 10.

57. The Special Masters ultimately file recommendations as to whether and how the claimed water rights should be decreed. *Id.* ¶ 6, Ex. 5 at 30 of 57. If the recommendations are not "challenged," the Presiding Judge generally decrees (or disallows) the claimed water right as recommended. *Id.* ¶ 6, Ex. 5 at 32 of 57. If a Special Master recommendation is "challenged," the matter is briefed and argued before the Presiding Judge, who issues a decision as to whether and how the claimed water right should be decreed. *Id.* ¶ 6, Ex. 5 at 30-32 of 57.

SRBA decrees for individual water rights are called "partial decrees" and define the water rights in a standard format that lists the statutory "elements" of the water right: owner, priority date, source, point of diversion, quantity, purpose of use, place of use, and period of use. Counsel Dec. ¶ 6, Ex. 5 at 12 of 57; Saxton Dec. ¶ 11 & Ex. 3; Idaho Code § 42-1412(6). Partial decrees are certified under I.R.C.P. 54(b) and can be appealed to the Idaho Supreme Court. Counsel Dec. ¶ 6, Ex. 5 at 12, 32 of 57; Saxton Dec. ¶ 11 & Ex. 3. The *Final Unified Decree* incorporates all "partial decrees" issued in the SRBA and is binding on the United States. Counsel Dec. ¶ 3, Ex. 2 at 7, 10 of 27.

II. Stockwater Litigation in the SRBA and the *Joyce Livestock* Appeal.

The United States claimed thousands of water rights in the SRBA for "stockwater" use ("stockwater rights") based on federal law. Saxton Dec. ¶ 14; Dkt. 36 ¶ 10.[11] It was well-established at the time that water rights based on federal law

[11] Unless otherwise noted, page numbers in "Dkt." citations refer to the ECF-generated page number.

are not subject to forfeiture under state law. *See, e.g., Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 574 (1983) ("Unlike state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used.") (Stevens, J., dissenting). Approximately 6,500 federal law-based stockwater rights were decreed in the SRBA in the name of the United States, most based on an executive order known as "Public Water Reserve 107" or "PWR 107." Dkt. 36 ¶ 10; Saxton Dec. ¶¶ 14- 15; *see generally* Counsel Dec. ¶ 5, Ex. 4 (partial decrees based on PWR 107).

The United States also filed SRBA claims for thousands of state law-based stockwater rights, Saxton Dec. ¶ 14; Dkt. 36 ¶ 10, even though it was well established at the time that Idaho water rights are based on beneficial use of water and are subject to statutory forfeiture for five years of non-use. Decl. of Shelley W. Keen ("Keen Dec.") ¶¶ 13, 15, 19; Decl. of Timothy J. Luke ("Luke Dec.") ¶ 10; 1905 Idaho Sess. Laws 27-28 (Appendix 13). Most of the United States' state law-based stockwater claims were "beneficial use" claims. Saxton Dec. ¶ 16; Dkt. 36 ¶ 10; Dkt. 35 ¶¶ 11, 13. "Beneficial use" stockwater claims assert that valid stockwater rights were established by diverting the water for use by livestock, or by allowing livestock to simply drink from the water source—"instream" stockwatering. Saxton Dec. ¶ 17.[12]

The livestock that made the claimed "beneficial use" of stockwater were not

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[12] A "beneficial use" claim is a claim under "the constitutional method of appropriation," which allows a water right to be established by simply diverting water from a surface or ground water source and making beneficial use of it. *Joyce Livestock*

owned by the United States, however, but rather by private parties. Counsel Dec. ¶ 13, Ex. 12 at 5-6 of 12; Saxton Dec. ¶ 19; Dkt. 36 ¶¶ 6-8, 13-15; Dkt. 35 ¶¶ 8-9, 14. Even though the United States did not own the livestock that drank the water, IDWR generally recommended decreeing those claims to the United States. Counsel Dec. ¶ 13, Ex. 12 at 5-6 of 12; Saxton Dec. ¶ 19. This was a result of IDWR's then-longstanding policy of recommending that water rights be decreed in the name of the owner of the place of use. *Id.*[13]

The United States' beneficial use stockwater claims asserted priority dates as early as 1874, Saxton Dec. ¶ 16, Ex. 5, which was long before the federal government began regulating grazing on the public domain. *Omaechevarria v. State of Idaho*, 246 U.S. 343, 344 (1918) ("For more than forty years the raising of cattle and sheep have been important industries in Idaho. The stock feeds in part by grazing on the public domain of the United States. This is done with the government's acquiescence, without the payment of compensation, and without federal regulation."). The State of Idaho, as a party, objected to most of these claims, asserting the United States could not claim a priority date earlier than June 28, 1934, the effective date of the

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Co., 144 Idaho at 7, 156 P.3d at 509. While "instream" stockwater rights can still be established under this method, Keen Dec. ¶ 14; Luke Dec. ¶ 8; Saxton Dec. ¶ 17, other types of water rights can no longer be established in this way due to mandatory permitting statutes enacted in 1963 (for groundwater) and 1971 (for surface water). Luke Dec. ¶ 8; Saxton Dec. ¶¶ 17-18. "Instream" stockwatering and so-called "domestic" wells are exceptions to the permit requirement. No permit is required for instream stockwatering or to water livestock from wells that fit the statutory definition of a "domestic" well. Keen. Dec. ¶¶ 14, 28; Luke Dec. ¶ 8; Saxton Dec. ¶¶ 17-18.

[13] IDWR subsequently abandoned this policy and now recommends that water rights be decreed in the name of the water user. Saxton Dec. ¶ 21.

Taylor Grazing Act. Counsel Dec. ¶ 7, Ex. 6 at 2 of 32 n.2.

In a subcase designated as the "test case" for the State's objections, Counsel Dec. ¶ 12, Ex. 11 at 2 of 3, the United States did not assert that its livestock had beneficially used the stockwater, but rather that it was entitled to "beneficial use" stockwater rights based solely on federal agencies' administration of federal lands and federal grazing programs. Counsel Dec. ¶ 10, Ex. 9 at 1, 4-5, 7, 13 of 15. To be clear: the United States did *not* assert in the SRBA what it appears to assert in this case—that its stockwater claims were based on "the consumption of water by livestock owned by federal grazing permittees." Dkt. 34-1 at 16; Dkt. 37 ¶ 4. The United States argued, rather, that it was entitled to ownership of the stockwater rights based solely on the United States' proprietary and sovereign authority to manage the public domain for grazing purposes. Counsel Dec. ¶ 10, Ex. 9 at 1, 4-5, 7, 13.

The Special Master presiding over the "test case" rejected this argument, characterizing it as "convoluted" and stating, "the result of such a theory would be to create either a quasi-riparian or quasi-reserved theory of water right ownership where only the United States may own a water right located on the public domain." Counsel Dec. ¶ 10, Ex. 9 at 7, 9 of 15. The Presiding Judge's "challenge" decision affirmed the Special Master. Counsel Dec. ¶ 9, Ex. 8 at 1-2, 7-8 of 11.[14]

The State therefore requested leave to amend its objections to assert that the

[14] Seven years later this "challenge" decision was held to have established the "law of the case" in the SRBA regarding the United States' theory that it was entitled to state

United States was not entitled to *any* beneficial use-based stockwater rights, but this request was denied. Counsel Dec. ¶ 8, Ex. 7 at 1-2 of 20. The State thus resolved its objections through settlements in which the United States agreed to the 1934 priority date. Counsel Dec. ¶ 7, Ex. 6 at 2 of 32 n.2. Many private party objections to the United States' stockwater claims were also resolved by settlements. Dkt. 36 ¶ 23. Because these settlements collectively resolved all the objections to thousands of the United States' beneficial use-based stockwater claims, the United States was decreed thousands of beneficial use-based stockwater rights based solely on IDWR's policy of recommending that water rights be decreed in the name of the title holder of the land where the water is used. Counsel Dec. ¶ 13, Ex. 12 at 5-6 of 12; Saxton Dec. ¶¶ 14, 19; Dkt. 36 ¶¶ 10, 18.

Some private parties continued to press their objections to the United States' claims in subcases that had been referred to a Special Master different than the one who handled the "test case." Counsel Dec. ¶ 7, Ex. 6 at 1-3 of 32. Those proceedings lasted several years, *id.*, and ultimately the Special Master accepted the United States' arguments that it was entitled to beneficial use-based stockwater rights based solely on its administration of federal lands and federal grazing programs. *Id.* ¶ 7, Ex. 6 at 9-11 of 32; *Joyce Livestock Co. v. United States*, 144 Idaho 1, 4-5, 156 P.3d 502, 505-06 (2007).

The Special Master's decision and recommendations were "challenged" to the

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law-based stockwater rights based solely federal agencies' administration of federal lands and grazing programs. Counsel Dec. ¶ 7, Ex. 6 at 29 of 32.

Presiding Judge, who reversed the Special Master and rejected the United States' arguments in a 2005 decision that echoed the 1998 "test case" decision. Counsel Dec. ¶ 7, Ex. 6 at 1, 21-30 of 32. The Presiding Judge held that the United States' arguments would result in decreeing stockwater rights "more akin to a federal reserved water right or a riparian water right than a water right based on state law," that "the Taylor Grazing Act made it clear that the operation of the Act was not intended to create federal reserved water rights," and that the United States' argument "appears to be an end-run around that intent and the requirements for establishing a federal reserved water right or some other type of riparian right." *Id.* ¶ 7, Ex. 6 at 26 of 32.

The United States and Joyce Livestock both appealed the Presiding Judge's "challenge" decision to the Idaho Supreme Court. *Joyce Livestock Co.*, 144 Idaho at 5, 154 P.3d at 506.[15] The United States continued to argue it was entitled to ownership of "constitutional method" stockwater rights simply because it owned the federal rangelands and managed federal grazing programs. *Id.* at 5, 17-19, 154 P.3d at 506, 518-20. The Idaho Supreme Court rejected this argument, because it was undisputed that the United States had not watered its own livestock and its grazing permittees had not acted as agents of the United States. *Id.*

The United States also argued that allowing private stockwater rights on federal rangelands would violate the purposes of the Taylor Grazing Act, lead to

[15] Joyce Livestock Company appealed the Presiding Judge's conclusions regarding the priority dates of the Company's stockwater rights and denial of the Company's request for attorneys fees. *Id.*

private monopolies over water sources and grazing on federal lands, and interfere with federal administration of the rangelands. *Id.* at 19, 154 P.3d at 520. The Idaho Supreme Court rejected these arguments and explained how they "reflect a misunderstanding of water law." *Id.* at 19-20, 154 P.3d at 520-21. The United States did not file a petition for certiorari with the United States Supreme Court.

III. Idaho Stockwater Statutes.

Since 1939, Chapter 5 of Title 42 of the Idaho Code ("Chapter 5") has addressed stockwater rights appropriated by the United States on lands managed by the Bureau of Land Management ("BLM") and its predecessor (the Division of Grazing). 1939 Idaho Sess. Laws 412-13 (Appendix 1). The original statutes comprising Chapter 5 remained substantially unchanged until 2017, when the Idaho Legislature repealed Chapter 5 and replaced it with a number of new stockwater rights provisions intended to "codify and enhance" the Legislature's understanding of the Idaho Supreme Court's *Joyce Livestock* decision. 2017 Idaho Sess. Laws 408-09 (Appendix 2). The Idaho Legislature subsequently amended and sometimes repealed or replaced these new provisions in the 2018, 2020, and 2022 legislative sessions. 2018 Idaho Sess. Laws 747-49 (Appendix 4); 2020 Idaho Sess. Laws 738-40 (Appendix 5); 2022 Idaho Sess. Laws 686-88 (Appendix 6). In 2018 the Legislature also amended Idaho Code § 42-113, a stockwater rights statute that had originally been enacted in 1984. 2018 Idaho Sess. Laws 303-05 (Appendix 3).

The 2018 legislation included a new statute addressing forfeiture of stockwater rights held by federal agencies, which was codified as Idaho Code § 42-503. 2018

Idaho Sess. Laws 748 (Appendix 3). That provision was repealed in 2020 and replaced by a new statute, Idaho Code § 42-224. 2020 Idaho Sess. Laws 738-40 (Appendix 5). This statute was not limited to stockwater rights held by federal agencies, but rather applied to all stockwater rights other than those based on federal law. *Id.* Section 42-224 also established a different procedure for addressing forfeiture of stockwater rights. *Id.*

Section 42-224 was itself extensively revised and amended during the 2022 legislative session, but still applies to all stockwater rights except those based on federal law. 2022 Idaho Sess. Laws 686-88 (Appendix 6). The revisions defined a new procedure for addressing allegations that a stockwater right has been lost to forfeiture pursuant to Idaho Code § 42-222(2). *Id.* The procedure consists of interlocking administrative and judicial components. The administrative component is defined by subsections (1)-(9), and the judicial component is defined by subsections (10)-(12). Idaho Code § 42-224(1)-(12).

The overall procedure established by Idaho Code § 42-224 is similar to that used in the SRBA and Idaho's other general water right adjudications. Decl. of Gary Spackman ("Spackman Dec.") ¶ 11. In the SRBA and the other general water right adjudications, IDWR investigates claims and makes recommendations to the SRBA District Court that carry "prima facie" weight. *Id.* Under the Idaho Code § 42-224, IDWR investigates claims of forfeiture and if IDWR determines the claim has merit, issues an order that has no legal effect in and of itself, but has "prima facie" weight in the ensuing "civil action" in the SRBA District Court. Idaho Code § 42-224(9)-(11);

see also Keen Dec. ¶ 23 (discussing the procedure defined by Idaho Code § 42-224). This does not change the burden or standard of proof in court, however. The Idaho Attorney General still has the burden of proving by clear and convincing evidence that a stockwater right has been lost to forfeiture pursuant to Idaho Code § 42-222(2). Idaho Code § 42-224(10)-(11).

IV. The Petitions and the Show-Cause Orders.

The administrative proceedings at issue in this case were initiated by four petitions filed with IDWR pursuant to Idaho Code § 42-224(1) by private parties holding permits to graze their livestock on federal lands. ("Petitions"). Spackman Dec. ¶¶ 4-5, Exs. 1-5.[16] The Petitions collectively alleged the United States owned a total of one hundred twenty-eight (128) stockwater rights located on the federal lands grazed by the Petitioners' livestock, and that the United States had not grazed or watered its own livestock on those lands. Spackman Dec. ¶ 5, Exs. 1, 2, 4, 5.[17] The Petitions also alleged that the Petitioners had not acted as agents of the United States for purposes of acquiring the stockwater rights. *Id.* The Petitions asked IDWR to issue orders to the United States, pursuant to Idaho Code § 42-224, to show cause

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[16] A fifth petition was also filed with IDWR and led to issuance of a show-cause order, but the Director withdrew that show-cause order and dismissed the proceeding after receiving evidence of an agency relationship between the United States and one of the other federal permittees using the same allotment. Spackman Dec. ¶¶ 6-7, Exs. 8, 11. That petition and the IDWR orders filed in that proceeding are not at issue in this case.

[17] All but six of the stockwater rights had been decreed to the United States in the SRBA. The exceptions consisted of four licensed rights and two unadjudicated "statutory" (i.e., beneficial use-based) claims. *Id.*; *see also* Appendix 7 (breakdown of the stockwater rights prepared by State Defendants' Counsel based on Exhibits 10, 12, 13, and 14 to the Spackman Declaration).

why the stockwater rights should not be lost to forfeiture, pursuant to Idaho Code § 42-222(2). *Id.*

The Director instructed IDWR staff to prepare memoranda analyzing the stockwater rights' places of use. Spackman Dec. ¶ 6; Keen Dec. ¶ 12. Based on the Petitions, the staff memoranda, and applicable Idaho law, the Director determined there was "prima facie" evidence that sixty-eight (68) of the United States' state law-based stockwater rights had been lost to forfeiture pursuant to Idaho Code § 42-222(2). Spackman Dec. ¶¶ 6,8, Exs. 10, 12, 13, 14. The Director determined that the remaining sixty (60) stockwater rights were either (1) based on federal law or (2) were state law-based water rights for which there was *not* "prima facie" evidence of forfeiture. *Id.*[18] The Director therefore granted the Petitions as to sixty-eight stockwater rights, and denied the Petitions as to the remaining sixty stockwater rights. *Id.* The Director issued the show-cause orders in May and June of 2022 ("Show-Cause Orders"). Spackman Dec. ¶¶ 6,8, Exs. 10, 12, 13, 14.[19]

The Orders required the United States, pursuant to Idaho Code § 42-224(2), to show cause why the sixty-eight (68) state law-based stockwater rights had not been lost to forfeiture, pursuant to Idaho Code § 42-222(2). Spackman Dec. ¶ 6, Exs. 10, 12, 13, 14. The Orders stated that, pursuant to Idaho Code § 42-224(6), the United

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[18] *See also* Appendix 7.

[19] Three of the four show-cause orders are amended orders. The original three orders were withdrawn and amended after IDWR was informed that some of the stockwater rights at issue were based on federal law. IDWR therefore withdrew and amended the orders to remove the federal law-based stockwater rights from the list of water rights subject to the show-cause orders. Spackman Dec. ¶ 8, Exs. 12, 13, 14.

States could request an administrative hearing on the Orders before the Director within twenty-one days of completion of service. *Id.* Finally, the Orders stated that pursuant to Idaho Code § 42-224(7), the sixty-eight stockwater rights for which the Petitions had been granted would be considered forfeited if the United States did not respond to the Orders within twenty-one (21) days, and the Director would issue an order within another fourteen (14) days stating that the stockwater rights had been forfeited, pursuant to Idaho Code § 42-222(2). *Id.*

The United States responded by filing the Complaint that initiated this case, Dkt. 1, and entering special appearances in the IDWR proceedings that requested hearings, but also contested IDWR's jurisdiction. Spackman Dec. ¶ 9. The United States also requested that the administrative proceedings be stayed pending the outcome of this case. *Id.*; Dkt. 37 ¶ 38. The Director granted this request and issued orders staying the administrative proceedings pending the outcome of this case or until otherwise ordered by the Director. Spackman Dec. ¶ 9. No other orders have been issued in the pending administrative proceedings.

STANDARD OF REVIEW

Summary judgment should be granted when the movant demonstrates that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, based on materials in the record including but not limited to affidavits or declarations. F.R.C.P. 56(a), (c). "'Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact.'" *Zetwick v. Cnty. of Yolo*,

850 F.3d 436, 440 (9th Cir. 2017) (citation omitted). When cross-motions for summary judgment are at issue, a court must "'evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences.'" *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 790–91 (9th Cir. 2006) (citation omitted).

ARGUMENT

I. Federal Land Management Agencies Are Subject to State Water Law.

Federal deference to state water law is well established. "[B]y the Desert Land Act of 1877 … if not before, Congress had severed the land and waters constituting the public domain" in the western United States. *Ickes v. Fox*, 300 U.S. 82, 95 (1937) (citation omitted). All non-navigable waters within the public domain "became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named[.]" *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). Congress thereby "recognize[d] and g[a]ve sanction … to the state and local doctrine of appropriation[.]" *Id.* at 164.

Since then, "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). "Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *see also id.* at 715 (referring to the reserved rights doctrine as "an exception to Congress'

explicit deference to state water law in other areas.").

The thread of federal deference to state water law is woven into the Taylor Grazing Act of 1934. Section 3 of the Taylor Grazing Act states that "nothing" within it "shall be construed or administered in any way to diminish or impair any right to the possession and use of water … which has vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law." 43 U.S.C. § 315b; *see also Joyce Livestock Co. v. United States*, 144 Idaho at 18, 154 P.3d at 519 ("The Taylor Grazing Act expressly recognizes that the ranchers could obtain their own water rights on federal land.").[20] The Federal Land Policy and Management Act of 1976 ("FLPMA") was not intended to cut the thread of federal deference to state water law. *See* Pub. Law 54-579, 90 Stat. 2743, Section 701 (note) ("Nothing in this Act shall be construed as … affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands," or "as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control.").[21]

Despite the long history of congressional deference to state water law, for many years the United States regularly asserted sovereign immunity from water right adjudications in state courts. *United States v. Oregon*, 44 F.3d 758, 765 (9th Cir.

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[20] The BLM's regulations and policies recognize the Taylor Grazing Act's deference to state water law. *See, e.g.,* Dkt. 36 ¶¶ 14, 16, 17(b) (citing BLM Land Exchange Handbook H-2200-1; 43 C.F.R. § 4120.3-9 (1995); BLM Handbook 1741-2 Water Developments). Excerpts of these regulations and policies, with highlighting added by Counsel for the State Defendants, are attached hereto in Appendices 9, 10, and 11.

[21] A copy of this "note" to FLPMA Section 701 is attached hereto in Appendix 12 (excepts, with highlighting added by Counsel for the State Defendants).

1994). In 1951, a bill was introduced into Congress "for the very purpose of correcting this situation and the evils growing out of such immunity." S. Rep. No. 82-755, at 5 (Sep. 17, 1951) ("Senate Report") (Appendix 8 at 4 of 10). This legislation became known as the "McCarran Amendment" and is codified at 43 U.S.C. § 666. The McCarran Amendment waives the United States' sovereign immunity in suits for (1) the adjudication of rights to the use of water on a river system or other source, and (2) for the administration of such rights. 43 U.S.C. § 666(a).

The Senate Report on the McCarran Amendment, which the United States Supreme Court has characterized as "[p]erhaps the most eloquent expression of the need to observe state water law," *California*, 438 U.S. at 678, discussed the long history of federal deference to state water law. The Senate Report stated:

> It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each Such State.
> …
> Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years. … The Committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the Court in the same manner as if it were a private individual.

Appendix 8 at 4, 6 of 10.

The United States Supreme Court has recognized only two exceptions to the rule that States have exclusive control of their water: "reserved rights 'so far at least as may be necessary for the beneficial use of government property' … and the

navigation servitude." *California*, 438 U.S. at 662 (citations omitted). This case obviously does not involve the federal navigation servitude, and the United States was decreed approximately 6,500 reserved stockwater rights in the SRBA, most pursuant to an executive order known as "Public Water Reserve 107," or "PWR 107." Dkt. 36 ¶ 10; Saxton Dec. ¶ 15. These are the *only* stockwater rights that Congress deemed necessary to support grazing programs on federal public lands in Idaho. *See United States v. State of* Idaho, 131 Idaho 468, 469, 959 P.2d 449, 450 (1998) ("We conclude that PWR 107 provides a valid reservation of water rights by the federal government for the limited purpose of stockwatering by permittees under the Taylor Grazing Act"). Federal land management agencies are subject to Idaho water law with respect to all other uses of water on federal lands in Idaho. This is what *Congress* has mandated. All of the United States' claims and arguments in this case are simply an attempt avoid this congressional mandate.

II. Idaho Water Rights Are Defined by Beneficial Use, Not Federal Land Management Programs and Policies.

Idaho water law is based on the "prior appropriation" doctrine. The two "bedrock" principles of Idaho's prior appropriation doctrine are "beneficial use" and "priority of right." *Idaho Ground Water Appropriators, Inc. v. IDWR*, 160 Idaho 119, 132, 369 P.3d 897, 910 (2016). Beneficial use is frequently described as the "basis, measure, and limit" of an appropriative water right. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 110-12, 157 P.3d 600 604-06 (2006). "Priority of right" means "first in time is first in right"— water rights established earlier in time ("senior water rights") have priority over water rights established later in time ("junior water

rights") when there is not enough water to satisfy all water rights. *In re CSRBA Case No.* 49576, 165 Idaho 489, 497, 447 P.3d 937, 945 (2018). Prior appropriation was the law in Idaho before statehood, and remains the foundation of Idaho water rights and water law to this day. *Joyce Livestock* Co., 144 Idaho at 7-8, 156 P.3d at 508-09.

Under Idaho law, the state's water resources are owned by the State of Idaho and allocated to beneficial uses according to state law. *Joyce Livestock Co.*, 144 Idaho at 7, 156 P.3d at 508; Idaho Code § 42-101. An Idaho water right is usufructuary—it is a right to *use* a portion of public waters of the state. *Joyce Livestock Co.*, 144 Idaho at 19, 156 P.3d at 520. An Idaho water right does not confer or include ownership of the *corpus* of the water, of any portion of the public water resource, or of the source from which the water is diverted. *Id.* at 7, 15, 19-20, 156 P.3d at 508, 516, 520-21. An Idaho water right also does not entitle the holder to monopolize a water source or hoard water, to exclude other water users from accessing the source, or to control any water other than that which is lawfully diverted for the authorized beneficial use. *Id.*; *3G AG LLC v. IDWR*, 170 Idaho 251, 262, 509 P.3d 1180, 1191 (2022).

The only "control" an Idaho water right holder has over the public water resource is the right to seek curtailment of diversions made under junior priority water rights, and *only* if those diversions are injuring a senior priority water right. *See Joyce Livestock Co.*, 144 Idaho at 15, 156 P.3d at 516 ("A water right simply gives the appropriator the right to the use of the water from that source, which right is superior to that of later appropriators when there is a shortage of water."); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 793, 252 P.3d 71, 74 (2011)

(discussing curtailment of junior priority water rights); Keen Dec. ¶ 17; Luke Dec. ¶ 10. An Idaho water right does not entitle the holder to block, control, or challenge uses of water that the water right holder does not need or cannot divert and apply to beneficial use. *Joyce Livestock Co.*, 144 Idaho at 7, 15, 19-20, 156 P.3d at 508, 516, 520-21. All Idaho water rights are subject to statutory forfeiture, and this was well established long before the United States filed its SRBA claims. 1905 Sess. Laws 27-28 (Appendix 1); *see, e.g., Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924) (discussing one of Idaho Code § 42-222(2)'s statutory predecessors).

Federal land management activities are not a "beneficial use" of water. *Joyce Livestock Co.*, 144 Idaho at 17-20, 156 P.3d at 518-21. If such activities constituted "beneficial use," the result would be "a quasi-riparian or quasi-reserved" water right, Counsel Dec. ¶ 10, Ex. 9 at 9 of 15—an impermissible "hybrid" water right nominally based on state law but defined by federal law. *See New Mexico ex rel. Reynolds v. Aamodt*, 1986 WL 1362103, at *2 (D.N.M. Jan. 24, 1986) ("There is a federal reserved right and a state appropriative right, but no hybrid of the two."). This would blur the "sharp" distinction between federal reserved rights and beneficial use-based appropriative rights. *See United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, 1248 (D. Nev. 2004), *aff'd sub nom. United States v. Truckee-Carson Irrigation Dist.*, 429 F.3d 902 (9th Cir. 2005) ("federal reserved rights are sharply distinguished from state water rights in that the latter can be lost pursuant to the doctrines of forfeiture,

abandonment, and the failure to perfect. … these doctrines are inapplicable to federal reserved rights.").

III. The United States' Challenges to Idaho Code §§ 42-222(2) and 42-224 Are Precluded by the SRBA's *Final Unified Decree.*

The United States asserts that Idaho Code §§ 42-222(2) and 42-224 violate the Property and Contract Clauses of the United States Constitution and the Retroactivity Clause of the Idaho Constitution by "divesting" the United States of its water rights, Dkt. 34-1 at 41-46, 53, and requests an order permanently enjoining application of these statutes to the United States. Dkt. 11 at 30. These claims and the requested relief are collateral attacks on the *Final Unified Decree* and precluded by *res judicata*.

A federal court must give a state court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also White v. City of Pasadena*, 671 F.3d 918, 926 (9th Cir. 2012) ("we follow the state's rules of preclusion"); 28 U.S.C. § 1738 ("full faith and credit"). Under Idaho law the *Final Unified Decree* is "conclusive as to the nature and extent of all [pre-commencement] water rights" within the boundaries of the SRBA. Counsel Dec. ¶ 3, Ex. 2 at 7, 9 of 27; Idaho Code § 42-1420(1). The Idaho Supreme Court has repeatedly confirmed the finality and preclusive effect of the *Final Unified Decree* and the partial decrees incorporated within it.[22]

[22] *In re SRBA Case No. 39576 Subcase No. 37-00864*, 164 Idaho 241, 245, 429 P.3d 129, 133 (2018) (quoting the *Final Unified Decree*"); *First Sec. Corp.*, 165 Idaho at

A. The United States' Challenge to Idaho Code § 42-222(2) is a Collateral Attack on the SRBA's *Final Unified Decree.*

The United States requests an order permanently enjoining the State from applying Idaho Code § 42-222(2) to the United States' water rights. Dkt. 11 at 30. Idaho Code § 42-222(2) states water rights "shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated." Idaho Code § 42-222(2).[23] This use-it-or-lose-it provision has been part of Idaho's water code for more than a century. 1905 Idaho Sess. Laws 27-28 (Appendix 1). The *Final Unified Decree* confirms that *all* state law-based water rights decreed in the SRBA, including those held by the United States, are subject to this forfeiture statute:

> *The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court* and not from the date of this Final Unified Decree. State

741, 451 P.3d at 454; *In re SRBA Case No. 39576 Subcase No. 37-00864*, 164 Idaho at 252-53, 429 P.3d at 140-41; *United States v. Black Canyon Irrigation Dist.*, 163 Idaho at 60-64, 408 P.3d at 58-62; *In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho at 150–55, 408 P.3d at 905–10; *City of Blackfoot*, 162 Idaho at 308-09, 396 P.3d at 1190-91; *IGWA*, 160 Idaho at 126-28, 369 P.3d at 904-06; *Rangen, Inc.*, 159 Idaho at 805-10, 367 P.3d at 200-05;.

[23] The full text of Idaho Code § 42-222(2) is as follows:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

> law regarding forfeiture does not apply to partial decrees based upon federal law.

Counsel Dec. ¶ 3, Ex. 2 at 12 (italics added). Nothing in the partial decrees for the United States' state law-based stockwater rights subject to the Show-Cause Orders exempts them from this provision or from forfeiture pursuant to state law. Saxton Dec. ¶ 20; *see also* Counsel Dec. ¶ 4, Ex. 3 (partial decrees).[24] Indeed, other than the name of the owner, nothing in the partial decrees for the United States' state law-based stockwater rights distinguishes them from those held by private individuals. Saxton Dec. ¶ 20.[25]

An order permanently immunizing the United States' state law-based water rights from forfeiture pursuant to state law would endow the United States' state law-based water rights with special protections that the *Final Unified Decree* and the partial decrees explicitly deny to them. Such an order would change the fundamental nature of the United States' water rights by nullifying the requirement of ongoing beneficial use, which inheres in every Idaho water right. *See, e.g., Pioneer Irr. Dist.*, 144 Idaho at 113, 157 P.3d at ("Beneficial use is enmeshed in the nature of a water right"); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d

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[24] The Show-Cause Orders identify the sixty-eight (68) state law-based stockwater rights subject to the show-cause requirement. Spackman Dec. ¶¶ 6, 8, Exs. 10, 12, 13, 14. The partial decrees for these sixty-eight stockwater rights are included in Exhibit 3 to the declaration of State Defendants' counsel. Counsel Dec. ¶ 4, Ex. 3; *see also* Appendix 7.

[25] In contrast, the partial decrees for the United States' *federal* law-based stockwater rights include provisions expressly identifying them as such, Counsel Dec. ¶ 5, Ex. 4, which mean "State law regarding forfeiture does not apply." Counsel Dec. ¶ 3, Ex. 2 at 12. *See also* Appendix 7.

400, 408 (1997) ("Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. *This is a continuing obligation*.") (italics added); *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) ("Appropriative rights do not depend on land ownership and are acquired *and maintained* by actual use.") (italics added).[26]

The United States could have requested such a special dispensation in the SRBA. It was already well-established that all state law-based stockwater rights are subject to forfeiture pursuant to Idaho Code § 42-222(2). The forfeiture provisions of Idaho Code § 42-222(2) had been part of Idaho's water code for at least eighty years when the SRBA commenced in 1987. 1905 Idaho Sess. Laws 27-28 (Appendix 1); *see also* Dkt. 34-1 at 21 (admitting that Idaho Code § 42-222(2) is "a longstanding provision of the Idaho Code"). It was also well established that even decreed water rights are subject to forfeiture for non-use. *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976); *Graham v. Leek*, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943); *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924).[27]

[26] *See also* Appendix 9 at 10 of 12 ("Water rights obtained under state law … may be subject to loss if not exercised in accordance with State water laws."); Appendix 10 at 3 of 3 (stating that water rights "for the purpose of livestock watering on public land shall be acquired, perfected, *maintained*, and administered under the substantive and procedural laws of the State within the land is located") (italics added).

[27] Older Idaho Supreme Court decisions sometimes used the word "abandonment" rather than "forfeiture" when referring to five years of non-use, apparently because section 42-222(2)'s statutory predecessors sometimes referred to this as "abandonment" rather than "forfeiture." The statutes discussed in *Albrethsen,* 40 Idaho at 59, 231 P. at 422, and *Graham*, 65 Idaho at 287, 144 P. at 479, are examples. The standards for statutory forfeiture are nonetheless distinct from those for "abandonment," which is a common-law doctrine that unlike forfeiture requires a showing of affirmative intent to abandon the water right. *See, e.g., Gilbert*, 97 Idaho

And it is undisputed that the legislation challenged in this case did not amend Idaho Code § 42-222(2). *See* Dkt. 34-1 at 19-24 (discussing the legislation that allegedly "targets" federal stockwater rights).[28]

Moreover, in the SRBA and the *Joyce Livestock* appeal the United States *did* make the same type of arguments it makes in this case. In the SRBA, the United States argued it was entitled to state law-based stockwater rights "based solely" on its administration of federal lands. Counsel Dec. 7, Ex. 6 at 1, 21, 26 of 32. In *Joyce Livestock* the United States argued it was entitled to state law-based stockwater rights based on the BLM's "ownership and control" of federal public lands "coupled" with the BLM's "comprehensive management of public lands under the Taylor Grazing Act." *Joyce Livestock Co.,* 144 Idaho at 17, 156 P.3d at 518.

In this case, the United States' argues that state law-based stockwater rights are needed to "support" or "enable" federal grazing programs and are "crucially important" to them. Dkt. 11 at 2, 7, 20; Dkt. 34-1 at 11, 12, 14, 44, 52; Dkt. 36 ¶ 8. These are essentially the same arguments the United States made in the SRBA and *Joyce Livestock* appeal, and which the Presiding Judge and the Idaho Supreme Court rejected. Counsel Dec. ¶ 7, Ex. 6 at 21-29 of 32; *Joyce Livestock Co.*, 144 Idaho at 17-

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at 738, 552 P.2d at 1223 (discussing the difference between statutory forfeiture and common-law abandonment).

[28] Idaho Code § 42-222(2) was amended in 2020 by legislation that the United States has *not* challenged in this case (2020 H.B. 615). 2020 Idaho Sess. Laws 849, 851 (Appendix 14 at 3 of 5). The amendment added this sentence: "The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence." *Id.* This addition simply confirmed the "clear and convincing" standard of proof that has always applied to statutory forfeiture in Idaho. *Albrethsen*, 40 Idaho at 59-60, 231 P. at 422.

19, 154 P.3d at 519-20.

The Idaho Supreme Court also rejected the United States' arguments that allowing private ownership of stockwater rights on federal lands would have dire consequences that could be avoided *only* through federal ownership of the stockwater rights:

> The United States contends that the denial of its claimed water rights conflicts with the Taylor Grazing Act and any requirement of state law that it actually apply the water to a beneficial use is invalid under the Supremacy Clause of the Constitution of the United States. The United States does not point to any provision of the Taylor Grazing Act allegedly in conflict with Idaho water law. Rather, it claims that application of Idaho water law to it would violate the purposes underlying the Act. It argues,
>
> > Recognition of a private appropriative water right to take water from streams on public lands in the course of grazing would likewise effectively lead to monopoly of federal grazing and interfere with federal administration of the lands *unless* the ability of others to graze there under permit by BLM under the Taylor Grazing Act is preserved through a decree of stock water rights to BLM that could be used by common and future permittees.

Joyce Livestock Co., 144 Idaho at 19, 156 P.3d at 520 (italics in original). The Idaho Supreme Court observed that this argument "reflects a misunderstanding of water law." *Id.* As the court explained:

> *A water right does not make the appropriator the owner of the source of water, nor does it give the appropriator control over that source.* … It does not even make the appropriator the owner of the water. We have long recognized that an appropriator may not waste water, but must permit others to use the water when the appropriator is not applying it to a beneficial use. … A water right simply gives the appropriator the right to the use of the water from that source, which right is superior to that of later appropriators when there is a shortage of water.
>
> …
>
> A water right does not constitute the ownership of the water; it is simply

> a right to use the water to apply it to a beneficial use. … *A person who is not applying the water to a beneficial purpose cannot waste it or exclude others from using it*. … Ownership of a water right does not include the right to trespass upon the land of another in order to access the water. … Indeed, Idaho law could not authorize anyone to trespass upon federal land. [A livestock owner holding a stockwater right on federal land] cannot water its livestock at water sources located on federal rangeland unless the government grants it permission to have its livestock on such land. It also cannot transfer the place of use of the water without first obtaining permission after following the required statutory procedure. …

Joyce Livestock Co, 144 Idaho at 15, 19-20, 156 P.3d at 516, 520-21 (italics added) (internal quotation marks and citations omitted).

The United States makes its *Joyce Livestock* arguments again in this case, asserting that *only* federal ownership of stockwater rights can ensure the continued availability of stockwater for multiple and successive permittees on a given allotment. Dkt. 34-1 at 47. According to the United States, "[t]he loss of federal rights could allow one permittee to prevent water use by others," and "could result in a permittee preventing water use by a successor permittee, or requiring payment from the successor to use the water," and "depriv[e] federal permittees of access to water needed to sustain their ranching operations[.]" Dkt. 34-1 at 47-48. These are the same arguments the Idaho Supreme Court rejected in the *Joyce Livestock* appeal. *Joyce Livestock Co.*, 144 Idaho at 19, 156 P.3d at 520.[29]

[29] In *Joyce Livestock* the Idaho Supreme Court also disposed of the United States' assertions that private stockwater right ownership will lead to "cattle trespass." Dkt. 34-1 at 51. *See Joyce Livestock Co.*, 144 Idaho at 19, 156 P.3d at 520 ("Joyce Livestock cannot water its livestock at water sources located on federal rangeland unless the government grants it permission to have its livestock on such land.").

In short, the United States is again arguing federal law should dictate the nature and purposes of its state law-based water rights, because all manner of terrible things will happen if state law controls. These arguments were made and rejected in the SRBA, and are now foreclosed. *See, e.g., United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 64, 408 P.3d 52, 62 (2017) ("claim preclusion bars the United States in this proceeding from seeking to litigate issues of refill and flood-control administration, and from attempting to supplement the water rights already decreed"). Idaho water law governs the definition and administration of state law-based water rights. *See Joyce Livestock Co.*, 144 Idaho at 6, 156 P.3d at 507 ("the appropriation of the nonnavigable waters within this State, including those located on federal land, is a matter of state law.").

The *Final Unified Decree* and the partial decrees it incorporates are "'conclusive as to the nature and extent'" of the United States' water rights. *In re SRBA Case No. 39576 Subcase No. 37-00864*, 164 Idaho at 245, 429 P.3d at 133 (citations omitted). The United States' assertions that its decreed water rights must be understood as being immune from forfeiture—an immunity not found anywhere within the four corners of its partial decrees and contrary to the express language of the *Final Unified Decree*—is an impermissible collateral attack on SRBA water right decrees. *See City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) ("Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack on the partial decree."); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) ("The district court found that

Rangen's argument was based on the idea that the decrees do not accurately reflect its historical beneficial use. The court held that this argument was an impermissible collateral attack on the decrees. This Court agrees … .") (*abrogated in part on different grounds by 3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022)); *Idaho Ground Water Appropriators, Inc.*, 160 Idaho at 128, 369 P.3d at 906 ("IGWA is essentially arguing that the Curren Tunnel was miscategorized as a surface water source in the SRBA … Allowing IGWA to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process."); *United States v. Hennen*, 300 F. Supp. 256, 264 (D. Nev. 1968) ("The complaint by the Government in this action constitutes a collateral attack on the State Court proceedings.").

B. The United States' Challenge to Idaho Code § 42-224's Procedural Provisions is Also a Collateral Attack on SRBA Decrees.

The United States' challenge to Idaho Code § 42-224 is also an impermissible collateral attack because that statute did not change longstanding Idaho forfeiture law. Idaho Code § 42-224 is a purely procedural statute that expressly incorporates and confirms the well-established standards of Idaho Code § 42-222(2). *See* Idaho Code § 42-224(1)-(2), (7)-(8), (12) ("pursuant to section 42-222(2), Idaho Code"); *id.* § 42-224(11) ("shall not change the standard of proof for forfeiture established by

section 42-222(2), Idaho Code").[30]

Idaho Code § 42-224 did not create the potential for stockwater rights to be forfeited; that potential has always existed under Idaho Code §42-222(2). Idaho Code § 42-224 simply defines a procedural pathway for addressing allegations that a stockwater right has been forfeited. Forfeiture still must be proven in court by the "clear and convincing evidence" standard of Idaho Code § 42-222(2). Idaho Code § 42-224(11). The United States' challenge to Idaho Code § 42-224's procedural provisions is simply an indirect way of arguing that the substantive forfeiture provisions of Idaho Code § 42-222(2) may never be applied to the United States' decreed stockwater rights. It is another collateral attack on the *Final Unified Decree* and is foreclosed by claim preclusion.

IV. This Case Should Be Dismissed Pursuant to the Rooker-Feldman Doctrine.

The *Rooker-Feldman* doctrine "bars federal courts from exercising subject-matter jurisdiction over a proceeding in 'which a party losing in state court' seeks 'what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Doe v. Mann*, 415 F.3d 1038, 1041 (9th Cir. 2005). Federal courts may not hear cases in which federal claims are so "'inextricably intertwined'" with a state court decision that adjudication of the federal claims "would undercut

[30] Contrary to the United States' assertion, nothing in Idaho Code §§ 42-222(2) or 42-224 states that stockwatering by federal permittees "no longer … constitute[s] beneficial use." Dkt. 34-1 at 45.

the state ruling or require the district court to interpret the application of state laws or procedural rules[.]" *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) (citation omitted).

This is such a case. The United States seeks a permanent injunction to undercut the *Final Unified Decree* and the partial decrees by effectively re-defining the nature and extent of the United States' state law-based stockwater rights. The United States seeks to justify this request by recycling arguments that were rejected in the SRBA and the *Joyce Livestock* appeal, apparently in the hope that this Court will see the matter differently.

It is impossible to award the United States the relief it seeks without undercutting the decisions of the SRBA District Court and the Idaho Supreme Court, thereby allowing the United States and other dissatisfied claimants to seek federal court rulings that effectively re-adjudicate the nature and extent of decreed water rights. The State of Idaho and its citizens have invested decades and many millions of dollars in the SRBA and the other adjudications, and the United States should not be allowed to undermine these efforts by seeking federal court relief that re-defines decreed water rights. *See Black Canyon Irrigation Dist.*, 163 Idaho at 64, 408 P.3d at 62 ("Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures.").

V. The SRBA District Court Has Prior Exclusive Jurisdiction Over the United States' Claims.

This Court should also dismiss this case pursuant to the doctrine of prior

exclusive jurisdiction. *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 591 (9th Cir. 2022). Under this "'ancient and oft-repeated'" doctrine, the court that first acquires jurisdiction over a res has *exclusive* jurisdiction over that res. *Id.* (citation omitted). This principle "is no mere discretionary abstention rule. Rather, it is a mandatory jurisdictional limitation," and it applies "in the water rights context." *State Engineer of State of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*, 339 F.3d 804, 810 (9th Cir. 2003).

The SRBA District Court acquired jurisdiction over the United States and its stockwater right claims in 1987, pursuant to the McCarran Amendment. Counsel Dec. ¶ 3, Ex. 2 at 4, 7 of 27. Partial decrees were issued for these stockwater rights and are incorporated into the *Final Unified Decree*, *id.* ¶ 3, Ex. 2 at 10 of 27, which explicitly confirms that *all* state law-based water rights decreed in the SRBA are subject to forfeiture pursuant to Idaho Code § 42-222(2). *Id.* ¶ 3, Ex. 2 at 12 of 27. Nothing in the partial decrees for the United States' state law-based stockwater rights exempts them from this provision or from forfeiture pursuant to state law. Counsel Dec. ¶ 4, Ex. 3; Saxton Dec. ¶ 20.[31] Moreover, the SRBA District Court specifically *retained* jurisdiction "to … resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or rules of the Idaho Department of Water Resources[.]" Counsel Dec. ¶ 3, Ex. 2 at 13 of 27.

The United States' claims fall within this retained jurisdiction because they

[31] *See also* Appendix 7.

are clearly "related" to the *Final Unified Decree*. Counsel Dec. ¶ 3, Ex. 2 at 13 of 27.[32] The United States' complaint and summary judgment filings put its stockwater rights and the "evolving but ever-present threat" of forfeiture, Dkt. 11 at 12, squarely at the center of this case. This action responds to the Show-Cause Orders and seeks to terminate the forfeiture proceedings. Dkt. 11 at 4, 30; Dkt. 34-1 at 23-24. The United States seeks an order permanently immunizing its state law-based water rights from forfeiture pursuant to Idaho Code § 42-222(2). Dkt. 11 at 30. The factual narratives in the United States' filings are dominated by assertions regarding: (1) the nature and scope of the United States state law-based stockwater rights; (2) the purposes for which the United States claimed them in the SRBA; (3) the basis upon which these rights were decreed in the SRBA; (4) the extent to which SRBA settlement agreements define the United States' stockwater rights; (5) the purposes for which the United States' stockwater rights may now be used; (6) the allegedly crucial role of the United States' stockwater rights in federal grazing programs and administration of federal lands; and (7) the allegedly dire consequences of forfeiting the United States' stockwater rights. Dkt. 11 at 2-3, 6-26; Dkt. 34-1 at 11-24; Dkt. 35 ¶¶ 8-19; Dkt. 36 ¶¶ 4-40; Dkt. 37 ¶¶ 1-48. The United States also argues that use of

[32] The United States' claims "are not reviewable" under the Idaho Administrative Procedures Act or IDWR's rules. The United States has not even submitted any claims or "issues" to IDWR, and Idaho Code § 42-224 does not authorize judicial review under the Idaho Administrative Procedures Act. Idaho Code §§ 67-5270—67-5279. It requires, rather, that any judicial consideration of IDWR's forfeiture determination will be in a "civil action" in the SRBA District Court in "proceedings … like those in a civil action triable without right to a jury." Idaho Code § 42-224 (10)-(11)

its stockwater rights is the same it was when they were decreed and that forfeiture would be contrary the *Final Unified Decree*. Dkt. 34-1 at 11, 15, 20, 32, 42, 45, 52.

The question of whether the United States' state law-based stockwater rights are subject to forfeiture under state law is *the* central issue in this case. The fact that the United States has asserted federal law as a defense against possible forfeiture does not change the nature of the issue. The question is whether Idaho water law applies to water rights claimed and decreed under Idaho law, "regardless of the presence of a federal defense." *Baker Ranches , Inc. v. Haaland*, 2022 WL 867267, at *5 (D.Nev. Mar. 22, 2022), *appeal filed,* June 6, 2022.

The United States' framing of this case as an *in personam* action rather than an attack on SRBA decrees changes nothing. In a prior exclusive jurisdiction analysis, "*State Engineer* instructs courts to look 'behind the form of the action to the gravamen of a complaint and the nature of the right sued on' when determining the true jurisdictional nature of a case." *Applied Underwriters*, 37 F.4th at 592 (quoting *State Engineer,* 339 F.3d at 810). This analysis includes consideration of whether the requested relief "'seek[s] necessarily [to] interfere with the jurisdiction or control by the state court over the res.'" *Id.* at 593 (citation omitted) (first brackets added; second brackets in original).

Applying these principles confirms that state water rights and state water law define this case's "true jurisdictional nature." *Id.* at 592. The ultimate issue the United States has put before this Court is the question of whether state law-based stockwater rights decreed to the United States in the SRBA are subject to forfeiture

under Idaho law. The United States' allegations, arguments, and claims for relief are narrowly focused on "the same *res*" that was at issue in the SRBA. *Applied Underwriters*, 37 F.4th at 591. Further, the requested relief "'seek[s] necessarily [to] interfere with the jurisdiction or control by the state court over the res,'" *Applied Underwriters*, 37 F.4th at 593 (citation omitted), because the question of whether the United States' stockwater rights are subject to forfeiture under Idaho law falls within the retained jurisdiction of the SRBA District Court.

The SRBA District Court has prior exclusive jurisdiction over the United States' claims. This Court should dismiss this case for lack of subject matter jurisdiction. *See Applied Underwriters*, 37 F.4th at 600 (affirming dismissal under the doctrine of prior exclusive jurisdiction).[33]

VI. This Case Should be Dismissed Pursuant to *Burford* Abstention.

Also, this Court should also dismiss this case pursuant to the *Burford* abstention doctrine. Federal district courts "have an obligation and a duty to decide cases properly before them, and '[a]bstention from the exercise of federal jurisdiction

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[33] The SRBA District Court is fully qualified to hear all of the United States' federal law claims and arguments. As the United States Supreme Court has stated, "[o]ur system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law." *McKesson v. Doe*, ___ U.S. ___, ___, 141 S. Ct. 48, 51 (2020) (citation omitted). Indeed, the SRBA District Court has previously adjudicated many SRBA claims and objections the United States filed based on federal law, *see, e.g.,* Counsel Dec. ¶¶ 7, 9, Exs. 6, 8 (SRBA "challenge" decisions"), and over the long course of the SRBA decided many water rights issues that arose under or were informed by federal law. The United States' federal law claims in this case are well within the authority, experience, and ability of the SRBA District Court to address and decide. Any decision of the SRBA District Court can be appealed to the Idaho Supreme Court, and further review can be sought in the United States Supreme Court.

is the exception, not the rule.'" *City of Tucson v. U.S. W. Commc'ns, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) (brackets in original). Even so, the *Burford* abstention doctrine allows a federal district court to abstain from exercising jurisdiction if the case presents "'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,'" or if decisions in a federal forum "'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *City of Tucson v. U.S. W. Commc'ns, Inc.*, 284 F.3d 1128, 1132 (9th Cir. 2002) (citation omitted). This is such a case.

The Ninth Circuit uses a three-factor test for applying *Burford* abstention: (1) the state has chosen to "concentrate suits challenging the actions of the agency involved in a particular court"; (2) the federal issues "could not be separated easily from complex state law issues with respect to which state courts might have special competence"; and (3) "federal review might disrupt state efforts to establish a coherent policy." *Id.* at 1133 (citation omitted). The question of whether the *Burford* abstention requirements have been met is one of law. *Id.* at 1132. When the requirements are met, abstention is a question of discretion. *Id.*

As to the first *Burford* factor, the SRBA District Court is the *only* Idaho court authorized to hear challenges to IDWR's determinations that stockwater rights have been forfeited. Idaho Code § 42-224(10).[34] Plainly, the State of Idaho "has chosen to

[34] The Twin Falls County District Court, Idaho Code § 42-224(10), is the "SRBA District Court." Saxton Dec. ¶ 5; *see also* Counsel Dec. ¶ 14, Ex. 13 at 1 of 1 (referring in caption to the "the SRBA District Court").

concentrate suits challenging the actions of the agency involved in a particular court." *City of Tucson*, 284 F.3d at 1133. And the reason for this choice is clear: the SRBA District Court presides over all of Idaho's water right adjudications, Saxton Dec. ¶ 5, and also hears all petitions for judicial review of IDWR's water rights administration decisions. Counsel Dec. ¶ 14, Ex. 13 at 1 of 1. In effect, the SRBA District Court is the State of Idaho's "water court."

The second *Burford* requirement is also met. Water rights are an issue of "vital concern" in arid western states such as Idaho, and "control over water and water rights" is "an area of comprehensive and complex regulation under state law." *Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 517 (9th Cir. 1987); *see also United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001) (stating that the question of "who is entitled to how much water" is a "complex state law issue."); Title 42, Idaho Code ("Irrigation and Drainage—Water Rights and Reclamation"). Further, IDWR and the SRBA District Court clearly have "special competence" in navigating these issues. *City of Tucson*, 284 F.3d at 1133.

In addition, the United States' claims cannot be "separated easily from [these] complex state law issues." *Id.* The United States seeks to permanently enjoining application of the statutory forfeiture provisions of Idaho Code § 42-222(2) to the United States' state law-based stockwater rights, Dkt. 11 at 30, supporting this request with assertions that dive deep into Idaho water law.[35] The United States

[35] Many of the United States' arguments and assertions regarding Idaho water rights and water law are based on statements in the declarations of Kathryn J. Conant (Dkt. 35) and Fredric W. Price (Dkt. 36) that are partly or wholly legal analyses, opinions,

contests: (1) the nature, extent, purpose, and use of these state law-based stockwater rights; (2) requirements of Idaho water law; (3) the consequences of forfeiting the stockwater rights; (4) and the consequences of private ownership of stockwater rights for sources located on federal lands. Dkt. 34-1 at 47-53; Dkt. 35 ¶¶ 8, 18-19; Dkt. 36 ¶¶ 25, 29-38; Dkt. 37 ¶¶ 6-8, 11-33, 41-48. The United States' claims and request for relief are inextricably intertwined with Idaho water rights and water law, and cannot be "separated easily" from them. *City of Tucson*, 284 F.3d at 1133. The second *Burford* requirement is met.

The third *Burford* requirement is also met because "federal review might disrupt state efforts to establish a coherent policy" regarding the use and forfeiture of state law-based stockwater rights. *Id.* at 1133. The administrative and judicial components of Idaho Code § 42-224 constitute an integrated procedure to resolve allegations of stockwater right forfeiture. That procedure had not run its course before the United States filed its complaint—indeed, even the administrative phase has not finished.

Moreover, the forfeiture proceedings are the *first* to take place under Idaho Code § 42-224, and the statute itself is the product of years of legislative development. By filing this action, the United States has unavoidably—and apparently

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conclusions, and arguments regarding Idaho water rights or Idaho water law. *See Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010) ("Pure legal conclusions are not admissible as factual findings."). The State Defendants therefore object to certain portions of these declarations pursuant to F.R.C.P. 56(c). The portions of these declarations to which the State objects are identified in Appendix 15.

intentionally—asked this Court to disrupt the State of Idaho's efforts to develop coherent policy on a complex matter of "vital concern" in Idaho—state water law and water rights. *Kern-Tulare Water Dist.*, 828 F.2d at 517.

The requirements for *Burford* abstention are met. This Court should dismiss this case under the *Burford* doctrine so the forfeiture proceedings can run their course. Dismissal will not prejudice the United States. It will have every opportunity before IDWR and the SRBA District Court to make arguments it has made in this case, and the opportunity to develop a record and submit evidence supporting the its assertions that its state law-based stockwater rights have been used and should not be forfeited. Should the SRBA District Court ultimately determine any of the United States' state law-based stockwater rights have been forfeited pursuant to Idaho Code § 42-222(2), the United States may appeal any adverse decision to the Idaho Supreme Court, and seek further review in the United States Supreme Court, if necessary.

VII. The United States Has Waived Sovereign Immunity.

A. The United States' Waiver of Sovereign Immunity in the SRBA Applies in This Case Through the *Final Unified Decree*.

The *Final Unified Decree*'s retained jurisdiction provision undermines the United States' claim of sovereign immunity. Dkt. 11 at 26; Dkt. 34-1 at 12, 25-26, 34-40. It is undisputed that the United States waived sovereign immunity in the SRBA and therefore is bound by the *Final Unified Decree*—including its retained jurisdiction provision. Counsel Dec. ¶ 3, Ex. 2 at 13 of 27. The United States incorrectly assumes that an *additional* waiver of sovereign immunity is necessary to subject the United States to forfeiture proceedings commenced in the SRBA District

Court pursuant to Idaho Code § 42-224(10)-(12). But the SRBA District Court already has jurisdiction over the United States for such a proceeding, pursuant to the retained jurisdiction provision of the *Final Unified Decree*. No additional waiver of sovereign immunity is necessary.[36]

B. The Pending Forfeiture Proceeding is a "Suit" for "Administration" of Decreed Water Rights Under the McCarran Amendment.

The United States has also waived sovereign immunity under the McCarran Amendment's consent to join the United States in a "suit" for "administration" of decreed water rights. 43. U.S.C. § 666(a). As discussed below, the pending forfeiture proceeding deals with the "administration" of decreed water rights, and is a "suit" within the meaning of the McCarran Amendment.

1. Forfeiture of a Decreed Water Right is Question of "Administration."

The Ninth Circuit addressed what it means to "administer" decreed water rights for purposes of the McCarren Amendment's waiver of sovereign immunity: "To

[36] The United States also may not rely on sovereign immunity to insulate its three licensed stockwater rights from application of Idaho water law. As the United States Court of Federal Claims stated in a case involving water rights the BLM acquired pursuant to Arizona law:

> the BLM was essentially acting in its proprietary capacity as a landowner and received the same treatment under Arizona law as a private owner. When, in such circumstances, "the Government 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.'"

Klump v. United States, 50 Fed. Cl. 268, 271–72 (2001), *aff'd,* 30 F. App'x 958 (Fed. Cir. 2002) (quoting *J & E Salvage Co.,* 36 Fed.Cl. 192, 195 (1996) and *Cooke v. United States,* 91 U.S. 389, 398 (1875)).

administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language.'" *S. Delta Water Agency v. U.S., Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985) (quoting *Hennen*, 300 F.Supp. at 263). The *Hennen* decision appears to be the first reported decision that addressed this question, and its definition of "administration" is often cited by other courts. *See, e.g., Federal Youth Center v. District. Court*, 575 P.2d 395, 398 (Colo. 1978) (quoting *Hennen*).

Under this definition, the question of forfeiture of a decreed water right is clearly a question of "administration" of the decree. If a water right has been forfeited, the decree for that right becomes a dead letter: it can no longer be "execute[d]" or "enforce[d]," *S. Delta Water Agency*, 767 F.2d at 541, because the underlying water right has ceased to exist. *See also Gila River Indian Cmty. v. Freeport Mins. Corp.*, 2020 WL 13178025, at *5-6 (D. Ariz. Mar. 5, 2020) (analyzing "forfeiture" as a question of "the Court's administration of the Decree"); *Gila River Indian Cmty. v. Freeport Mins. Corp.*, 2018 WL 9880063, at *2 (D. Ariz. July 20, 2018) ("Though forfeiture is not a separately enshrined right in the Decree, the water right forming the basis for Plaintiff's forfeiture claim is."); *Federal Youth Center,* 595 P.2d at 401 (holding that McCarran Amendment's waiver for "administration" applied when "the substance of the plaintiff's adverse possession claim is that one or more of the claimants to water in the Warrior Ditch have lost their respective rights by failure to exercise them").

The United States' circular argument that forfeiture is not "administration"

because it involves "void[ing]]water rights, not 'administer[ing] them" proves nothing, Dkt. 34-1 at 37, and is contradicted by the explicitly broad language of the McCarran Amendment. As the Colorado Supreme Court has observed, "[i]t would be difficult to draft a provision more all-inclusive than [43 U.S.C.] s 666(a)(2). … a suit for 'administration' of water rights could be virtually any action concerning the status of those rights as they had been previously adjudicated." *Federal Youth Center*, 575 P.2d at 398; *see also Hennen*, 300 F.Supp. at 264 (determining that proceedings to correct and amend a decree "were proceedings within the meaning of [43 U.S.C. §] 666(a)(2)").

Ultimately, the United States' own arguments demonstrate that forfeiture questions are matters of "administration," because those arguments hinge on interpretation of the *Final Unified Decree.* The United States repeatedly asserts that its stockwater rights were decreed on the basis of federal permittees' use of water, that there has allegedly been no change in use from the time the stockwater rights were decreed, and that it would be contrary to the *Final Unified Decree* to forfeit decreed water rights. Dkt. 34-1 at 11, 15, 20, 32, 42, 45, 52. Plainly, these arguments require a court to "construe and interpret" the language of the *Final Unified Decree* and "resolve conflicts as to its meaning." *S. Delta Water Agency*, 767 F.2d at 541.

The United States' assertions that the term "administration" should be narrowly construed are also contrary to the purposes of the McCarran Amendment. The Colorado Supreme Court explained:

> [T]he intent of the McCarran Amendment was to ensure that the United States would be subject to suits seeking initial declaration or

> adjudication of water rights, *as well as to subsequent proceedings further affecting or disposing of those rights*. To provide only the former consent, without the latter, would be to allow the United States to take advantage of each state's water law system and acquire adjudicated water rights, without being limited by subsequent state actions attempting to assure the orderly use of those rights.
>
> …
>
> *Accordingly, we construe the broad language of s 666(a)(2) to refer to the entire body of water law administration procedures of each state, regardless of the forms in which they may exist*. In Colorado, as in many states, those procedures derive from statutes, judicial decisions, and administrative regulations. Exclusion of any portion of those would result in only a partial fulfillment of the legislative intent of the McCarran Amendment.

Federal Youth Center, 575 P.2d at 399-400 (italics added). The Colorado court's reasoning and conclusions are supported by the Senate Report's recognition that the United States "must be amenable to the laws of the State, if there is to be a proper administration of the water law as it has developed over the years." Senate Report at 6 (Appendix 8 at 6 of 10). This Court should come to the same conclusion.

2. *A Section 42-224 Proceeding Qualifies as a "Suit" for Administration of Decreed Water Rights.*

The McCarran Amendment's waiver of sovereign immunity is not limited to the judicial portion of the integrated forfeiture proceeding authorized by Idaho Code § 42-224. It also applies to the administrative component of that proceeding. The United States' attempt to assert sovereign immunity from the administrative component of the forfeiture proceeding, Dkt. 11 at 26; Dkt. 34-1 at 35, fails for the same reasons the Ninth Circuit rejected substantially the same argument in *United States v. Oregon*, 44 F.3d 758, 765-67 (9th Cir. 1994). In *Oregon,* the United States argued that Oregon's water right adjudication procedure did not constitute a "suit"

under the McCarran Amendment because it began as an "administrative proceeding" before moving into the adjudication court. *Id.* at 765. The court of appeals rejected this argument because "'it does not recognize the true relation of the proceeding before the [administrative agency] to that before the court.'" *Id.* at 765 (quoting *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 451 (1916).

The United States' argument here also ignores the linkage between the administrative and judicial components of the integrated proceeding established by Idaho Code § 42-224. *See Oregon*, 44 F.3d at 765 ("They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court."). The administrative proceeding under subsections (1)-(9) of section 42-224 also "'merely paves the way for an adjudication by the court[.]'" *Id.* (citation omitted). IDWR's forfeiture determination has "no legal effect" on the stockwater right, Idaho Code § 42-224(9), and any administrative determination by IDWR that a stockwater right has been forfeited pursuant to Idaho Code § 42-222(2) must be submitted to the SRBA District Court in a "civil action." Idaho Code § 42-224(10). The proceedings in the SRBA District Court "shall be like those in a civil action triable without right to a jury," *id.* § 42-224(11), and the court "shall issue an order determining whether the stockwater right has been forfeited pursuant to section 42-222(2), Idaho Code." *Id.* § 42-224(12).[37] If the SRBA District Court "determines that the stockwater right has been forfeited, the court shall also enter a judgment that the stockwater right has been

[37] Trials in the SRBA are also bench trials.

forfeited." *Id.* "In the end," *Oregon,* 44 F.3d at 764, the question of forfeiture is decided by "judgment of the court" in "a normal civil case." *Id.* at 764.

Thus, as in the *Oregon* case, IDWR's forfeiture determination and the ensuing civil action in the SRBA District Court are parts of a single "seamless" statutory proceeding "possessing both administrative and judicial components." *United States v. Puerto Rico*, 287 F.3d 212, 219 (1st Cir. 2002). IDWR's administrative proceeding merely "paves the way" for the civil forfeiture proceeding in the SRBA District Court. *Oregon*, 44 F.3d at 765; *see also* Spackman Dec. ¶ 11 ("This procedural framework is similar to the process employed in Idaho's general water right adjudications"). The McCarran Amendment's waiver of sovereign applies to both the administrative and judicial components of the integrated, "seamless" forfeiture procedure established by Idaho Code § 42-224. *Puerto Rico*, 287 F.3d at 219.

Any other conclusion would be contrary to the McCarran Amendment's underlying purposes. As the Ninth Circuit recognized in the *Oregon* case, interpreting the McCarran Amendment so narrowly as to exclude administrative proceedings that are integral to water rights actions throughout the western states would rely on a "technical" distinction, 44 F.3d at 767, and defeat the McCarran Amendment's "underlying congressional policy." *Id.* at 766; *see also United States v. Idaho*, 508 U.S. 1, 7 (1993) ("But just as 'we should not take it upon ourselves to extend the waiver beyond that which Congress intended [,] ... [n]either, however, should we assume the authority to narrow the waiver that Congress intended.'")

(citations omitted; brackets in original).[38]

VIII. The United States' Claims Fail as a Matter of Law.

Even if this Court addresses the merits of the United States' arguments, the Court should deny the United States' motion for summary judgment and dismiss this case. The United States asserts that Idaho Code §§ 42-113(2)(b), 42-222(2), 42-224, 42-501, 42-502, and 42-504 are unconstitutional "as applied" to the United States, and that Idaho Code §§ 42-113(2)(b), 42-502, and 42-504 are "facially" unconstitutional. Dkt. 11 at 26-30; Dkt. 34-1 at 28-34, 41-46. These constitutional challenges fail as a matter of law.

A. The United States is Not Entitled to "As-Applied" Relief.

The United States seeks an order declaring six Idaho statutes—Idaho Code §§ 42-113(2)(b), 42-222(2), 42-224, 42-501, 42-502, and 42-504—to be unconstitutional as they have been applied to the United States in this case. Dkt. 11 at 30. An "as-applied" challenge "'focuses on the statute's application to the plaintiff'" and only involves "the circumstances of the case at hand." *Rodriguez Diaz v. Garland*, 53 F.4th

[38] Federal and state courts regularly consider the congressional policies and purposes of the McCarran Amendment in determining the scope of its waiver of sovereign immunity. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976) ("And cogently, the Senate report on the amendment observed … ."); *id.* at 820 ("particularly the policy underlying the McCarran Amendment"); *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 549, (1976) ("in light of the clear federal policies underlying the McCarran Amendment"); *Oregon*, 44 F.3d at 766 ("the 'scope of such a waiver can only be ascertained by reference to underlying congressional policy.'")(citation omitted); *Hennen*, 300 F. Supp. at 261-63 (quoting the Senate Report at length); *In re Snake River Basin Water System*, 115 Idaho 1, 6-7, 764 P.3d 78, 83-84 (1988) (discussing the McCarran Amendment and quoting the Senate Report); *United States v. Bell*, 724 P.2d 631, 643 (Colo. 1986) (similar).

1189, 1203 (9th Cir. 2022) (citation omitted).[39] The United States has not shown that any of these statutes have been impermissibly applied to it in this case.

1. The United States Has Not Shown That Idaho Code §§ 42-222(2) and 42-224 Have Been Unconstitutionally Applied.

The Show-Cause Orders arguably "apply" Idaho Code §§ 42-222(2) and 42-224 to the United States but do not cite or mention any of the other challenged statutes. Spackman Dec. ¶¶ 6, 8, Exs. 10, 12, 13, 14.[40] The United States' as-applied challenge to Idaho Code §§ 42-222(2) and 42-224 requires the United States to show how the Show-Cause Orders impermissibly applied these statutes in "the circumstance of this case." *Rodriguez Diaz*, 53 F.4th at 1203. The United States has failed to carry this burden. It simply attacks the bare language of Idaho Code § 42-224 without explaining how the Show-Cause Orders' application of Idaho Code §§ 42-224 and 42-222(2) in this case violates any constitutional provision. Dkt. 34-1 at 22-23, 44-46.[41] As a matter of law, therefore, the United States is not entitled "as-applied" relief with respect to Idaho Code §§ 42-224 and 42-222(2). *Rodriguez Diaz*, 53 F.4th at 1203.

The record confirms this conclusion. The Show-Cause Orders are not determinations that the United States' stockwater rights have been or will be forfeited. Spackman Dec. ¶ 9; Keen Dec. ¶ 23. They simply notify the United States that the Director determined there is "prima facie" evidence that some of the state

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[39] The same standards apply under Idaho law. *Am. Falls Res. Dist. No. 2 v. IDWR*, 143 Idaho 862, 870, 154 P.3d 433, 441 (2007).

[40] The other four statutes the United States challenges are Idaho Code §§ 42-113(2)(b), 42-501, 42-502, and 42-504.

[41] The United States has *not* asserted that Idaho Code §§ 42-224 and 42-222(2) are "facially" unconstitutional.

law-based stockwater rights identified in the Petitions have been lost to forfeiture pursuant to Idaho Code § 42-222(2), and require the United States to show cause why the stockwater rights have not been forfeited. Spackman Dec. ¶ 9; *id.* ¶¶ 6, 8, Exs. 10, 12, 13, 14.[42] Even if the United States declines to respond to the Show-Cause Orders, it will suffer no injury because any subsequent forfeiture determinations by IDWR "have no legal effect" on the United States' stockwater rights. Idaho Code § 42-224(9). Only the SRBA District Court can legally determine if the stockwater rights have been forfeited, and nothing in Idaho Code §§ 42-224 and 42-222(2) requires that court to adopt or defer to IDWR's forfeiture determinations.

The United States has not, and cannot, show that Idaho Code §§ 42-224 and 42-222(2) have been unconstitutionally applied to the United States in "the circumstance of the case at hand." *Rodriguez Diaz*, 53 F.4th at 1203. The United States' as-applied challenges to Idaho Code §§ 42-224 and 42-222(2) thus fail as a matter of law.

2. The United States Has Not Shown That Idaho Code §§ 42-113(2)(b), 42-501, 42-502, and 42-504 Have Been Unconstitutionally Applied.

The Show-Cause Orders do not cite, reference, or even mention any of the other four statutes the United States has challenged—Idaho Code §§ 42-113(2)(b), 42-501, 42-502, and 42-504. Spackman Dec. ¶¶ 6, 8, Exs. 10, 12, 13, 14. Further, nothing in these statutes applies the standards for forfeiture in Idaho Code § 42-222(2), or the

[42] The Orders' requirement to "show cause" before the Director "why the stockwater rights have not been lost through forfeiture" is constitutional because the United States has waived sovereign immunity, as discussed above.

defenses to forfeiture in Idaho Code § 42-223. *See generally* Idaho Code §§ 42-113(2)(b), 42-501, 42-502, 42-504. The United States has not, and cannot, show that these statutes have been unconstitutionally applied to the United States in the circumstance of this case. *Rodriguez Diaz*, 53 F.4th at 1203. The United States' as-applied challenges to these statutes thus fail as a matter of law.[43]

B. The United States Has Not Shown That The Challenged Statutes Are Facially Unconstitutional.

The United States has not requested a declaration that Idaho Code §§ 42-224 and 42-222(2) are facially unconstitutional, Dkt. 11 at 30, but argues as if they are by attacking the language of the statues. Dkt. 34-1 at 22-23, 44-46. The United States expressly asserts that Idaho Code §§ 42-113(2)(b), 42-502, and 42-504 are facially unconstitutional. Dkt. 11 at 30. To prevail in its facial challenges, the United States must "'establish that no set of circumstances exists under which [a statute] would be valid.'" *Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1217 (9th Cir. 2020) (brackets in original) (citation omitted). This is a "heavy burden." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200 (2008). "Facial challenges

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[43] The State Defendants note that the Conant and Price Declarations fail to show that Idaho Code § 42-502 has been "applied" to the United States. The form letter referenced in the Conant Declaration, Dkt. 35 ¶ 18(f), Ex. 5, notified the United States of the requirements of Idaho Code § 42-502 but did not void the permit, which is still "active" and has not been voided. Keen Dec. ¶ 25. Further, the United States' assertion that "IDWR is denying approval of BLM stockwater projects," Dkt. 34-1 at 49-50, relies on paragraph 25 of Price Declaration but mischaracterizes what it actually says. That paragraph does *not* state that IDWR has been "denying" approval of any stockwater projects, but rather that it has been asking the United States "to show compliance with the *Joyce* decision" when making filings with IDWR. Dkt. 36 ¶ 25.

are disfavored for several reasons" and "often rest on speculation." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). The United States speculates to support its facial claims, but offers no substance. Its facial challenges fail as a matter of law.

1. Sections 42-222(2) and 42-224 are Facially Valid.

The United States' attack on Idaho Code §§ 42-224 and 42-222(2) lack merit. The United States' arguments assume that forfeiture of the stockwater rights is the assured or inevitable outcome of a proceeding under Idaho Code § 42-224. *See generally* Dkt. 34-1 at 22, 32-33, 41-45, 47-51. This is disproven by the plain language of the statutes.

Mere issuance of a show-cause order does not mean that IDWR will necessarily determine that the stockwater right in question has been forfeited. Spackman Dec. ¶ 9; Keen Dec. ¶ 23. The stockwater right holder can request an administrative hearing, Idaho Code § 42-224(6); Spackman Dec. ¶¶ 9-10; Keen Dec. ¶ 23, and the statute requires IDWR to issue a post-hearing order determining "*whether*" the stockwater right has been forfeited, *id*. § 42-224(8) (italics added), not that "*it has*" been forfeited. Even if IDWR were to determine that the stockwater right had been forfeited, that determination would "have no legal effect." *Id*. § 42-224(9); Spackman Dec. ¶ 11. The determination of forfeiture is not made by IDWR, but rather in the SRBA District Court "in a civil action triable without right to a jury," in which the Idaho Attorney General has the burden of proving forfeiture under the clear and convincing evidence standard of Idaho Code § 42-222(2). *Id*. § 42-224(10)-(12).

Further, Idaho Code §§ 42-224 and 42-222(2) are facially neutral statutes that do not expressly target the United States or otherwise "'treat someone else better.'" *United States v. California*, 921 F.3d 865, 881 (9th Cir. 2019) (citation omitted). The United States implicitly acknowledges this, but asserts Idaho Code §§ 42-224 and 42-222(2) have "'the inevitable effect'" of targeting the United States, Dkt. 34-1 at 29, relying on *United States Postal Serv. v. City of Berkeley*, 228 F. Supp. 3d 963, 969 (N.D.Cal. 2017). The ordinance in that case, however, was crafted so it could apply *only* to the United States. *Id.* at 968-69. That is not so here. For example, and as the United States recognizes, the Idaho State Department of Lands ("IDL") leases thousands of acres of State endowment lands for grazing purposes, Dkt. 34-1 at 31 n.11, and IDL also holds many stockwater rights for these lands. Spackman Dec. ¶ 12; Keen Dec. ¶ 24. Nothing in Idaho Code §§ 42-224 or 42-222(2) would prevent their application to stockwater rights owned by IDL. *Id.*[44]

The United States incorrectly relies on legislative history as demonstrating discriminatory intent. Dkt. 34-1 at 19-22. It is well established, as the United States admits, that legislative intent or "motive" is irrelevant to an Intergovernmental Immunity analysis. Dkt. 34-1 at 29; *see, e.g., First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017) ("'[t]he Supreme Court has held unequivocally that it 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit

[44] In all likelihood there are also many private parties (including large corporations) that rent or lease their lands for grazing. Nothing in Idaho Code §§ 42-224 or 42-222(2) would prevent those statutes from being applied to any stockwater rights held by such private landowners.

legislative motive.'") (citations omitted); *City of Berkeley*, 228 F. Supp. 3d at 969 ("facts 'introduced solely to establish a supposed nefarious motive . . . are wholly irrelevant . . . as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it.'") (citations omitted). The United States' reliance on Idaho Code § 42-501 is misplaced for the same reasons. As its title states, this statute sets forth "Legislative Intent," and the statute's language does not contain any requirements that apply in determining whether a stockwater right has been forfeited pursuant to Idaho Code § 42-222(2). Idaho Code § 42-224.[45]

Further, despite the United States' arguments, Idaho Code § 42-224 does not "limit defenses to forfeiture based on an agency relationship for stockwater rights located on federal lands." Dkt. 34-1 at 32.[46] The statute only says that the Director "*shall not issue an order to show cause*" when the Director "has or receives written evidence" of an agency relationship. Idaho Code § 42-224(4) (italics added). This proviso bars the Director from issuing a show-cause order in certain cases (and it expressly applies to both state and federal lands) but does not "preclude" the United

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[45] The United States' brief confirms this point. The United States does not identify any way in which Idaho Code § 42-501 has actually been applied to the United States, does not assert that it contains any substantive forfeiture standards or requirements, and does not identify any scenario in which it would even be possible to "apply" Idaho Code § 42-501 to the United States or its stockwater rights in a forfeiture proceeding.

[46] This provision also applies to "state grazing lands." Idaho Code § 42-224(4). For purposes of an Intergovernmental Immunity analysis, the United States and the State of Idaho are "similarly situated," *North Dakota v. United States*, 495 U.S. 423, 438 (1990), because both are sovereigns that own grazing lands within Idaho, and typically make the lands available for grazing by livestock owned by permittees or lessees. Spackman Dec. ¶ 12; Keen Dec. ¶ 24; Dkt. 34-1 at 31 n.11.

States from submitting a written agency agreement after a show-cause order has issued. Spackman Dec. ¶ 10. It also does not limit the scope or availability of the agency defense in subsequent proceedings. *Id.*

The language of Idaho Code § 42-224 also contradicts the United States' assertion that the statute modified decreed stockwater rights or retroactively changed the substantive law of forfeiture. Dkt. 34-1 at 41-42 & n.14; *id.* at 45. Idaho Code § 42-224 is a procedural statute. Keen Dec. ¶ 23. The statute establishes an integrated administrative and judicial procedure for addressing allegations that a stockwater right has been forfeited "pursuant to" the substantive forfeiture standards of Idaho Code § 42-222(2). Idaho Code § 42-224(1)-(2), (7)-(8), (12). The statute changes none of those longstanding standards. *See* Idaho Code § 42-224(11) ("shall not change the standard of proof for forfeiture of the water right established by section 42-222(2), Idaho Code"). Water right forfeiture has long been "disfavored" in Idaho, *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001), and nothing in Idaho Code § 42-224 changes that. Further, and contrary to the United States' contention, there is nothing in Idaho Code § 42-224 "that no longer deems [stockwatering use by federal permittees] to constitute beneficial use." Dkt. 34-1 at 45. Forfeiture must be affirmatively proven in a civil action in the SRBA District Court under the standards of Idaho Code § 42-222(2). Idaho Code § 42-224(11).

Forfeiture also does not "retroactively" modify decreed property rights. Dkt. 34-1 at 41, 42 & n.14, 45-46. Idaho water rights are based on beneficial use and must be maintained by ongoing beneficial use. *See Hagerman Water Right Owners, Inc.*,

130 Idaho at 735, 947 P.2d at 408 ("This is a continuing obligation."). It has long been the law in Idaho that even decreed water rights are subject to statutory forfeiture. *Graham*, 65 Idaho at 287, 144 P.2d at 479. A water right decree confirms the water right exists at the time the decree is issued. It does not foreclose questions of how the water right is actually used after the decree. *See Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982) ("The decree does not establish … Jenkins or his predecessors continued to apply that water to a beneficial use on the land following the 1930 decree."); *Graham,* 65 Idaho at 287, 144 P.2d at 479 (holding that decreed rights can be forfeited if the evidence of non-use "relates to a time subsequent to the decree."). This is essentially black-letter law in prior appropriation states. *See, e.g., Federal Youth Center*, 575 P.2d at 401 ("The decree granted does not and cannot guarantee the owner that his title or priority will not be wholly or partially lost in the future by abandonment or adverse possession.")

Contrary to the United States' arguments, the fact that forfeited water rights "revert to the state and [are] again subject to appropriation," Idaho Code § 42-222(2), does not make this statute a law impermissibly enacted "for the benefit of a railroad, or other corporation, or any individual, or association of individuals" within the meaning of the Idaho Constitution's Retroactivity Clause. Dkt. 34-1 at 27, 44. To the contrary, this longstanding forfeiture provision is "consistent with beneficial use concepts" that are the foundation of Idaho water law and water rights. *Hagerman*

Water Right Owners, Inc., 130 Idaho at 735, 947 P.2d at 408.[47]

Further, contrary to the United States' assertions, Congress *has* authorized forfeiture of the United States' state law-based water rights. Dkt. 34-1 at 41-42. The McCarran Amendment makes the United States subject to state water law for purposes of having its water rights decreed in an adjudication. 43 U.S.C. § 666(a). The United States claimed thousands of stockwater rights in the SRBA based on Idaho law and was decreed thousands of such stockwater rights. The *Final Unified Decree* expressly confirmed that those water rights are subject to forfeiture under state law. Counsel Dec. ¶ 3, Ex. 2 at 12 of 27. The argument that additional congressional authorization is needed before the United States' state law-based water rights can be forfeited, Dkt. 34-1 at 41-42, is simply a collateral attack on the *Final Unified Decree.*

Accepting the United States' contention that congressional "authorization" is necessary before the United States state law-based water right may be forfeited would recognize a new class of water right, a "hybrid" water right nominally based on state law but defined in significant part by federal law. *New Mexico ex rel. Reynolds*, 1986 WL 1362103, at *2. The result would be "a legal no-man's land." *United States v. Idaho*, 508 U.S. 1, 7 (1993); *see also California*, 438 U.S. at 667

[47] Most prior appropriation states have forfeiture statutes. *See, e.g.,* Arizona Revised Statutes § 45-188(B); Annotated California Water Code § 1241; Oregon Revised Statutes § 540.610; Nevada Revised Statutes § 534.090; New Mexico Statutes Annotated § 72-5-28; Utah Code Annotated § 73-1-4; Revised Code of Washington Annotated 90.14.160; Wyoming Statutes Annotated § 41-3-401.

(stating "the utmost confusion would prevail" if "the appropriation and use were not under the provision of the State law"). This Court should reject the United States' attempt to re-define its state law-based water rights by making post-decree constitutional claims about the nature and purposes of those water rights.

Forfeiture of the United States' stockwater rights also would not violate the Contract Clause of the United States Constitution, because it would not impair operation of the United States' settlement agreements in the SRBA. Dkt. 34-1 at 42-44. The settlement agreements simply resolved objections to the United States' state law-based stockwater claims in the SRBA. Dkt. 36 ¶ 22, Ex. 3; Dkt. 36-3 at 4-64; Dkt. 11-3 at 2-10. Nothing in the agreements immunized the United States' state law-based stockwater rights from forfeiture, pursuant to Idaho Code § 42-222(2) or from any other component of Idaho water law. *Id.* The settlement agreements were predicated on Idaho law, and under Idaho law state law-based stockwater rights have always been subject to statutory forfeiture.

2. Sections 42-113, 42-501, 42-502, 42-504 are Facially Valid.

The United States' facial challenges to Idaho Code §§ 42-113(2)(b), 42-502, and 42-504 also fail, because the United States has not shown "that no set of circumstances exists under which [these statutes] would be valid."' *Wells Fargo Bank, N.A.*, 979 F.3d at 1217. To the contrary, the plain language of the statues confirms they can be constitutionally applied.

The United States' challenges to Idaho Code § 42-113(2)(b) assume it operates retroactively by changing the lands to which existing stockwater rights are

"appurtenant." Dkt. 34-1 at 43-44. There is no expressly retroactive language in Idaho Code § 42-113, however, and "'a well-settled and fundamental rule of statutory construction' is to construe statutes to have a prospective rather than retroactive effect." *Guzman v. Piercy*, 155 Idaho 928, 937, 318 P.3d 918, 927 (2014) (citation omitted). Idaho Code § 42-113 also lacks any language implying retroactive application, such as the "'whenever or however acquired'" language of the ground water statute discussed in *Guzman*. *Id.* at 938, 318 P.3d at 928 (citation omitted). When the language of Idaho Code § 42-113(2)(b) is taken at face value it clearly applies only prospectively.

The statute *can* apply prospectively, and that is enough to survive a facial challenge. Under subsection (1) of Idaho Code § 42-113, federal grazing permittees can still establish instream stockwater rights associated with federal lands via the "constitutional method of appropriation," *Joyce Livestock Co.*, 144 Idaho at 7, 156 P.3d at 508, by simply allowing their livestock to drink from surface sources. Keen Dec. ¶¶ 14, 27; Luke Dec. ¶ 8; Saxton Dec. ¶ 17. When a federal permittee establishes a new stockwater right on federal land in this way, it is "appurtenant" to the permittee's "base property" as a matter of law. *Joyce Livestock Co.*, 144 Idaho at 12-13, 156 P.3d at 513-14. Idaho Code § 42-113(2)(b) thus can be constitutionally applied, which forecloses the United States' facial challenges to it. This potential application of Idaho Code § 42-113(2)(b) also demonstrates that it does not "discriminate" against the United States in violation of the Supremacy Clause. Dkt. 34-1 at 31-32. The statute simply ensures that the Idaho Supreme Court's clear

holdings in *Joyce Livestock* will be applied to beneficial use-based stockwater rights associated with federal lands that may be claimed in Idaho's pending general water right adjudications,[48] as well as any future adjudications.

Finally, the mere fact Idaho Code § 42-113(2)(b) authorizes stockwater rights to be conveyed from one grazing permittee to the next "[w]hen a federal grazing permit is transferred to a new owner" does not "discriminate" against the United States within the meaning of the Intergovernmental Immunity Doctrine. Dkt. 34-1 at 32. A statutory provision must do more than simply refer to the United States to be discriminatory—it must "treat someone else better than it treats [the United States]." *North Dakota v. United States*, 495 U.S. 423, 438 (1990).

The United States has not alleged it has been or could be disadvantaged in any way by Idaho Code § 42-113(2)(b)'s authorization of conveyances of stockwater rights when a federal grazing permit changes hands. To the contrary, the United States asserts that problems will arise if former permit holders do *not* transfer their stockwater right to the new permit holders. Dkt. 34-1 at 47-49; *see also* Dkt. 36 ¶¶ 30-31 (stating concerns with "disorderly succession"). Expressly authorizing the conveyance of stockwater rights between successive permittees can only help ameliorate these potential problems. *See North Dakota*, 495 U.S. at 439 ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it.").

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[48] There are four general water right adjudications pending in Idaho, and *de minimis* stockwater rights can still be claimed in the SRBA. Saxton Dec. ¶¶ 4, 7; Counsel Dec. ¶ 3, Ex. 2 at 9 of 27.

Idaho Code § 42-502 also can be constitutionally applied. For instance, if the United States were to file a claim for a beneficial use-based stockwater right in any of Idaho's general water right adjudications when the United States did not own the livestock or have an agency agreement with the livestock owner, the claim would have to be denied as a matter of law. *Joyce Livestock Co.*, 144 Idaho at 17-20, 156 P.3d at 518-21. The United States' facial challenge to Idaho Code § 42-502 thus fails because the statute can be constitutionally applied. *Wells Fargo Bank*, 979 F.3d at 1217.

The United States argues Idaho Code § 42-504 is facially unconstitutional for two reasons: (1) it "singles out" the United States by prohibiting changes to the "purpose of use" and "place of use" elements of the United States' stockwater rights, Dkt. 34-1 at 34; and (2) it "places a retroactive limitation on thousands of rights decreed to the United States that does not apply to rights held by non-federal parties and that did not exist at the time of issuance of the Final Unified Decree." Dkt. 34-1 at 45-46. The record belies these contentions: these same "limitations" on federal stockwater rights have always been part of Idaho's water code.

The pre-2017 version of Idaho Code § 42-501 stated that any permit or license issued to the BLM for stockwatering on the public domain "shall be conditioned that the water appropriated *shall never be utilized thereunder for any purpose other than watering of livestock without charge therefore on the public domain*." 1939 Idaho Sess. Laws 412-13 (Appendix 1) (italics added); *see also Joyce Livestock Co.*, 144 Idaho at 18 n.3, 156 P.3d at 519 n.3 (quoting 1939 Idaho Sess. Laws 412-13). Thus, like Idaho Code § 42-504, the pre-2017 version of Idaho Code § 42-501 limited the "purpose of

use" and "place of use" elements of the BLM's stockwater rights—it just used slightly different verbiage than Idaho Code § 42-504. The enactment of Idaho Code § 42-504 changed nothing. Idaho law always limited the United States' state law-based stockwater rights to stockwater use on federal lands.

Moreover, the United States' briefing shows that these limitations *support* the United States' grazing programs. The United States asserts that allowing stockwater rights to be transferred off federal lands or to be used for different purposes could cause "dewatering" of federal rangelands. Dkt. 34-1 at 48-49; Dkt. 36 ¶ 34. These arguments demonstrate that the limitations Idaho Code § 42-504 places on stockwater rights on federal lands can only serve to benefit the United States' grazing programs. A statute that "so favors the Federal Government cannot be considered to discriminate against it." *North Dakota*, 495 U.S. at 439.

IX. The United States Is Not Entitled to a Permanent Injunction.

The United States requests an order permanently enjoying application of Idaho Code §§ 42-113(2)(b), 42-222(2), 42-224, 42-501, 42-502, and 42-504 to the United States. Dkt. 11 at 30. It is not entitled to such an order for reasons discussed above: this case should be dismissed, and the United States' constitutional challenges fail as a matter of law. *See Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987) (noting that "actual success" on the merits is a prerequisite for granting a permanent injunction). The United States' request for a permanent injunction should also be denied for the reasons discussed below.

A. The United States Has Not Been Irreparably Harmed.

The United States has not made the required showing that "it has *already* suffered irreparable injury." *TCR, LLC v. Teton Cnty.*, 2023 WL 356169, at *6 (D. Idaho Jan. 23, 2023) (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010)) (italics added). The United States only asserts that *if* the pending forfeiture proceedings continue, there is a *possibility* the United States' state law-based stockwater rights *might* be declared to have been lost to forfeiture pursuant to Idaho Code § 42-222(2). *See, e.g.,* Dkt. 34-1 at 47 ("*If* stockwater rights on federal lands are forfeited . . . .") (italics added); *see also id.* at 49 ("In addition, the Idaho legislation *could* negatively impact water development opportunities . . . .") (italics added); *id.* at 50 (" . . . these complications *are likely to lead* to a wholesale reduction in the scale of the federal grazing program and the associated loss in federal grazing fees . . . .") (italics added); *id.* at 51 ("implementation of these laws *could* result in additional cattle trespasses") (italics added).

The record also contradicts the United States' assertion that the Forest Service "is unable to obtain final state approval and use a fully completed stockwater development." Dkt. 34-1 at 49-50. The Idaho water permit for the Forest Service stockwater development remains "active" and is available for use by the United States. Keen Dec. ¶ 25. The Forest Service can obtain "final approval" of the permit—that is, issuance of a license for the water right—by submitting evidence that it owns the livestock using the water. Dkt. 35-5 at 3. Nothing in the record shows that it is impossible for the Forest Service to do this.

The assertion that IDWR "is denying approval of BLM stockwater developments" relies entirely on paragraph 25 of the Price Declaration, Dkt. 34-1 at 50, but that paragraph does *not* state that IDWR has "denied" any water right applications or filings. It only states that in 2015 IDWR "started asking BLM and USFS to show compliance with the *Joyce* decision" when filing applications or proofs of beneficial use, Dkt. 36 ¶ 25, and the record contains no documented "denials" of any water right applications or rejections of any proofs of beneficial use.[49]

Finally, any alleged "uncertainty for federal grazing permittees" that may result from potential forfeiture of the United States' state law-based stockwater rights, Dkt. 34-1 at 50, is not an "irreparable harm" suffered by the United States. Any allegation of such "uncertainty" is speculative and unquantifiable in any event, and contrary to Idaho's prior appropriation doctrine. There is a "continuing obligation" to make beneficial use of an Idaho water right in order to avoid statutory forfeiture of the water right, *Hagerman Water Right Owners, Inc.*, 130 Idaho at 735, 947 P.2d at 408, and this principle was part of Idaho water law long before federal grazing programs arrived on the scene in 1934. 1905 Idaho Sess. Laws 27-28 (Appendix 1).

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[49] The United States' assertions that IDWR is denying approval of "stockwater developments," Dkt. 34-1 at 49-50, misapprehends IDWR's jurisdiction. IDWR's authority is over water rights, not "stockwater developments." Federal law governs the approval and construction of "water developments" and "range improvements" on federal lands, as the United States has emphasized. Dkt. 36 ¶¶ 16-17, 38. "Water rights" and "water developments" are different things and controlled by different legal regimes, Keen. Dec. ¶ 29, as the BLM's own regulations recognize. *See generally* Appendices 9-11.

B. The United States Cannot be "Harmed" by Applying Idaho Water Law to the United States' State Law-Based Water Rights.

The United States asserts it will be irreparably harmed by forfeiture of its state law-based stockwater rights, because that would have "significant negative impacts to the federal grazing program" and "limit the availability and use of water on federal lands." Dkt. 34-1 at 47. Specifically, the United States asserts that federally-owned stockwater rights allow the United States to "control the water" and thereby "allow[] use of water by all permittees, not just a single permittee." *Id.* The United States asserts that private ownership of stockwater rights on federal lands "could allow one permittee to prevent water use by others" and successor permittees, or to demand "payment from the successor to use the water." *Id.* at 47-48. The United States also asserts that forfeiting the United States' state law-stockwater rights would in some cases "terminate the only stockwater rights that provide water for the United States' permittees," *Id.* at 47, and "could also result in additional cattle trespasses[.]" *Id.* at 51.

Even if there were any factual basis for these allegations—and there is not because these allegations rely entirely on flawed *legal* interpretations of Idaho water rights and water law, as discussed in the next section—these alleged "impacts" are not legally cognizable injuries. They are simply natural and entirely lawful consequences of the fact that federal agencies are subject to Idaho water law. The stockwater rights at issue were decreed on the basis of *Idaho* law, not federal law, and water rights based on Idaho law have been subject to statutory forfeiture for non-use for more than a century. 1905 Idaho Sess. Laws 27-28 (Appendix 1). The Taylor

Grazing Act *expressly* defers to state water law, 43 U.S.C. § 315b, and the Federal Land Policy and Management Act ("FLPMA") adheres to "Congress' explicit deference to state water law" in areas outside the federal reserved water rights doctrine. *United States v. New Mexico*, 438 U.S. at 715; *see* Pub. Law 54-579, 90 Stat. 2743, Section 701.//43 USC 1701 note.// ("Nothing in this Act shall be construed as …affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands" or "as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control.") (Appendix 12).

The *only* stockwater rights Congress deemed necessary to support federal grazing programs are those based on federal law, such as Public Water Reserve 107, and they are immune from forfeiture under state law. Whatever "impacts" that forfeiture of the United States' state law-based stockwater rights may have on federal grazing programs and land management are simply part-and-parcel of Idaho water law. As a matter of law, those "impacts" cannot constitute "irreparable harm" because they are inherent in "the consistent thread of purposeful and continued deference to state water law by Congress." *California*, 438 U.S. at 653.

C. The United States' "Harm" Arguments Misunderstand Idaho Water Law.

As previously discussed, the United States' assertions of injuries in this case are the same as those it made in the *Joyce Livestock* appeal. *Supra* Part III.A. They have perhaps been re-packaged and updated, but are materially indistinguishable. In *Joyce Livestock* the United States argued federally-owned stockwater rights are

the *only* way to ensure all present and future permittees have lawful access to stockwater, and private stockwater right ownership will allow some permittees to monopolize the water supply and prevent other permittees from using the water. *See Joyce Livestock Co.*, 144 Idaho at 19, 156 P.3d at 520 ("'*unless* the ability of others to graze there under permit by BLM under the Taylor Grazing Act is preserved through a decree of stock water rights to BLM that could be used by common and future permittees'") (quoting United States' brief) (italics in original).

The United States is making the same arguments here, not based on *facts* but rather on the *legal* opinions of federal land managers—their interpretations of Idaho water rights and Idaho water law. *See, e.g.,* Dkt. 34-1 at 47-51; Dkt. 35 ¶¶ 8, 18-19; Dkt. 36 ¶¶ 29-31. In this case, as in *Joyce Livestock*, "the United States has been unable to explain" why or how it would be injured beyond offering its land managers' views of Idaho water rights. *Id.* at 20, 156 P.3d at 521. Those views continue to reflect "a misunderstanding of water law." *Id.* at 19, 156 P.3d at 520.

Even if the federal land managers' views of Idaho water rights and water law are taken as facts rather than legal opinions, they are simply wrong. Federal land managers do not apply or administer Idaho water law, and their views of Idaho water rights and water law are in direct conflict with the understanding of the experienced professionals who are charged with understanding and administering Idaho water rights and water law. Keen Dec. ¶¶ 13-19, 26-32; Luke Dec. ¶¶ 8-12; Saxton Dec. ¶¶

17-18; Decl. of Nicholas R. Miller ("Miller Dec.") ¶¶ 1-2; Spackman Dec. ¶¶ 1-3.[50]

D. The Equities and the Public Interest Weigh Against Issuing a Permanent Injunction

The public interest in the use of stockwater on federal lands is defined by state law, not federal law. Congress has expressly confirmed this in "the consistent thread of purposeful and continued deference to state water law by Congress." *California*, 438 U.S. at 653. The Taylor Grazing Act and the Federal Land Policy and Management Act incorporate this deference. When it comes to the allocation and use of water on the public domain, Congress has expressly determined that with the exception of the reserved rights doctrine, federal land management programs must conform to state law—not the other way around. Whatever regulations or policies *federal agencies* may have promulgated to the contrary cannot reverse or limit this *congressional* deference. The equities clearly favor the State of Idaho.

[50] Any reliance on the "on-going issue" referenced in the Price Declaration, Dkt. 36 ¶ 35, as evidence that private stockwater right ownership carries a right to exclude other grazing permittees from a public water source is misplaced. The water right involved in that "on-going issue" does not divert from a water source on federal lands. It diverts from a source on private land and the water is then transported via pipeline to places of use on federal lands. Miller Dec. ¶ 4; Dkt. 36 ¶ 35, Ex. 7. Water that is lawfully diverted pursuant to a valid Idaho water right is not considered to be available for use by anyone other than the water right holder. Miller Dec. ¶ 4; *see also* Idaho Code § 42-110 ("Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator."). Protecting water lawfully diverted pursuant to a valid water right is not the same thing as attempting to exercise sole dominion over the source from which the water is diverted. Also, the "on-going issue" referenced in the Price Declaration is more complicated than the declaration suggests. *See* Miller Dec. ¶ 5 (describing the circumstances).

Moreover, it is impossible to understate the injury to the State of Idaho if the United States' request for relief is granted. Granting this relief would re-define the nature and extent of the United States' state law-based water rights by making them immune from forfeiture in perpetuity, essentially transforming them into federal reserved water rights. And the relief the United States seeks is not confined to stockwater rights. Dkt. 11 at 30. If granted it would prohibit application of Idaho forfeiture law to *any* of the United States' state law-based water rights, including those claimed, decreed, or acquired in the future.

Granting this relief would fatally undermine the finality of the SRBA and every other general water rights adjudication in Idaho. "Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures." *Black Canyon Irrigation Dist.*, 163 Idaho at 64, 408 P.3d at 62. It would also severely undermine Idaho's sovereign authority to control the allocation and use of Idaho water resources, by allowing federal law to displace state water law whenever the United States happens to own or claim a state law-based water right. This is *exactly* what the McCarran Amendment and many other congressional enactments were intended to prevent. *See* Appendix 8 at 6 of 10 ("there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the Court in the same manner as if it were a private individual.")

CONCLUSION

The State Defendants are entitled to summary judgment as a matter of law. The United States' motion for summary judgment fails as a matter of law. The State Defendants therefore respectfully request that this Court grant the States Defendants' cross-motion for summary judgment, deny the United States' motion for summary judgment, and dismiss this case.

Respectfully submitted this 17th day of March, 2023.

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APPENDIX 1

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

SECTION 3. That any salaries paid to any officer or employee of any board or any institution or department herein named shall never at any time exceed the amount fixed by the State Board of Education and Board of Regents of the University of Idaho or by law, regardless of whether or not such salaries are to be paid out of moneys directly appropriated herein, or from moneys available for such board, department or institution from local income, or from moneys received from the federal government.

SECTION 4. The moneys accruing to the various interest fund, arising from endowment and educational grants to the various institutions herein appropriated for, shall not be placed in the General Fund of the State of Idaho, nor confused therewith, but shall remain inviolable in the respective interest funds, for the sole use of the designated beneficiary thereof.

SECTION 5. No portion of an appropriation herein made for expenses other than salaries and wages shall be expended in payment of salaries and wages, but, with the consent of the State Board of Examiners, any portion of an appropriation herein made for the payment of salaries and wages may be expended for other expenses of the particular office or institution for which it is appropriated.

SECTION 6. An emergency existing therefor, which emergency is hereby declared to exist, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, 1939.

CHAPTER 205

(H. B. No. 229)

AN ACT

RELATING TO FILING APPLICATIONS FOR APPROPRIATION OF WATER BY THE DIVISION OF GRAZING OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES AND PRESCRIBING THE PROCEDURE IN CONNECTION THEREWITH AND THE EXTENT AND LIMITS OF THE RIGHT TO BE ACQUIRED THEREUNDER, AND FIXING THE FEE IN CONNECTION THEREWITH OF THE DEPARTMENT OF RECLAMATION; PROVIDING THE CONDITION FOR THE REVOCATION OF ANY PERMIT, LICENSE OR CERTIFICATE ISSUED UNDER THE ACT, THE LEGISLATIVE INTENT WITH THE RESPECT TO THE CONSTITUTIONALITY OF THE ACT, AND THAT THE ACT SHALL CONTROL OVER OTHER PROVISIONS OF LAW IN CONFLICT THEREWITH.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. The division of grazing of the department of Interior of the United States may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The department of Reclamation shall, upon application in such form and of such content as it shall by rule prescribe issue permit and license and certificate of water right within a reasonable time in such form as it shall prescribe for such appropriation. With each such application there shall be paid to the department of Reclamation a fee of one dollar and there shall be no further fee required for the issuance of the permit or license and certificate of water right, nor for any other proceedings in connection with such application. Such permit, license and certificate of water right shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than the watering of livestock without charge therefor on the public domain. The maximum flow for which permit, license and certificate of water right may issue hereunder shall be five miner's inches, and the maximum storage for which permit, license and certificate of water right may issue hereunder shall be fifteen acre feet in any one storage reservoir.

SECTION 2. Such permit, license and certificate of water right may be revoked by the commissioner of Reclamation in his discretion for the purpose of issuing permit for the construction of any reservoir to have a storage capacity of at least five hundred acre feet of water for irrigation purposes.

SECTION 3. Nothing herein shall be construed to deprive the department of Reclamation of the United States from filing application for waters nor from obtaining permit, license and certificate of water right under the general laws of the state having to do with the appropriation of waters of the state.

SECTION 4. Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act and the application of such provision to persons and circumstances other than those as to which it is held invalid, shall not be affected thereby.

SECTION 5. In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

Approved March 9, 1939.

APPENDIX 2

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

original judgment, and the lien established thereby shall continue for ten (10) years from the date of the renewed judgment.

(2) Unless the judgment has been satisfied, and prior to the expiration of the lien created in section 10-1110, Idaho Code, or any renewal thereof, a court that has entered a judgment for child support may, upon motion, renew such judgment. The renewed judgment may be enforced in the same manner as the original judgment, and the lien established thereby shall continue for ten (10) years from the date of the renewed judgment.

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved March 27, 2017

CHAPTER 178
(S.B. No. 1111)

AN ACT

RELATING TO STOCKWATER RIGHTS; REPEALING CHAPTER 5, TITLE 42, IDAHO CODE, RELATING TO STOCKWATER RIGHTS; AMENDING TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 5, TITLE 42, IDAHO CODE, TO PROVIDE LEGISLATIVE INTENT, TO PROHIBIT THE ACQUISITION OF CERTAIN STOCKWATER RIGHTS, TO PROVIDE THAT CERTAIN PERMITTEES SHALL NOT BE CONSIDERED AGENTS OF THE FEDERAL GOVERNMENT, TO LIMIT THE USE OF CERTAIN STOCKWATER RIGHTS, TO PROVIDE FOR THE EFFECT OF AN ILLEGAL CHANGE OF OWNERSHIP OR TRANSFER, TO PROVIDE FOR SEVERABILITY, TO PROVIDE THAT SPECIFIED LAW SHALL BE CONTROLLING; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 5, Title 42, Idaho Code, be, and the same is hereby repealed.

SECTION 2. That Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW CHAPTER, to be known and designated as Chapter 5, Title 42, Idaho Code, and to read as follows:

CHAPTER 5
STOCKWATER RIGHTS

42-501. LEGISLATIVE INTENT. In the landmark case of *Joyce Livestock Company v. United States of America*, 144 Idaho 1, 156 P.3d 502 (2007), the Idaho Supreme Court held that an agency of the federal government cannot obtain a stockwater right under Idaho law, unless it actually owns livestock and puts the water to beneficial use.
In *Joyce*, the court held that the United States:

> "bases its claim upon the constitutional method of appropriation. That method requires that the appropriator actually apply the water to a beneficial use. Since the United States has not done so, the district court did not err in denying its claimed water rights."

The court also held that federal ownership or management of the land alone does not qualify it for stockwater rights. It opined:

> "The United States claimed instream water rights for stock watering based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act...The argument of the United States reflects a misunderstanding of water law...As the United States has

held, Congress has severed the ownership of federal lands from the ownership of water rights in nonnavigable waters located on such lands."

The court went on to state:

"Under Idaho Law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right...If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as the agent of the owner...The Taylor Grazing Act expressly recognizes that ranchers could obtain their own water rights on federal land."

A rancher is not unwittingly acting as an agent of a federal agency simply by grazing livestock on federally managed lands when he files for and receives a stockwater right.

It is the intent of the Legislature to codify and enhance these important points of law from the *Joyce* case to protect Idaho stockwater right holders from encroachment by the federal government in navigable and nonnavigable waters.

42-502. FEDERAL AGENCIES -- STOCKWATER RIGHTS. (1) No agency of the federal government, nor any agent acting on its behalf, shall acquire a stockwater right unless the agency owns livestock and puts the water to beneficial use. For purposes of this chapter, "stockwater rights" means water rights for the beneficial use for livestock.

(2) For the purposes of this chapter, a permittee on a federally administered grazing allotment shall not be considered an agent of the federal government.

42-503. LIMITS OF USE. If an agency of the federal government acquires a stockwater right, that stockwater right shall never be utilized for any purpose other than the watering of livestock.

42-504. EFFECT OF ILLEGAL CHANGE OF OWNERSHIP OR TRANSFER. Any application for a change in ownership or any application proposing to change the nature of use of a stockwater right that is in violation of the provisions of this chapter shall be denied.

42-505. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

42-506. PROVISIONS CONTROLLING OVER OTHER ACTS. Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved March 27, 2017

APPENDIX 3

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

proof of the facts surrounding such matter, and this provision shall apply whether such claim be for equitable or legal relief or for intentional or unintentional tort of any kind and whether pressed by a patient, physician, emergency medical services personnel, or any other person, but such waiver shall only be effective in connection with the disposition or litigation of such claim, and the court shall, in its discretion, enter appropriate orders protecting, and as fully as it reasonably can do so, preserving the confidentiality of such materials and information.

Approved March 19, 2018

CHAPTER 146
(S.B. No. 1305)

AN ACT

RELATING TO STOCKWATER; AMENDING SECTION 42-113, IDAHO CODE, TO PROVIDE THAT FOR RIGHTS TO THE USE OF WATER FOR IN-STREAM OR OUT-OF-STREAM LIVESTOCK PURPOSES ASSOCIATED WITH GRAZING ON FEDERALLY OWNED OR MANAGED LAND ESTABLISHED UNDER THE DIVERSION AND APPLICATION TO BENEFICIAL USE METHOD OF APPROPRIATION, THE WATER RIGHT SHALL BE AN APPURTENANCE TO THE BASE PROPERTY, TO PROVIDE THAT WHEN A FEDERAL GRAZING PERMIT IS TRANSFERRED OR CONVEYED TO A NEW OWNER THE ASSOCIATED STOCKWATER RIGHTS MAY ALSO BE CONVEYED UNDER CERTAIN CONDITIONS AND BECOME APPURTENANT TO THE NEW OWNER'S BASE PROPERTY AND TO MAKE A TECHNICAL CORRECTION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-113, Idaho Code, be, and the same is hereby amended to read as follows:

42-113. IN-STREAM AND OTHER WATER USE FOR LIVESTOCK. (1) A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock. In the consideration of applications for permits to appropriate water for other purposes, the director of the department of water resources shall impose such reasonable conditions as are necessary to protect prior downstream water rights for in-stream livestock use, and in the administration of the water rights on any stream, the director, and the district court where applicable, shall recognize and protect water rights for in-stream livestock use, according to priority, as they do water rights for other purposes. As used in this section, the phrase "in-stream watering of livestock" means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works.

(2) For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation~~,~~:

(a) T~~t~~he priority date shall be the first date that water historically was used for livestock watering associated with grazing on the land, subject to the provisions of section 42-222(2), Idaho Code; and

(b) The water right shall be an appurtenance to the base property. When a federal grazing permit is transferred or otherwise conveyed to a new owner, the associated stockwater rights may also be conveyed and, upon approval of an application for transfer, shall become appurtenant to the new owner's base property.

(3) This subsection is established to promote the watering of livestock away from streams and riparian areas, but not to require fencing of livestock away from streams and riparian areas.

(a) Any person having an established water right or appropriating water for in-stream watering of livestock pursuant to subsection (1) of this section may, in addition to the in-stream use, divert the water for livestock use away from the stream or riparian area. The diversion may occur only if the following conditions are met:

(i) The water is diverted from a surface water source to a trough or tank through an enclosed water delivery system;

(ii) The water delivery system is equipped with an automatic shut-off or flow control mechanism or includes a means for returning unused water to the surface water source through an enclosed delivery system, and the system is designed and constructed to allow the rate of diversion to be measured;

(iii) The diversion is from a surface water source to which the livestock would otherwise have access and the watering tank or trough is located on land from which the livestock would have access to the surface water source from which the diversion is made;

(iv) The diversion of water out of the stream in this manner does not injure other water rights;

(v) The use of the water diverted is for watering livestock; and

(vi) The bed and banks of the source shall not be altered as that term is defined in section 42-3802, Idaho Code, except that an inlet conduit may be placed into the source in a manner that does not require excavation or obstruction of the stream channel, unless additional work is approved by the director of the department of water resources.

(b) The amount of water diverted for watering of livestock in accordance with this subsection shall not exceed thirteen thousand (13,000) gallons per day per diversion.

(c) Before construction and use of a water diversion and delivery system as provided in this subsection, the person or other entity proposing to construct and use the system shall give notice to the director of the department of water resources. Separate notice for each diversion shall be provided on a form approved by the director and shall be accompanied by a twenty-five dollar ($25.00) fee for each notice filed. Filing of the notice as herein provided shall serve as a substitute for filing a notice of claim to a water right pursuant to section 42-243, Idaho Code. The director may provide notice to holders of water rights and others as the director deems appropriate.

(d) Compliance with the provisions of this subsection is a substitute for the requirements for transfer proceedings in section 42-222, Idaho Code. In the administration of water diverted for livestock watering pursuant to this subsection, the director, and the district court where applicable, shall recognize and protect water rights for out-of-stream livestock watering use pursuant to this subsection as they would in-stream livestock watering use. The priority date for out-of-stream watering of livestock pursuant to this subsection shall be the first date that water historically was used for livestock watering and shall not be altered due to the diversion out-of-stream.

(e) Any water right holder who determines that diversion or use of water under the provisions of this subsection is depriving the water right holder of water to which the water right holder is entitled may petition the director of the department of water resources to curtail the diversion or use of water for livestock purposes. Upon such petition, the director shall cause an investigation to be made and may hold hearings or gather information in other ways. If the director finds that an interference is occurring, the director may order curtailment of diversion or use of the water or may require the water diversion and delivery system to be modified to prevent injury to other water rights. Any person

feeling aggrieved by an order of the director in response to a petition filed as herein provided shall be entitled to review as provided in section 42-1701A, Idaho Code.

(4) No change in use of any water right used for watering of livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.

Approved March 19, 2018

CHAPTER 147
(S.B. No. 1275)

AN ACT

RELATING TO WOLVES; AMENDING SECTION 36-201, IDAHO CODE, TO PROVIDE THAT IT IS THE EXPECTATION OF THE LEGISLATURE THAT WOLF COLLARING WILL BE CONTINUED AS A MANAGEMENT TOOL FOR CERTAIN PACKS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 36-201, Idaho Code, be, and the same is hereby amended to read as follows:

36-201. FISH AND GAME COMMISSION AUTHORIZED TO CLASSIFY WILDLIFE. With the exception of predatory animals, the Idaho fish and game commission is hereby authorized to define by classification or reclassification all wildlife in the state of Idaho. Such definitions and classifications shall include:

(a) Game animals
(b) Game birds
(c) Game fish
(d) Fur-bearing animals
(e) Migratory birds
(f) Threatened or endangered wildlife
(g) Protected nongame species
(h) Unprotected wildlife

Predatory wildlife shall include:

1. Coyote
2. Jackrabbit
3. Skunk
4. Weasel
5. Starling
6. Raccoon

Notwithstanding the classification assigned to wolves, all methods of take including, but not limited to, all methods utilized by the United States fish and wildlife service and the United States department of agriculture wildlife services, shall be authorized for the management of wolves in accordance with existing laws or approved management plans. <u>It is the expectation of the legislature that wolf collaring will be continued as one of the proactive management tools for packs that are predisposed to depredation on domestic livestock.</u>

Approved March 19, 2018

APPENDIX 4

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

CHAPTER 320
(H.B. No. 718)

AN ACT

RELATING TO STOCKWATER RIGHTS; AMENDING SECTION 42-501, IDAHO CODE, TO PROVIDE ADDITIONAL LEGISLATIVE INTENT REGARDING CERTAIN STOCKWATER RIGHTS; AMENDING CHAPTER 5, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-503, IDAHO CODE, TO PROVIDE FOR THE FORFEITURE OF CERTAIN STOCKWATER RIGHTS AND TO PROVIDE A PROCEDURE; AMENDING SECTION 42-503, IDAHO CODE, TO CLARIFY THAT IF AN AGENCY OF THE FEDERAL GOVERNMENT ACQUIRES A STOCKWATER RIGHT, THAT RIGHT SHALL NEVER BE UTILIZED FOR ANY PURPOSE OTHER THAN WATERING OF LIVESTOCK UNLESS OTHERWISE APPROVED BY THE STATE AND TO REDESIGNATE THE SECTION; AMENDING SECTION 42-504, IDAHO CODE, TO REDESIGNATE THE SECTION; AMENDING SECTION 42-505, IDAHO CODE, TO REDESIGNATE THE SECTION; AND AMENDING SECTION 42-506, IDAHO CODE, TO REDESIGNATE THE SECTION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-501, Idaho Code, be, and the same is hereby amended to read as follows:

42-501. LEGISLATIVE INTENT. In the landmark case of *Joyce Livestock Company v. United States of America*, 144 Idaho 1, 156 P.3d 502 (2007), the Idaho Supreme Court held that an agency of the federal government cannot obtain a stockwater right under Idaho law, unless it actually owns livestock and puts the water to beneficial use.

In *Joyce*, the court held that the United States:

> "bases its claim upon the constitutional method of appropriation. That method requires that the appropriator actually apply the water to a beneficial use. Since the United States has not done so, the district court did not err in denying its claimed water rights."

The court also held that federal ownership or management of the land alone does not qualify it for stockwater rights. It opined:

> "The United States claimed instream water rights for stock watering based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act...The argument of the United States reflects a misunderstanding of water law...As the United States has held, Congress has severed the ownership of federal lands from the ownership of water rights in nonnavigable waters located on such lands."

The court went on to state:

> "Under Idaho Law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right...If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as the agent of the owner...The Taylor Grazing Act expressly recognizes that ranchers could obtain their own water rights on federal land."

A rancher is not unwittingly acting as an agent of a federal agency simply by grazing livestock on federally managed lands when he files for and receives a stockwater right.

It is the intent of the Legislature to codify and enhance these important points of law from the *Joyce* case to protect Idaho stockwater right holders from encroachment by the federal government in navigable and nonnavigable waters.

Further, in order to comply with the *Joyce* decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture.

SECTION 2. That Chapter 5, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-503, Idaho Code, and to read as follows:

42-503. FORFEITURE OF CERTAIN STOCKWATER RIGHTS. (1) Within ninety (90) days following the enactment of this section, the director of the department of water resources shall:

(a) Compile a list of all stockwater rights held by any federal agency; and

(b) Submit the list of stockwater rights to the appropriate federal agency.

(2) Following the ninety (90) day period as provided in subsection (1) of this section, the director shall, upon approval by the governor, submit an order to the federal agency identifying the stockwater right or rights held by that federal agency and requiring the federal agency to show cause before the director why the stockwater right or rights should not be lost or forfeited pursuant to section 42-222(2), Idaho Code.

(3) Any order to show cause shall contain the factual and legal basis for the order.

(4) The director shall serve a copy of any order to show cause on the stockwater right owner by personal service or by certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by certified mail shall be complete upon receipt of the certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the director may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by publication shall be complete upon the date of the last publication.

(5) The stockwater right owner shall have a right to an administrative hearing before the director if requested in writing within twenty-one (21) days from completion of service of the order to show cause. The water right is forfeited if the water right owner fails to timely request a hearing.

(6) If the stockwater right owner timely requests a hearing, the hearing shall be in accordance with section 42-1701A, Idaho Code, and the rules of procedure promulgated by the director. If, after the hearing, the director determines that the stockwater right has been lost and forfeited pursuant to section 42-222(2), Idaho Code, the director shall issue an order declaring the stockwater right forfeited. Judicial review of any decision of the director shall be in accordance with section 42-1701A, Idaho Code.

(7) The term "stockwater right owner" as used in this section means the owner of the stockwater right shown in the records of the department of water resources at the time of service of the order to show cause.

(8) This section applies only to stockwater rights decreed to the United States that were based on a claim of beneficial use. It does not apply to stockwater water rights decreed to the United States based on federal law or acquired pursuant to chapter 2, title 42, Idaho Code.

(9) Any forfeiture under this provision shall not prejudice the ability of the current holder of a federal grazing permit or lease to graze livestock on the place of use designated in the forfeited stockwater right from filing a claim pursuant to Idaho law.

SECTION 3. That Section 42-503, Idaho Code, be, and the same is hereby amended to read as follows:

42-5034. LIMITS OF USE. If an agency of the federal government acquires a stockwater right, that stockwater right shall never be utilized for any purpose other than the watering of livestock unless otherwise approved by the state of Idaho pursuant to section 42-222, Idaho Code.

SECTION 4. That Section 42-504, Idaho Code, be, and the same is hereby amended to read as follows:

42-5045. EFFECT OF ILLEGAL CHANGE OF OWNERSHIP OR TRANSFER. Any application for a change in ownership or any application proposing to change the nature of use of a stockwater right that is in violation of the provisions of this chapter shall be denied.

SECTION 5. That Section 42-505, Idaho Code, be, and the same is hereby amended to read as follows:

42-5056. SEVERABILITY. The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act.

SECTION 6. That Section 42-506, Idaho Code, be, and the same is hereby amended to read as follows:

42-5067. PROVISIONS CONTROLLING OVER OTHER ACTS. Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

Approved March 27, 2018

CHAPTER 321
(S.B. No. 1246, As Amended in the House)

AN ACT
RELATING TO CORRECTIONAL FACILITIES; PROVIDING LEGISLATIVE INTENT; AMENDING SECTION 20-237B, IDAHO CODE, TO PROVIDE THAT PRIVATIZED MEDICAL PROVIDERS SHALL MAKE CERTAIN PAYMENTS, TO PROVIDE FOR INPATIENT AND OUTPATIENT HOSPITALIZATIONS AND EMERGENCY SERVICES, TO REVISE TERMINOLOGY, TO PROVIDE CERTAIN CONTRACTUAL REQUIREMENTS AND TO PROVIDE APPLICABILITY; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. LEGISLATIVE INTENT. It is the intent of the Legislature that any amendments to Section 20-237B, Idaho Code, shall not apply retroactively to any hospital medical services or non-hospital medical services provided before the enactment of this act.

SECTION 2. That Section 20-237B, Idaho Code, be, and the same is hereby amended to read as follows:

20-237B. MEDICAL COSTS OF STATE PRISONERS HOUSED IN CORRECTIONAL FACILITIES. (1) The state board of correction or any privatized medical provider under contract with the department of correction shall pay to a provider of a medical service, other than hospital inpatient or outpatient

APPENDIX 5

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

CHAPTER 253
(H.B. No. 592)

AN ACT
RELATING TO STOCKWATER; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-224, IDAHO CODE, TO PROVIDE FOR ISSUANCE OF ORDERS TO SHOW CAUSE, TO PROVIDE FOR CONTENT OF ORDERS TO SHOW CAUSE, TO PROVIDE FOR SERVICE OF ORDERS TO SHOW CAUSE, TO PROVIDE FOR PUBLICATION, TO PROVIDE FOR COPIES OF THE ORDER, TO PROVIDE FOR REQUESTS FOR HEARING, TO PROVIDE THAT MULTIPLE STOCKWATER RIGHTS HELD BY A SINGLE OWNER MAY BE CONSIDERED IN A SINGLE ORDER TO SHOW CAUSE, TO PROVIDE FOR HEARINGS, TO PROVIDE FOR ORDERS, TO PROVIDE FOR JUDICIAL REVIEW, TO DEFINE TERMS, AND TO PROVIDE FOR APPLICABILITY; AMENDING SECTION 42-501, IDAHO CODE, TO PROVIDE THAT CERTAIN STOCKWATER RIGHTS ARE SUBJECT TO FORFEITURE PURSUANT TO SPECIFIED LAW AND TO MAKE A TECHNICAL CORRECTION; AMENDING SECTION 42-502, IDAHO CODE, TO REMOVE PROVISIONS REGARDING AGENTS OF THE FEDERAL GOVERNMENT AND PERMITTEES ON FEDERALLY ADMINISTERED GRAZING ALLOTMENTS; REPEALING SECTION 42-503, IDAHO CODE, RELATING TO THE FORFEITURE OF CERTAIN STOCKWATER RIGHTS; AND AMENDING SECTION 42-504, IDAHO CODE, TO REVISE PROVISIONS REGARDING LIMITS OF USE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-224, Idaho Code, and to read as follows:

42-224. FORFEITURE OF STOCKWATER RIGHTS. (1) Whenever the director of the department of water resources receives a petition making a prima facie showing, or finds, on his own initiative based on available information, that a stockwater right has not been put to beneficial use for a term of five (5) years, the director shall expeditiously issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code.

(2) Any order to show cause shall contain the director's findings.

(3) The director shall serve a copy of any order to show cause on the stockwater right owner by personal service or by certified mail. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by certified mail shall be complete upon receipt of the certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the director may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by publication shall be complete upon the date of the last publication.

(4) If the order affects a stockwater right where the place of use is a federal grazing allotment, the director shall provide a copy of the order to the holder or holders of any livestock grazing permit or lease for said allotment.

(5) The stockwater right owner shall have twenty-one (21) days from completion of service to request in writing a hearing pursuant to section 42-1701A, Idaho Code. If the stockwater right owner fails to timely respond to the order to show cause, the stockwater right shall be considered forfeited, and the director shall issue an order declaring the stockwater right to be forfeited pursuant to section 42-222(2), Idaho Code.

(6) The director may consider multiple stockwater rights held by a single owner in a single order to show cause.

(7) If the stockwater right owner timely requests a hearing, the hearing shall be in accordance with section 42-1701A, Idaho Code, and the rules of procedure promulgated by the director. If, after the hearing, the director confirms that the water right has been lost and forfeited pursuant to section 42-222(2), Idaho Code, the director shall issue an order declaring the water right forfeited. Judicial review of any decision of the director shall be in accordance with section 42-1701A, Idaho Code.

(8) For purposes of this section, the following terms have the following meanings:

(a) "Stockwater right" means water rights for the watering of livestock meeting the requirements of section 42-1401A(11), Idaho Code.

(b) "Stockwater right owner" as used in this section means the owner of the stockwater right shown in the records of the department of water resources at the time of service of the order to show cause.

(9) This section applies to all stockwater rights except those stockwater rights decreed to the United States based on federal law.

(10) The director shall not issue an order to show cause, and shall not proceed under the provisions of this section, where the holder or holders of any livestock grazing permit or lease on a federal grazing allotment asserts a principal/agent relationship with the federal agency managing the grazing allotment.

SECTION 2. That Section 42-501, Idaho Code, be, and the same is hereby amended to read as follows:

42-501. LEGISLATIVE INTENT. In the landmark case of *Joyce Livestock Company v. United States of America*, 144 Idaho 1, 156 P.3d 502 (2007), the Idaho Supreme Court held that an agency of the federal government cannot obtain a stockwater right under Idaho law~~,~~ unless it actually owns livestock and puts the water to beneficial use.

In *Joyce*, the court held that the United States:

"bases its claim upon the constitutional method of appropriation. That method requires that the appropriator actually apply the water to a beneficial use. Since the United States has not done so, the district court did not err in denying its claimed water rights."

The court also held that federal ownership or management of the land alone does not qualify it for stockwater rights. It opined:

"The United States claimed instream water rights for stock watering based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act...The argument of the United States reflects a misunderstanding of water law...As the United States has held, Congress has severed the ownership of federal lands from the ownership of water rights in nonnavigable waters located on such lands."

The court went on to state:

"Under Idaho Law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right...If the water right was initiated by the lessee, the right is the lessee's property, unless the lessee was acting as the agent of the owner...The Taylor Grazing Act expressly recognizes that ranchers could obtain their own water rights on federal land."

A rancher is not unwittingly acting as an agent of a federal agency simply by grazing livestock on federally managed lands when he files for and receives a stockwater right.

It is the intent of the Legislature to codify and enhance these important points of law from the *Joyce* case to protect Idaho stockwater right holders from encroachment by the federal government in navigable and nonnavigable waters.

Further, in order to comply with the *Joyce* decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture pursuant to sections 42-222(2) and 42-224, Idaho Code.

SECTION 3. That Section 42-502, Idaho Code, be, and the same is hereby amended to read as follows:

42-502. FEDERAL AGENCIES -- STOCKWATER RIGHTS. ~~(1)~~ No agency of the federal government~~, nor any agent acting on its behalf,~~ shall acquire a stockwater right unless the agency owns livestock and puts the water to beneficial use. For purposes of this chapter, "stockwater rights" means water rights for the beneficial use for livestock.
~~(2) For the purposes of this chapter, a permittee on a federally administered grazing allotment shall not be considered an agent of the federal government.~~

SECTION 4. That Section 42-503, Idaho Code, be, and the same is hereby repealed.

SECTION 5. That Section 42-504, Idaho Code, be, and the same is hereby amended to read as follows:

42-504. LIMITS OF USE. If an agency of the federal government, or the holder or holders of any livestock grazing permit or lease on a federal grazing allotment, acquires a stockwater right, that stockwater right shall never be utilized for any purpose other than the watering of livestock ~~unless otherwise approved by the state of Idaho pursuant to section 42-222, Idaho Code~~ on the federal grazing allotment that is the place of use for that stockwater right.

Approved March 24, 2020

CHAPTER 254
(H.B. No. 594)

AN ACT
RELATING TO LEASES; AMENDING SECTION 55-307, IDAHO CODE, TO PROVIDE THAT CERTAIN NOTICE SHALL BE GIVEN FOR NONRENEWAL OF A LEASE OR AN INCREASE IN THE AMOUNT OF RENT CHARGED AND TO MAKE TECHNICAL CORRECTIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 55-307, Idaho Code, be, and the same is hereby amended to read as follows:

55-307. CHANGE IN TERMS OF LEASE -- NOTICE. (1) In all leases of lands or tenements, or of any interest therein from month to month, the landlord may, upon giving notice in writing at least fifteen (15) days before the expiration of the month, change the terms of the lease~~,~~ to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish, as a part of the lease, the terms, rent and conditions specified in the notice~~,~~ if the tenant shall continue to hold the premises after the expiration of the month.

APPENDIX 6

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

CHAPTER 215
(H.B. No. 608)

AN ACT

RELATING TO STOCKWATER; AMENDING SECTION 42-224, IDAHO CODE, TO REVISE PROVISIONS REGARDING THE FORFEITURE OF STOCKWATER RIGHTS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-224, Idaho Code, be, and the same is hereby amended to read as follows:

42-224. FORFEITURE OF STOCKWATER RIGHTS. (1) ~~Whenever~~ Within thirty (30) days of receipt by the director of the department of water resources ~~receives~~ of a petition ~~making a prima facie showing, or finds, on his own initiative based on available information,~~ or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If the director determines the petition or other information, or both, is insufficient, he shall ~~expeditiously issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code~~ notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.

(2) If the director determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, the director must within thirty (30) days issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause ~~shall~~ must contain the director's findings of fact and a reasoned statement in support of the determination.

(3) The director ~~shall~~ must serve a copy of any order to show cause on the stockwater right owner by personal service or by certified mail with return receipt. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by certified mail shall be complete upon receipt of the certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the director may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by publication shall be complete upon the date of the last publication.

(4) If the order affects a stockwater right where all or a part of the place of use is ~~a~~ on federal or state grazing ~~allotment~~ lands, the director ~~shall provide~~ must mail by certified mail with return receipt a copy of the order to show cause to the holder or holders of any livestock grazing permit or lease for said ~~allotment~~ lands. However, the director shall not issue an order to show cause where the director has or receives written evidence signed by the principal and the agent, prior to issuance of said order, that a principal/agent relationship existed during the five (5) year term mentioned in subsection (1) of this section or currently exists between the owner of the water right as principal and a permittee or lessee as agent for the purpose of obtaining or maintaining the water right.

(5) ~~The stockwater right owner shall have twenty-one (21) days from completion of service to request in writing a hearing pursuant to section 42-1701A, Idaho Code. If the stockwater right owner fails to timely respond to the order to show cause, the stockwater right shall be considered forfeited, and the director shall issue an order declaring the stockwater right to be forfeited pursuant to section 42-222(2), Idaho Code.~~

~~(6)~~ The director may consider multiple stockwater rights held by a single owner in a single order to show cause.

(6) The stockwater right owner has twenty-one (21) days from completion of service of the order to show cause to request in writing a hearing pursuant to section 42-1701A(1) and (2), Idaho Code.

(7) If the stockwater right owner fails to timely ~~requests a hearing, the hearing shall be in accordance with section 42-1701A, Idaho Code, and the rules of procedure promulgated by the director. If, after the hearing, the director confirms that the water right has been lost and forfeited pursuant to section 42-222(2), Idaho Code, the director shall issue an order declaring the water right forfeited. Judicial review of any decision of the director shall be in accordance with section 42-1701A, Idaho Code.~~ respond to the order to show cause, the director must issue an order within fourteen (14) days regarding forfeiture stating the stockwater right has been forfeited pursuant to section 42-222(2), Idaho Code.

(8) If the stockwater right owner timely requests a hearing, the hearing shall be in accordance with section 42-1701A(1) and (2), Idaho Code, and the rules of procedure promulgated by the director. Following the hearing, the director must issue an order regarding forfeiture that sets forth findings of fact, conclusions of law, and a determination of whether the stockwater right has been forfeited pursuant to section 42-222(2), Idaho Code. The director must issue the order regarding forfeiture no later than forty-five (45) days after completion of the administrative proceeding.

(9) Any order determining that a stockwater right has been forfeited pursuant to subsection (7) or (8) of this section shall have no legal effect except as provided for in subsection (11) of this section. No judicial challenge to an order determining that a stockwater right has been forfeited pursuant subsection (7) or (8) of this section shall be allowed except within the civil action authorized in subsections (10) and (11) of this section.

(10) Within sixty (60) days after issuance of an order by the director determining that a stockwater right has been forfeited, the state of Idaho, by and through the office of the attorney general, must initiate a civil action by electronically filing in the district court for the fifth judicial district, Twin Falls county, the following: a complaint requesting a declaration that the stockwater right is forfeited; certified copies of the order regarding forfeiture; and the record of the administrative proceeding. A copy of the complaint and accompanying documents shall be served on the stockwater right holder who shall be named as the defendant in the action, all parties to the administrative proceeding, and any holder or holders of livestock grazing permits or leases for the place of use of the stockwater right for which the director possesses an address. Any person may move to intervene in the action pursuant to the Idaho rules of civil procedure, but only if such a motion is filed at least twenty-one (21) days before the date set for the hearing under the scheduling order.

(11) After the initiation of the civil action required by this section, the proceedings in the district court shall be like those in a civil action triable without right to a jury, provided that the department of water resources shall not be a party to the civil action but may appear as a witness to explain the basis for the director's forfeiture determination. In any such proceeding, the director's order determining forfeiture shall constitute prima facie evidence that the right has been forfeited but shall not change the standard of proof for forfeiture of the water right established by section 42-222(2), Idaho Code.

(12) At the conclusion of the action, the district court shall issue an order determining whether the stockwater right has been forfeited pursuant to section 42-222, Idaho Code. If the district court determines that the stockwater right has been forfeited, the court shall also enter a judgment that the stockwater right has been forfeited.

(~~8~~13) For purposes of this section, the following terms have the following meanings:

(a) "Stockwater right" means water rights for the watering of livestock meeting the requirements of section 42-1401A(11), Idaho Code.

(b) "Stockwater right owner" as used in this section means the owner of the stockwater right shown in the records of the department of water resources at the time of service of the order to show cause.

(~~9~~14) This section applies to all stockwater rights except those stockwater rights decreed to the United States based on federal law.

~~(10) The director shall not issue an order to show cause, and shall not proceed under the provisions of this section, where the holder or holders of any livestock grazing permit or lease on a federal grazing allotment asserts a principal/agent relationship with the federal agency managing the grazing allotment.~~

SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved March 24, 2022

CHAPTER 216
(H.B. No. 555)

AN ACT

RELATING TO THE PUBLIC EMPLOYEE RETIREMENT SYSTEM OF IDAHO; AMENDING SECTION 59-1302, IDAHO CODE, TO DEFINE A TERM; AMENDING SECTION 59-1322, IDAHO CODE, TO PROVIDE FOR SEPARATE RATES OF CONTRIBUTION FOR CERTAIN EMPLOYERS AND TO MAKE TECHNICAL CORRECTIONS; AMENDING SECTION 59-1333, IDAHO CODE, TO PROVIDE FOR SCHOOL EMPLOYEES AND TO REMOVE A PROVISION REGARDING SPECIFIED MEMBER RATES; AMENDING SECTION 59-1334, IDAHO CODE, TO REMOVE A PROVISION REGARDING SPECIFIED MEMBER RATES; AMENDING CHAPTER 13, TITLE 59, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 59-1335, IDAHO CODE, TO PROVIDE FOR CONTRIBUTIONS FROM SCHOOL EMPLOYEES; AMENDING SECTION 59-1356, IDAHO CODE, TO PROVIDE FOR REEMPLOYMENT WITH AN EMPLOYER PARTICIPATING IN THE PUBLIC EMPLOYEE RETIREMENT SYSTEM OF IDAHO AND TO MAKE TECHNICAL CORRECTIONS; REPEALING SECTION 59-1371, IDAHO CODE, RELATING TO DEFINITIONS; REPEALING SECTION 59-1372, IDAHO CODE, RELATING TO THE TRANSFER OF ALL ASSETS, LIABILITIES, DUTIES, OBLIGATIONS, AND RIGHTS TO EMPLOYEE SYSTEM; REPEALING SECTION 59-1373, IDAHO CODE, RELATING TO ACCUMULATED TEACHER MEMBER CONTRIBUTIONS, REMAINING CONTRIBUTIONS, AND MEMBERSHIP SERVICE CREDIT; REPEALING SECTION 59-1374, IDAHO CODE, RELATING TO EMPLOYERS, MEMBERS, AND EXCEPTIONS; REPEALING SECTION 59-1375, IDAHO CODE, RELATING TO ANNUITANTS AND CONTRIBUTIONS IN LIEU OF THE REQUIREMENT OF SIX MONTHS OF MEMBERSHIP SERVICE; REPEALING SECTION 59-1376, IDAHO CODE, RELATING TO BENEFITS TO TEACHER MEMBERS; AMENDING SECTION 33-2101A, IDAHO CODE, TO REMOVE CODE REFERENCES; AND DECLARING AN EMERGENCY AND PROVIDING EFFECTIVE DATES.

Be It Enacted by the Legislature of the State of Idaho:

APPENDIX 7

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

Appendix 7

SOURCE: EXHIBITS 10, 12, 13, AND 14 TO DECLARATION OF GARY SPACKMAN

	A	B	C	D
1	**WATER RIGHT NO.**	**TYPE**	**IDWR DOCKET**	**PETITION GRANTED?**
2	67-12395	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
3	67-12396	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
4	67-12399	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
5	67-12400	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
6	67-12401	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
7	67-12740	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
8	67-12741	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
9	67-12743	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
10	67-12744	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
11	67-12745	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
12	67-12746	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
13	67-12747	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
14	67-12748	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
15	67-12749	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
16	67-12750	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
17	67-12753	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
18	67-12754	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
19	67-13008	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
20	67-13009	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
21	67-13010	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
22	67-13013	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
23	67-13140	State Law-Based (Decreed)	P-OSC-2021-001	**YES**
24				
25	65-19685	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
26	65-20003	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
27	65-20010	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
28	65-20011	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
29	65-20012	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
30	65-20015	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
31	65-20390	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
32	65-20464	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
33	65-20468	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
34	65-20475	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
35	65-20476	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
36	65-20477	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
37	65-20479	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
38	65-20480	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
39	65-20487	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
40	65-20488	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
41	65-20489	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
42	65-20597	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
43	67-12751	State Law-Based (Decreed)	P-OSC-2021-002	**YES**

SOURCE: EXHIBITS 10, 12, 13, AND 14 TO DECLARATION OF GARY SPACKMAN

	A	B	C	D
44	67-12752	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
45	67-12775	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
46	67-12809	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
47	67-12810	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
48	67-12841	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
49	67-13085	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
50	67-13086	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
51	67-13141	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
52	67-13142	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
53	67-13147	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
54	67-13148	State Law-Based (Decreed)	P-OSC-2021-002	**YES**
55				
56	75-11102	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
57	75-13808	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
58	75-13813	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
59	75-13822	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
60	75-13826	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
61	75-13899	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
62	75-13912	State Law-Based (Decreed)	P-OSC-2022-001	**YES**
63	75-4241	State Law-Based (Statutory claim)	P-OSC-2022-001	**YES**
64	75-7279	State Law-Based (Licensed)	P-OSC-2022-001	**YES**
65	75-7288	State Law-Based (Licensed)	P-OSC-2022-001	**YES**
66	75-7335	State Law-Based (Licensed)	P-OSC-2022-001	**YES**
67				
68	79-11372	State Law-Based (Decreed)	P-OSC-2021-004	**YES**
69	79-11373	State Law-Based (Decreed)	P-OSC-2021-004	**YES**
70	79-11374	State Law-Based (Decreed)	P-OSC-2021-004	**YES**
71	79-11376	State Law-Based (Decreed)	P-OSC-2021-004	**YES**
72	79-11756	State Law-Based (Decreed)	P-OSC-2021-004	**YES**
73				
74				
75	67-12397	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
76	67-12398	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
77	67-12405	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
78	67-12408	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
79	67-12409	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
80	67-12427	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
81	67-12429	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
82	67-12431	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
83	67-12433	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
84	67-12435	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
85	67-12437	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
86	67-12443	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
87	67-12445	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
88	67-12447	Federal Law-Based (Decreed)	P-OSC-2021-001	**NO**
89	67-12508	State Law-Based (Decreed)	P-OSC-2021-001	**NO**

SOURCE: EXHIBITS 10, 12, 13, AND 14 TO DECLARATION OF GARY SPACKMAN

	A	B	C	D
90	67-12509	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
91	67-12742	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
92	67-13006	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
93	67-13014	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
94	67-13015	State Law-Based (Decreed)	P-OSC-2021-001	**NO**
95				
96	65-19750	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
97	65-19812	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
98	65-19814	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
99	65-19816	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
100	65-19818	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
101	65-19820	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
102	65-19822	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
103	65-19824	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
104	65-19894	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
105	65-19897	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
106	65-20055	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
107	65-20057	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
108	65-20059	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
109	65-20061	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
110	65-20063	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
111	65-20065	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
112	65-20067	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
113	65-20069	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
114	65-20071	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
115	65-20370	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
116	65-20388	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
117	65-20469	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
118	65-20471	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
119	65-20472	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
120	65-20478	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
121	65-20484	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
122	65-20486	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
123	67-12386	Federal Law-Based (Decreed)	P-OSC-2021-002	**NO**
124	67-12776	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
125	67-12777	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
126	67-12900	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
127	67-12999	State Law-Based (Decreed)	P-OSC-2021-002	**NO**
128				
129	79-11259	State Law-Based (Decreed)	P-OSC-2021-004	**NO**
130	79-11261	State Law-Based (Decreed)	P-OSC-2021-004	**NO**
131	79-11784	Federal Law-Based (Decreed)	P-OSC-2021-004	**NO**
132				
133	75-2225	State Law-Based (Decreed)	P-OSC-2022-001	**NO**
134	75-4236	State Law-Based (Statutory claim)	P-OSC-2022-001	**NO**
135	75-7672	State Law-Based (Licensed)	P-OSC-2022-001	**NO**

SOURCE: EXHIBITS 10, 12, 13, AND 14 TO DECLARATION OF GARY SPACKMAN

	A	B	C	D
136	75-13804	State Law-Based (Decreed)	P-OSC-2022-001	**NO**
137	75-13825	State Law-Based (Decreed)	P-OSC-2022-001	**NO**

APPENDIX 8

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

Calendar No. 711

82 | NATE | REPORT No. 755

161

AUTHORIZING SUITS AGAINST THE UNITED STATES TO ADJUDICATE AND ADMINISTER WATER RIGHTS

SEPTEMBER 17 (legislative day, SEPTEMBER 13), 1951.—Ordered to be printed

Mr. McCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 18]

The Committee on the Judiciary, to which was referred the bill (S. 18) to authorize suits against the United States to adjudicate and administer water rights, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

AMENDMENTS

1. On page 1, strike out all that follows the colon in line 10 down to and including line 1, on page 2, and insert in lieu thereof the following:

Provided, That nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. When the United States shall be a party to any such suit it shall be deemed to have waived any right to plead that the State laws are not applicable, or that the United States is not amenable thereto, by reason of the sovereignty of the United States, and the United States 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*,

2. At the end of the bill add the following new section:

SEC. 2. The head of every department or agency of the United States and of every corporation which is wholly owned by the United States shall, within two years from the effective date of this Act, cause to be filed with the Secretary of the Interior, in such form and detail as he shall prescribe, a complete list of all claims of right to the use by that department, agency, or corporation of the waters of any stream or other body of surface water in the United States for agricultural, silvicultural, horticultural, stock-water, municipal, domestic, industrial, mining, or military purposes, or the protection, cultivation, and propagation of fish and

wildlife, or any other purpose involving a consumptive use of water, or for the production of hydroelectric or other power or energy. Said list shall be supplemented and revised promptly as new claims of right are made and existing claims are abandoned or otherwise disposed of. A catalogue of such claims shall be maintained by the Secretary and, except for items therein which are certified by the head of the claimant department, agency, or corporation to be of such importance to the national defense as to require secrecy, shall be open to inspection by the public and, subject to the same exception, copies thereof and of items therein shall be furnished by the Secretary upon payment of the cost thereof. The Secretary may make rules and regulations to carry out the purpose of this section.

PURPOSE

The purpose of the proposed legislation, as amended, is to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights by appropriation under State law, by purchase, exchange, or otherwise and that the United States is a necessary party to such suit.

STATEMENT

Hearings were held on S. 18, and the committee is of the opinion that in order to understand the background of this legislation a résumé of some of the history and decisions relating to the law of water rights would be of help.

The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.

There are two established doctrines relating to the law of water rights as it is applied in the United States today. The first is the riparian doctrine, which was inherited from England, and the second is the prior appropriation doctrine, which is founded in the customs and practices of the settlers and is uniformly recognized in the law of most of the western states.

The reason that there have been two doctrines lies in the volume of water which is available to particular sections of the country. The riparian doctrine generally has currency in localities where water is plentiful, and the prior appropriation doctrine is adhered to in those areas where water is at a premium. Under the riparian doctrine, the owner of land contiguous to a stream has certain rights in the flow of the water by reason of his ownership of land. Under the doctrine of prior appropriation the first user of the water acquires a priority right to continue the use, and the contiguity of land to the watercourse is not a factor. It can readily be seen that the western states are the ones which are susceptible to the doctrine of prior appropriation.

It will follow that the adjudication of water rights which might involve the United States would in most instances be confined to those states in which the doctrine of prior appropriation is applicable.

The doctrine of prior appropriation had its inception in the Western-States early in the settlement of the West, being brought about by the arid and semi-arid character of such States. The doctrine that "first in time is first in right" to the beneficial use of the water in the streams of such States first became the law of appropriation by custom and

was later sanctioned by constitutional and legislative enactment in 11 of the Western States. Under the law sanctioning the doctrine of "first in time is first in right," vast quantities of land in these States, beginning back in the territorial days, was brought under cultivation through the courage and hard work of those who homesteaded or otherwise secured farm and ranch lands and made appropriations of water with which to make such lands productive. Litigation with respect to the water rights developed early in the history of the right to the use of water by appropriation. Down through the years the courts of the respective States marked out the pathway whereby order was instituted in lieu of chaos. Rights were established, and all of this at the expense, trial, and labor of the pioneers of the West, without material aid from our United States Government until a much later time when irrigation projects were initiated by Congress through the Department of the Interior and later the Bureau of Reclamation. Even then Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States. In 1902 Congress wrote into the Federal Reclamation Act a strict admonition to the Secretary of the Interior. Section 8 of that act, being now section 383, title 43, United States Code, is in effect as follows:

> Vested rights and State laws unaffected.—Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

It will be seen that in the Western States irrigation of the lands is essential to successful farming and ranching and failure by a landowner to receive the amount of water vested or adjudicated to him is likely to be fatal to his economic welfare.

In the arid Western States, for more than 80 years, the law has been that the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.

In 1877 the Congress, in the Desert Land Act of 1877 (19 Stat. L. 377, Ch. 107), severed the water from the land, and the effect of such statute was thereafter that the land should be patented by the United States separate and apart from the water and that all the nonnavigable water should be reserved for the use of the public under the laws of the States and Territories named in the act. This statute was construed by the Supreme Court of the United States in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.* (295 U. S. 142), in which the Court, inter alia, held:

> 1. Following the Desert Land Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain.
> 2. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the State of their location.

3. The effect of the statute was to sever all waters upon the public domain, not theretofore appropriated, from the land itself, and that a patent issued thereafter for lands in a desert-land State or Territory, under any of the land laws of the United States, carried with it, of its own force, no common-law right to the water flowing through or bordering upon the lands conveyed.

In the course of its opinion the Court said:

The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the States and Territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not suceptible of any other construction. The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced.

The Court further stated:

Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the States affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated States, including those since created out of the Territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain. For since Congress cannot enforce either rule upon any State, *Kansas* v. *Colorado* (206 U. S. 46, 94), the full power of choice must remain with the State.

It is interesting to note what the Court said in a marginal note on page 164 of the opinion:

In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of State law in respect to the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards.

The effect and authority of the foregoing cited case was later followed by the Supreme Court in *Ickes* v. *Fox* (300 U. S. 82), decided February 1, 1937, wherein the Court said, at page 95.

The Federal Government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the Government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land States. *California Power Co.* v. *Beaver Cement Co.* (295 U. S. 142, 162). And in those States, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by State law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State.

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the

adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

The committee believes that such a situation cannot help but result in a chaotic condition. [Each water user under some State laws is required to pay a graduated fee or tax annually for the services of water commissioners. The commissioners must apportion the water to the decreed users thereof in accordance with their decreed rights, and are required to deny the use of water to any user who at a particular time is not in the priority for the available supply of water. Failure to comply with the lawful orders of the water commissioner subjects the offender to the administrative and penal orders of the court, usually issued in contempt proceedings. If a water user possessing a decreed water right is immune from suits and proceedings in the courts for the enforcement of valid decrees, then the years of building the water laws of the Western States in the earnest endeavor of their proponents to effect honest, fair and equitable division of the public waters will be seriously jeopardized.]

If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i. e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of *Pacific Live Stock Co.* v. *Oregon Water Board* (241 U. S. 447):

> * * * All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

The committee is aware of the fact, as shown by the hearings, that the United States Government has acquired many lands and water rights in States that have the doctrine of prior appropriation. When

these lands and water rights were acquired from the individuals the Government obtained no better rights than had the persons from whom the rights were obtained.

Since it is clear that the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

It will be noted that the amendment to S. 18 provides that nothing in the act shall authorize the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream. This is done in order not to open up any controversies between the States as to water rights on an interstate stream by permitting the United States to be made a party thereto.

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or blocking a multip.e-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. The committee can think of no particular reason why the mere development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Senator Magnuson also submitted an amendment to the bill which appears as section 2 of the bill. It requires the head of each department or agency of the United States and every corporation which is wholly owned by the United States to submit within a 2-year period of time to the Secretary of the Interior a complete list of all claims of right to use any stream or body of surface water in the United States. This list shall be supplemented properly as new claims and rights are made or other claims are abandoned or otherwise disposed of. A catalog of such claims is to be maintained by the Secretary, which shall be open to the public inspection, except when they may be barred from such inspection by reason of secrecy required by national defense.

The committee is of the opinion that development of a catalog of this nature would be most salutary and that there should be a single

depository where the water rights claims of the United States should be available for whatever purpose may be needed. This provision is not only helpful to all of the landowners who may be interested in the water rights of a particular stream but is exceedingly helpful to the United States in knowing where and how it can, on short notice, determine its holdings in this respect. This is a provision the committee believes should have been in force and effect long before now and believes that it will prove most helpful in the future administration and adjudication on questions of water rights, to say nothing of the incidental uses to which such a catalog may be made.

The committee, therefore, recommends that the bill S. 18, as amended, be considered favorably.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, August 3, 1951.

Hon. PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR: The Department of Justice is unable to recommend the enactment of the bill (S. 18) to authorize suits against the United States to adjudicate and administer water rights.

This measure would permit the joinder of the United States as a defendant in any suit for the adjudication of rights to the use of water of a river system or other source or for the administration of such rights where it appears that the United States is the owner or is in the process of acquiring water rights and is a necessary party to such suit. It would also provide that the United States could effect the removal to the Federal court of any such suit in which it is a party and that no judgment for costs shall be entered against the United States in any such suit. The last provision of the bill would authorize the service of summons or other process in any such suit upon the Attorney General or his designated representative.

The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need, or subject itself to the possible loss of valuable rights on the theory of having split its cause of action. There is, moreover, no reason to believe that in any instance in which it is desirable to do so, Congress would fail to authorize making the United States a party defendant in the litigation of water rights.

The Director of the Bureau of the Budget has advised this office that there would be no objection to the submission of this report.

Yours sincerely,

PEYTON FORD,
Deputy Attorney General.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., August 3, 1951.

Hon PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR MCCARRAN: Reference is made to your request of April 27 for the views of this Department on S. 18, a bill to authorize suits against the United States to adjudicate and administer water rights

I recommend that the bill be not enacted.

While there are some circumstances covered by the bill in which the relief which it would afford litigants may well be warranted, there are many others where it is more fitting that litigants be required to pursue their remedies under the Tort Claims Act or the Tucker Act.

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interestes by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* (207 U. S. 564 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U. S. C. 661), July 9, 1870 (16 Stat 218, 43 U. S. C. 661), and March 3, 1877 (19 Stat. 377, 43 U. S. C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U. S. C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

The brief exemplification of some of the types of interests given above does, however, suggest an approach to the problem which, we believe, merits consideration. Subject to the qualifications noted in the next paragraph, it seems to me to be proper for the United States to permit itself to be joined as a party defendant, with a right of removal (as is now provided in the bill) to the Federal district court, wherever,

(1) in the course of a judicial proceeding in a State court for a general adjudication of rights to the consumptive use of waters within that State it is made to appear to the court that the United States is a claimant of such right and is a necessary party to the proceeding; that the right is claimed for the direct benefit of persons who, if they were themselves the claimants, would be subject to the laws of that State with respect to the appropriation, use, or distribution of water; and that the right claimed by the United States exists solely by virtue of the laws of the State and is required, by a statute of the United States, to be established by an officer or employee thereof in accordance with said laws or has been or is being acquired by the United States from a predecessor in interest whose right depends upon its having been so established; or

(2) judicial review is sought, as provided by State law, by a person adversely affected by and a party to a State administrative proceeding relating to the appropriation, use, or distribution of water invoked by a duly authorized officer or employee of the United States upon the outcome of which a right of the United States depends.

The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) The waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law or to those which have existed for a stated number of years (say, 6 years); (b) it should be limited to those claims which are made to appear with particularity in the papers upon the basis of which the court is moved to make the United States a party; (c) it should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (d) the United States should not in any way be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party; (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

MASTIN G. WHITE,
Acting Assistant Secretary of the Interior.

AUGUST 24, 1951.

Re S. 18.
Hon. PAT MCCARRAN,
Chairman, Committee on the Judiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general purposes of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether S. 18 could be used in the manner I have described. I think clarification on this point will be extremely useful if made a part of the legislative history of this bill.

I have another suggestion I respectfully submit for consideration of the committee. From all I can gather, there is no central place in the entire administrative branch of the Government where a catalog of water rights, to which the several agencies lay claim, has been assembled or is maintained. It appears to me it would be extremely helpful to the Attorney General to have access to an up-to-date list of the water rights he may be called upon to protect.

Accordingly, I am attaching a suggested new section for the bill and commend it to you for consideration before final action on S. 18 is taken.

Kindest personal regards.

Sincerely,

WARREN G. MAGNUSON, U. S. S.

AUGUST 25, 1951.

Hon. WARREN G. MAGNUSON,
United States Senate, Washington, D. C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

You further suggest an amendment to the bill relative to the cataloging of water rights to which the several agencies of the Government lay claim and with this suggestion I am heartily in accord. I believe that such an amendment should be presented to the committee for its incorporation into S. 18.

I trust that the foregoing has served to clarify the situation as to your doubts.

Kindest personal regards.

Sincerely,

PAT McCARRAN, *Chairman.*

O

APPENDIX 9

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

Form 1221-2
(June 1969)

UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

MANUAL TRANSMITTAL SHEET

Release

2-294

Date

12/16/05

Subject

H - 2200-1 Land Exchange Handbook (public)

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1. Explanation of Material Transmitted: This release transmits an updated Land Exchange Handbook. The Handbook provides specific guidance for the consideration of land exchanges to ensure that statutory and regulatory requirements are followed and that the public interest is protected. It provides further direction related to the objectives, authorities, responsibilities, and policy considerations outlined in Manual Section 2200, Exchange of Public Lands.

   As described in the BLM Directives Manual (1221.13), handbook and manual sections have equal force and effect, and instructions provided in this Handbook are mandatory unless otherwise indicated.

   Change: This release transmits pen and ink corrections to Release 1-1695 dated 08/29/05. The release number assigned is incorrect. Please change Rel. 1-1695 on (1) the manual transmittal sheet in upper right corner and under "insert" and (2) on all Handbook sheets in the footer section on lower right side to **Rel. 2-294**.

2. Reports Required: None.

3. Material Superseded: Handbook H-2200-1 Release Number 2-286, dated August 14, 1997 and Release Number 2-288, dated June 4, 1999.

4. Filing Instructions: File as directed below.

REMOVE:	INSERT:
All of Rel. 2-286 and 2-288	All of Rel. 2-294 (H - 2200-1)
(Total: 76 sheets)	(Total: 91 sheets)

Thomas Lonnie
Assistant Director
Minerals, Realty and Resource Protection

U.S. GOVERNMENT PRINTING OFFICE 1987-181-423/54150

Form 1221-2
(June 1969)

UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

MANUAL TRANSMITTAL SHEET

Release
1-1695

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1. Explanation of Material Transmitted: This release transmits an updated Land Exchange Handbook. The Handbook provides specific guidance for the consideration of land exchanges to ensure that statutory and regulatory requirements are followed and that the public interest is protected. It provides further direction related to the objectives, authorities, responsibilities, and policy considerations outlined in Manual Section 2200, Exchange of Public Lands.

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2. Reports Required: None.

3. Material Superseded: Handbook H-2200-1 Release Number 2-286, dated August 14, 1997 and Release Number 2-288, dated June 4, 1999 (Chapter 7 and 8).

4. Filing Instructions: File as directed below.

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Thomas Lonnie
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Bureau of Land Management

Land Exchange Handbook H-2200-1 (Public)

H-2200-1 LAND EXCHANGE HANDBOOK (Public)

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- The prospective patentee must be willing to accept title subject to the mining claims.

Water Rights/Resources

Identification of water rights and consideration of how they will be handled in an exchange must begin at the earliest possible point in the process of considering a land exchange proposal. Being able to identify what water rights will be transferred or reserved in both the Federal and non-Federal portions of the exchange is essential to the accuracy of the valuation, notification, environmental documentation, public interest determination, and decision steps of the land exchange process. Resolution of all water-related issues is always important particularly when the BLM acquires lands specifically for their wetland or riparian values. Investigating water rights takes time and may require specialized expertise and legal consultation, research, and/or field investigations. Without water rights for the acquired lands, the BLM may have to purchase water rights or apply for more junior rights on its own.

If water rights are involved in the transaction, early consultation with your BLM water rights specialist and the ASD appraisal staff is necessary to ensure the availability of specific expertise to meet processing schedules. Water laws and practices are extremely localized, and value implications are usually significant. Use extreme caution when considering acquisition of water rights. Secure local professional expertise well versed in the entire spectrum of water laws and practices in the area. Because water is a State jurisdictional issue, early contact with the appropriate state agency dealing with water rights is essential. With the exception of federal reserved rights, it is the BLM's policy that water rights necessary for Bureau programs and projects be secured pursuant to the applicable State statutory and administrative procedures.

A water right is a valuable property right that must be managed in a way that will ensure it will not be lost. Water rights obtained under State law, whether appropriated, acquired by assignment of a deed to land, or acquired by separate purchase or exchange of water rights, may be subject to loss if not exercised in accordance with State water laws. Because non-use is the primary reason for losing a right, the use of the right is the best way to protect it.

(1) Identification of Water Rights on the Federal and Non-Federal Land

- Obtain a set of legal descriptions for the Federal and non-Federal lands involved.
- Identify all developed and undeveloped waters on Federal and non-Federal lands.
- For the non-Federal lands, obtain a list of appurtenant water rights. Have the non-Federal land owners clearly identify which water rights will transfer to the BLM, and at what stage those water rights are in (i.e., application, permit, certificate, vested, etc.). In addition, record the priority date and the authorized amount, season, period of use, and purpose of use for each water right to the U.S. would acquire.
- Identify whether any partial assignment /acquisition of water rights will occur. Sometimes, not all points of diversion and/or places of use will be transferred to the BLM. If a partial acquisition will occur, negotiate an equitable split (for example, identify the amount of irrigated acreage each will own after the exchange). Often, changes in the type of use allowed for a water right will initiate a review by the state water authorities, resulting in a change (usually a reduction) in the amount of water that can be transferred. A full understanding of these legal intricacies is required as the exchange is analyzed and the valuation problem formulated. Consult with the DOI ASD

review appraiser, and anticipate the need for external, local expertise.

- Identify any developed waters on the Federal and non-Federal lands involved that do not have water rights.
- Obtain logs for any wells on non-Federal lands.
- Review a copy of appraisals as soon as they are complete. These appraisals typically identify irrigated acreage and water sources for various uses.
- If the BLM is acquiring land for another Federal agency as part of a three-way exchange, contact that agency's water rights coordinator and get them involved.
- Determine whether there are any assessment fees for water rights the BLM would acquire (for example, some irrigation districts charge a fee for water usage).
- Obtain a list of water rights on all the properties involved from the State agency responsible for water resources. Compare this list with the ones developed by the non-BLM party and investigate discrepancies.
- Determine whether any of the Federal or non-Federal lands are in a municipal watershed, wellhead protection area, or are located in a watershed closed to further appropriation.

(2) Identification of Any Reserved Water Rights on Federal Lands

Federal reserved water rights cannot be transferred out of the BLM's ownership because, by law, Federal reserved water rights can only exist on lands owned by the Federal government. Therefore, if a Federal reserved water right exists on land transferred out of the BLM's ownership, the new landowner must be advised that the existing water right will no longer be in effect.

The most common and one of the more important reserved water rights for the BLM is for public water holes and springs (Public Water Reserves). Many of these Public Water Reserves have not been registered with the State, nor do they show up on a Mater Title Plat as a withdrawal. It is important that the District/Field Office/State Office water rights coordinator determine whether potential or existing Public Water Reserves occur on the Federal lands to be exchanged.

(3) Establish Title/Ownership

Determine whether all water rights to be transferred to the BLM are in the non-Federal party's name. If a third party ownership is involved, ensure title conveyance to the BLM or to a non-Federal exchange party prior to the exchange, for subsequent conveyance to the BLM. Obtain hard copies of applications, certificates, permits, proofs of appropriation, etc. for water rights on non-Federal lands to be transferred to the BLM. Obtain a copy of the current chain of title for water rights being transferred to the BLM. Some states will not recognize new owners of water rights if there are deficiencies or conflicts in the chain of title.

(4) Field Verification

Properties to be acquired by the BLM should always be field checked to ensure that:

- each water right is being exercised according to the provisions of State law;
- the water right is not subject to a declaration of forfeiture or abandonment by the State under

provisions of State law due to nonuse, unauthorized changes in type of use, place of diversion or use, or other reasons; and

- the water right(s) will satisfactorily serve the present and future foreseeable needs of the BLM.

The field inspection also serves to identify water sources which have not appeared in official water rights lists or on maps; inaccurate legal descriptions for the place of use, point of diversion, or delivery systems; water delivery and control system repair needs; and management options for use of the existing water rights.

(5) Evaluation/Case Processing

Include a description of the water rights to be considered in the exchange proposal in all relevant land exchange evaluation process steps. This would include addressing the water rights as a part of the property interest at a minimum in the feasibility report, ATI, NOEP, NEPA document, decision and Notice of Decision. Address in the evaluation process, as necessary, any management costs or responsibilities that would be associated with acquisition of the water rights.

(6) Conveyance Documents and Filing

All water rights issues must be resolved before the closing. The non-Federal parties will have little incentive to work with the BLM on water rights issues after the closing. All water rights to be transferred should be specifically listed in the final deeds consistent with state requirements. Even though the law in many states assumes that all appurtenant water rights are automatically transferred with changes in ownership, a specific list will eliminate any doubt and future questions about ownership.

All parties should be provided with the documentation for the water rights each party is acquiring. This documentation will include (but is not limited to) applications, permits, proofs of appropriation, certificates, and transfer documents. Attach a copy of the final chain of title to each documentation package. If not already done, have all parties fill out the necessary paperwork for transferring ownership of water rights. It may be a "Report of Conveyance" form or similar type of document that must be signed and submitted to the State. Determine who will pay any recording fees, if they are required. If existing water uses on the land acquired by the BLM need to be changed or amendments are needed to existing water rights paperwork, file the necessary paperwork with the State, along with payment of any fees.

APPENDIX 10

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

SUBCHAPTER D—RANGE MANAGEMENT (4000)

Group 4100—Grazing Administration

NOTE: The information collection requirements contained in subparts 4120 and 4130 of Group 4100 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance numbers 1004–0005, 1004–0019, 1004–0020, 1004–0041, 1004–0047, 1004–0051, 1004–0068 and 1004–0131. The information is being collected to permit the authorized officer to determine whether an application to utilize the public lands for grazing purposes should be granted. The information will be used to make this determination. A response is required to obtain a benefit.

[48 FR 40890, Sept. 12, 1983]

PART 4100—GRAZING ADMINISTRATION—EXCLUSIVE OF ALASKA

Subpart 4100—Grazing Administration—Exclusive of Alaska; General

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4100.0–2 Objectives.
4100.0–3 Authority.
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4190.1 Effect of wildfire management decisions.

AUTHORITY: 43 U.S.C. 315, 315a-315r, 1181d, 1740.

SOURCE: 43 FR 29067, July 5, 1978, unless otherwise noted.

Subpart 4100—Grazing Administration—Exclusive of Alaska; General

§4100.0–1 Purpose.

The purpose is to provide uniform guidance for administration of grazing on the public lands exclusive of Alaska.

[49 FR 6449, Feb. 21, 1984]

§4100.0–2 Objectives.

The objectives of these regulations are to promote healthy sustainable rangeland ecosystems; to accelerate restoration and improvement of public rangelands to properly functioning conditions; to promote the orderly use, improvement and development of the public lands; to establish efficient and effective administration of grazing of public rangelands; and to provide for the sustainability of the western livestock industry and communities that are dependent upon productive, healthy public rangelands. These objectives shall be realized in a manner that is consistent with land use plans, multiple use, sustained yield, environmental values, economic and other objectives stated in 43 CFR part 1720, subpart 1725; the Taylor Grazing Act of June 28, 1934, as amended (43 U.S.C. 315, 315a–315r); section 102 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1740).

[60 FR 9960, Feb. 22, 1995]

§4100.0–3 Authority.

(a) The Taylor Grazing Act of June 28, 1934 as amended (43 U.S.C. 315, 315a through 315r);

(b) The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et seq.*) as amended by the Public Rangelands Improvement Act of 1978 (43 U.S.C. 1901 *et seq.*);

(c) Executive orders transfer land acquired under the Bankhead-Jones Farm Tenant Act of July 22, 1937, as amended (7 U.S.C. 1012), to the Secretary and authorize administration under the Taylor Grazing Act.

(d) Section 4 of the O&C Act of August 28, 1937 (43 U.S.C. 118(d));

(e) The Public Rangelands Improvement Act of 1978 (43 U.S.C. 1901 *et seq.*); and

(f) Public land orders, Executive orders, and agreements authorize the Secretary to administer livestock grazing on specified lands under the Taylor Grazing Act or other authority as specified.

[43 FR 29067, July 5, 1978, as amended at 49 FR 6449, Feb. 21, 1984; 49 FR 12704, Mar. 30, 1984; 50 FR 45827, Nov. 4, 1985; 61 FR 4227, Feb. 5, 1996]

§4100.0–5 Definitions.

Whenever used in this part, unless the context otherwise requires, the following definitions apply:

The *Act* means the Taylor Grazing Act of June 28, 1934, as amended (43 U.S.C. 315, 315a–315r).

Active use means the current authorized use, including livestock grazing and conservation use. Active use may constitute a portion, or all, of permitted use. Active use does not include temporary nonuse or suspended use of forage within all or a portion of an allotment.

Activity plan means a plan for managing a resource use or value to

(b) The authorized officer may require permittees or lessees to remove range improvements which they own on the public lands if these improvements are no longer helping to achieve land use plan or allotment goals and objectives or if they fail to meet the criteria under § 4120.3–4 of this title.

(c) Whenever a grazing permit or lease is cancelled in order to devote the public lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States reasonable compensation for the adjusted value of their interest in authorized permanent improvements placed or constructed by the permittee or lessee on the public lands covered by the cancelled permit or lease. The adjusted value is to be determined by the authorized officer. Compensation shall not exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein. Where a range improvement is authorized by a range improvement permit, the livestock operator may elect to salvage materials and perform rehabilitation measures rather than be compensated for the adjusted value.

(d) Permittees or lessees shall be allowed 180 days from the date of cancellation of a range improvement permit or cooperative range improvement agreement to salvage material owned by them and perform rehabilitation measures necessitated by the removal.

[49 FR 6452, Feb. 21, 1984; 49 FR 12704, Mar. 30, 1984, as amended at 61 FR 4227, Feb. 5, 1996]

§ 4120.3–7 Contributions.

The authorized officer may accept contributions of labor, material, equipment, or money for administration, protection, and improvement of the public lands necessary to achieve the objectives of this part.

[49 FR 6452, Feb. 21, 1984]

§ 4120.3–8 Range improvement fund.

(a) In addition to range developments accomplished through other resource management funds, authorized range improvements may be secured through the use of the appropriated range improvement fund. One-half of the available funds shall be expended in the State and district from which they were derived. The remaining one-half of the fund shall be allocated, on a priority basis, by the Secretary for on-the-ground rehabilitation, protection and improvement of public rangeland ecosystems.

(b) Funds appropriated for range improvements are to be used for investment in all forms of improvements that benefit rangeland resources including riparian area rehabilitation, improvement and protection, fish and wildlife habitat improvement or protection, soil and water resource improvement, wild horse and burro habitat management facilities, vegetation improvement and management, and livestock grazing management. The funds may be used for activities associated with on-the-ground improvements including the planning, design, layout, contracting, modification, maintenance for whith the Bureau of Land Management is responsible, and monitoring and evaluating the effectiveness of specific range improvement projects.

(c) During the planning of the range development or range improvement programs, the authorized officer shall consult the resource advisory council, affected permittees, lessees, and members of the interested public.

[60 FR 9965, Feb. 22, 1995, as amended at 61 FR 4227, Feb. 5, 1996]

§ 4120.3–9 Water rights for the purpose of livestock grazing on public lands.

Any right acquired on or after August 21, 1995 to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the State within which such land is located. To the extent allowed by the law of the State within which the land is located, any such water right shall be acquired, perfected, maintained, and administered in the name of the United States.

[60 FR 9965, Feb. 22, 1995]

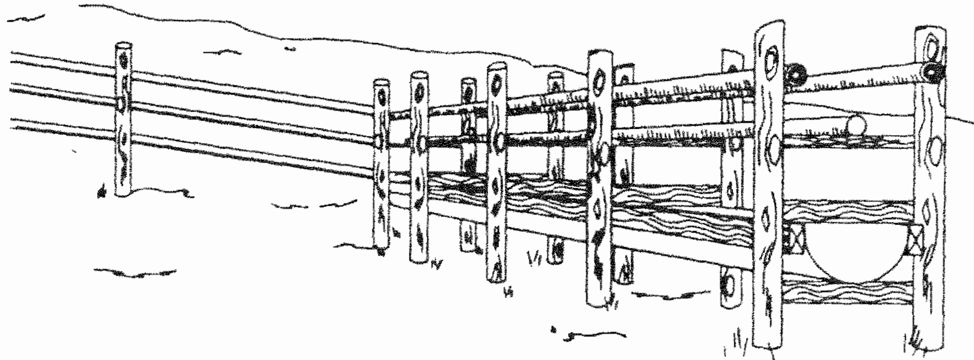
§ 4120.4 Special rules.

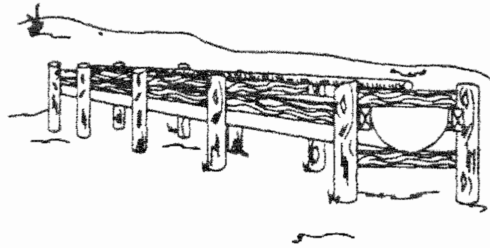
(a) When a State Director determines that local conditions require a special rule to achieve improved administration consistent with the objectives of

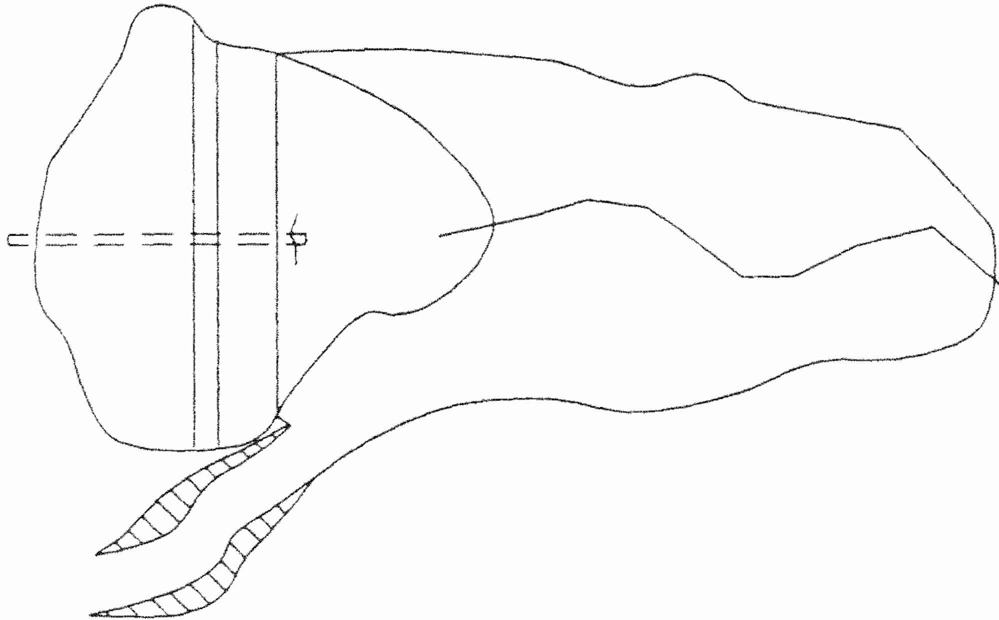
APPENDIX 11

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

Water Developments







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Chapter II

3. Conservation Organizations. Coordination with conservation, environmental, and other interests which may be affected by installation, modification, reconstruction, or removal of water developments should occur during the planning process. Agreements reached during activity planning regarding participation in, or responsibility for, constructing, maintaining, or operating improvements should always be documented in a Cooperative Agreement.

4. Federal, State, and Local Government Agencies. Federal and State agencies such as the U.S. Forest Service, U.S. Fish and Wildlife Service; State lands, wildlife, and recreation agencies; and county and municipal officials should all have an opportunity to review or comment on proposed water developments that may affect the lands or interests for which they are responsible. The most efficient means of accomplishing this is by asking them to participate in the land use planning process. Annual coordination meetings with some State and local entities may be beneficial. Use the project planning checklist and environmental analysis procedures to identify coordination needs for specific water development projects.

5. State Water Resource Administration. It is the policy of the Bureau that States have the primary authority and responsibility for the allocation and management of water resources within their boundaries, except as otherwise specified by the Congress. This requires that the Bureau cooperate with State agencies having the responsibility to protect identified public land water uses and to comply with applicable State law for the appropriation of water needed for management of the public lands. When applicable, water rights must be appropriated prior to project construction/installation.

APPENDIX 12

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

PL 94–579, October 21, 1976, 90 Stat 2743

UNITED STATES PUBLIC LAWS

94th Congress - Second Session

Convening January 19, 1976

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE.(SEESCOPE)

Additions and Deletions are not identified in this document.

PL 94–579 (S 507)

October 21, 1976

An Act to establish public land policy; to establish guidelines for its administration; to provide for the management, protection, development, and enhancement of the public lands; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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Sec. 304.Service charges and reimbursements.
Sec. 305.Deposits and forfeitures.
Sec. 306.Working capital fund.
Sec. 307.Studies, cooperative agreements, and contributions.

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Sec. 308.Contracts for surveys and resource protection.
Sec. 309.Advisory councils and public participation.
Sec. 310.Rules and regulations.
Sec. 311.Program report.
Sec. 312.Search and rescue.
Sec. 313.Sunshine in government.
Sec. 314.Recordation of mining claims and abandonment.
Sec. 315.Recordable disclaimers of interest.
Sec. 316.Correction of conveyance documents.
Sec. 317.Mineral revenues.
Sec. 318.Appropriation authorization.

TITLE IV— RANGE MANAGEMENT
Sec. 401.Grazing fees.
Sec. 402.Grazing leases and permits.
Sec. 403.Grazing advisory boards.
Sec. 404.Management of certain horses and burros.

TITLE V—RIGHTS- OF- WAY
Sec. 501.Authorization to grant rights-of-way.
Sec. 502.Cost-share road authorization.
Sec. 503.Corridors.
Sec. 504.General provisions.
Sec. 505.Terms and conditions.
Sec. 506.Suspension and termination of rights-of-way.
Sec. 507.Rights-of-way for Federal agencies.
Sec. 508.Conveyance of lands.
Sec. 509.Existing rights-of-way.
Sec. 510.Effect on other laws.
Sec. 511.Coordination of applications.

TITLE VI— DESIGNATED MANAGEMENT AREAS
Sec. 601.California desert conservation area.
Sec. 602.King range.
Sec. 603.Bureau of land management wilderness study.

TITLE VII— EFFECT ON EXISTING RIGHTS: REPEAL OF EXISTING LAWS; SEVERABILITY
Sec. 701.Effect on existing rights.
Sec. 702.Repeal of laws relating to homesteading and small tracts.
Sec. 703.Repeal of laws related to disposals.
Sec. 704.Repeal of withdrawal laws.
Sec. 705.Repeal of laws relating to administration of public lands.
Sec. 706.Repeal of laws relating to rights-of-way.
Sec. 707.Severability.

TITLE I—SHORT TITLE, DECLARATION OF POLICY, AND DEFINITIONS

SHORT TITLE

Sec. 101. // 43 USC 1701 note. // This Act may be cited as the “Federal Land Policy and Management Act of 1976”.

DECLARATION OF POLICY

Sec. 102. // 43 USC 1701. // (a) The Congress declares that it is the policy of the United States that—,

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically

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preservation of their wilderness character.Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act // 16 USC 1131 note. // which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d) (2) of the Wilderness Act, // 16 USC 1133. // and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

TITLE VII— EFFECT ON EXISTING RIGHTS; REPEAL OF EXISTING LAWS; SEVERABILITY

EFFECT ON EXISTING RIGHTS

Sec. 701. // 43 USC 1701 note. // (a) Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.

(b) Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a–1181j), and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

(c) All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

(d) Nothing in this Act, or in any amendments made by this Act, shall be construed as permitting any person to place, or allow to be placed, spent oil shale, overburden, or byproducts from the recovery of other minerals found with oil shale, on any Federal land other than Federal land which has been leased for the recovery of shale oil under the Act of February 25, 1920 (41 Stat. 437, as amended; 30 U.S.C. 181 et seq.).

(e) Nothing in this Act shall be construed as modifying, revoking, or changing any provision of the Alaska Native Claims Settlement Act (85 Stat. 688, as amended; 43 U.S.C. 1601 et seq.).

(f) Nothing in this Act shall be deemed to repeal any existing law by implication.

(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—,

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

(3) as displacing, superseding, limiting, or modifying any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more States or of two or more States and the Federal Government;

(4) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto;

(5) as modifying the terms of any interstate compact;

(6) as a limitation upon any State criminal statute or upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the national resource lands; or as amending, limiting, or infringing the existing laws providing grants of lands to the States.

(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

(i) The adequacy of reports required by this Act to be submitted to the Congress or its committees shall not be subject to judicial review.

(j) Nothing in this Act shall be construed as affecting the distribution of livestock grazing revenues to local governments under the Granger–Thye Act (64 Stat. 85, 16 U.S.C. 580h), under the Act of May 23, 1908 (35 Stat. 260, as amended; 16 U.S.C. 500), under the Act of March 4, 1913 (37 Stat. 843, as amended; 16 U.S.C. 501), and under the Act of June 20, 1910 (36 Stat. 557).

REPEAL OF LAWS RELATING TO HOMESTEADING AND SMALL TRACTS

Sec. 702.Effective on and after the date of approval of this Act, the following statutes or parts of statutes are repealed except the effective date shall be on and after the tenth anniversary of the date of approval of this Act insofar as the listed homestead laws apply to public lands in Alaska:

Act of	Chapter	Section	Statute	43 U.s. Code

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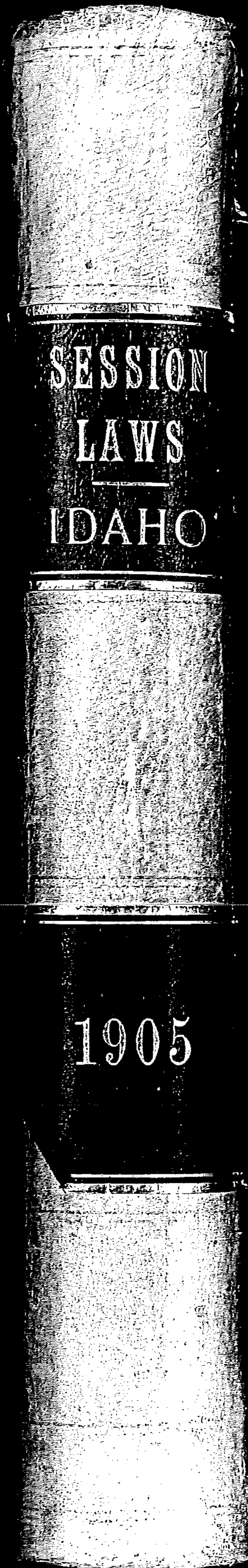
APPENDIX 13

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment


SESSION
LAWS
IDAHO
1905

GENERAL LAWS

OF THE

STATE OF IDAHO

PASSED AT THE EIGHTH SESSION

OF THE

STATE LEGISLATURE.

PUBLISHED BY AUTHORITY OF THE
SECRETARY OF STATE.

BOISE, IDAHO.
STATESMAN PRINTING CO.
1905.

of his duties, and the careful keeping and disbursements of said funds.

Copies of Act to be Printed and Distributed.

SEC. 11. The Governor shall, from time to time, cause such numbers of this act as may be deemed necessary, to be printed, and the same shall be distributed to the National Guard by the adjutant general.

SEC. 12. That all laws and parts of laws conflicting with the provisions of this act are hereby repealed.

SEC. 13. Whereas, an emergency exists, therefore this act shall take effect and be in force from and after its passage.

This act became a law on the 18th day of February, 1905.

HOUSE BILL NO. 19.

AN ACT

TO AMEND SECTION ELEVEN OF AN ACT ENTITLED "AN ACT TO REGULATE THE APPROPRIATION AND DIVERSION OF THE PUBLIC WATERS AND TO ESTABLISH RIGHTS TO THE USE OF SUCH WATERS AND THE PRIORITY OF SUCH RIGHTS," APPROVED MARCH 11, 1903.

Be It Enacted By the Legislature of the State of Idaho:

SECTION 1. That section 11 of "An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of such waters and the priority of such rights" approved March 11, 1903, be so amended as to read as follows:

Section 11. All rights to the use of water acquired under this act or otherwise, shall be lost and abandoned by a failure, for the term of five years, to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through non-use or abandonment, such right to such water shall revert to the State and be again subject to appropriation under this act: *Provided, however,* That any person owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of this act may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same, and transfer the same to other land. Such person desiring to change the place of use of such water shall first make application to the State engineer, stating fully

in such application the reasons for making such transfer. Such application shall describe the land, the use of the water on which is to be abandoned, and shall describe the land to which it is desired to have such right transferred, and if such water is to be conducted to such land through another canal or lateral or from a different point of diversion than the one described in the license or decree of the court confirming such right, such facts shall be fully set out in such application, and, if the State engineer shall require it, a plat showing the location of such land and ditches or canals or points of diversion shall be furnished by such applicant, and upon receipt of such application, the State engineer shall examine the same and shall, provided no one shall be injured by the transfer, issue to such applicant under the seal of his office a certificate authorizing such transfer, which certificate shall state the name of the applicant and shall contain a copy of the license or an abstract of the decree confirming the right to the use of the water upon the land from which it is desired to transfer such right and a description of the land to which such right is transferred. And a fee of one dollar shall be paid the State engineer by such applicant for such certificate of transfer issued by him, and such application shall be recorded by the State engineer in a book kept for that purpose, and a notice that such transfer has been authorized shall be sent by the State engineer to the water commissioner of the district in which such land is situated, and such water commissioner shall notify the water master of the stream furnishing water for the irrigation of such lands of the transfer of such use, and such water master shall not thereafter divert onto the lands, the water for which has been so abandoned, any of such water, but shall divert such water, from such stream so that it may be used on the lands to which such right has been transferred.

Approved on the 23rd day of February, 1905.

HOUSE BILL NO. 20.

AN ACT

IN RELATION TO THE PRACTICE AND PROCEDURE IN PROBATE COURTS; REPEALING SECTION 4629 OF THE REVISED STATUTES OF IDAHO.

Be It Enacted By the Legislature of the State of Idaho:

APPENDIX 14

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

6-2105. REMEDIES FOR EMPLOYEE BRINGING ACTION -- PROOF REQUIRED. (1) As used in this section, "damages" means damages for injury or loss caused by each violation of this chapter, and includes court costs and reasonable attorneys' fees.

(2) An employee who alleges a violation of this chapter may bring a civil action for appropriate injunctive relief or actual damages, or both, within one hundred eighty (180) days after the occurrence of the alleged violation of this chapter.

(3) An action begun under this section may be brought in the district court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides or has his principal place of business.

(4) To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf, engaged or intended to engage in an activity protected under section 6-2104, Idaho Code.

(5) (a) In no action brought pursuant to this chapter shall a judgment for noneconomic damages be entered for a claimant exceeding the limitation on damages contained in section 6-1603(1), Idaho Code.
(b) The limitation contained in this subsection shall apply to the sum of noneconomic damages sustained by a claimant.
(c) Governmental entities and their employees shall not be liable for punitive damages on any claim allowed under the provisions of this section.

Approved March 24, 2020

CHAPTER 296
(H.B. No. 615)

AN ACT

RELATING TO WATER; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE THAT A PARTY ASSERTING THAT A WATER RIGHT HAS BEEN FORFEITED HAS THE BURDEN OF PROVING THE FORFEITURE BY CLEAR AND CONVINCING EVIDENCE; AND AMENDING SECTION 42-223, IDAHO CODE, TO PROVIDE THAT CERTAIN WATER RIGHTS SHALL NOT BE LOST OR FORFEITED FOR NONUSE AND TO PROVIDE FOR THIRD-PARTY CLAIMS OF RIGHT.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-222, Idaho Code, be, and the same is hereby amended to read as follows:

42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION -- APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to ex-

amine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate.

When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement

in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

(3) Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.

(4) Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee; provided that water rights protected from forfeiture under the provisions of section 42-223, Idaho Code, are exempt from this requirement.

(a) Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine the same and to provide notice of the application for an extension in the same manner as applications under section 42-203A, Idaho Code. The notice shall fully describe the right, the extension which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, to the director of the department of water resources within ten (10) days of the last date of publication.

(b) Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct a hearing thereon as in this chapter provided.

(c) The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use.

(d) In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before

such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section.

(e) In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section, he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(5) Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right or an application for an extension of time within which to resume the use of water as provided in this section, may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code.

SECTION 2. That Section 42-223, Idaho Code, be, and the same is hereby amended to read as follows:

42-223. EXCEPTIONS OR DEFENSES TO FORFEITURE. A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(1) A water right appurtenant to land contracted in a federal cropland set-aside program shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

(2) A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.

(4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a ground water management plan approved by the director of the department of water resources pursuant to section 42-233a or 42-233b, Idaho Code.

(5) A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the water supply bank or is retained in or rented from the water supply bank pursuant to sections 42-1761 through 42-1765A, Idaho Code, or while the water right is leased pursuant to sections 43-335 through 43-342, Idaho Code, or sections 42-2501 through 42-2509, Idaho Code, or while use of the water is made under any other provision of law authorizing the rental or lease of water rights.

(6) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

(7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

(8) No portion of a water right held by an irrigation district shall be lost, forfeited or subject to forfeiture as a result of the exclusion of land from the district pursuant to chapter 11, title 43, Idaho Code, so long as any five (5) year period of nonuse following the exclusion does not result from circumstances over which the district has control.

(9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.

(10) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the director of the department of water resources including as a condition of approval for a new water right appropriation approved pursuant to section 42-203A, Idaho Code, a water right transfer approved pursuant to section 42-222, Idaho Code, a water exchange approved pursuant to section 42-240, Idaho Code, or a mitigation plan approved in accordance with rules promulgated pursuant to section 42-603, Idaho Code.

(11) No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section 47-1205, Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

(12) No portion of any water right shall be lost or forfeited for nonuse if, after the five (5) year period of nonuse, use of the water is resumed prior to a claim of right by a third party. A third party has made a claim of right if the party has:

(a) Instituted proceedings to declare a forfeiture;

(b) Obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use; or

(c) Used the water made available by nonuse pursuant to an existing water right.

Approved March 24, 2020

APPENDIX 15

State Defendants' Memorandum in Support Of Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment

STATE DEFENDANTS' OBJECTIONS PURSUANT TO FED. R. CIV. P. 56(C)(2)

The State Defendants object, pursuant to Rule 56(c)(2) of the Federal Rules of Civil Procedure, to parts of the Declaration of Kathryn J. Conant in Support of United States' Motion for Summary Judgment (Dkt. 35) and the Declaration of Frederic W. Price in Support of United States Motion for Summary Judgment (Dkt. 36), listed below, to the extent they consist of or are based the declarants' legal analyses, opinions, conclusions, and/or arguments regarding Idaho water rights or Idaho water law, *see Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 777 (9th Cir. 2010) ("Pure legal conclusions are not admissible as factual findings"), to the extent they rely on hearsay or other material that cannot be presented in a form that would be admissible in evidence, and/or to the extent they are not based on personal knowledge. These objections are made without prejudice to the State Defendants' right to make additional objections in the future.

1. Declaration of Kathryn J. Conant in Support of United States' Motion for Summary Judgment:
    A. Paragraph 8.
    B. Paragraph 11, second sentence.
    C. Paragraph 13, last sentence.
    D. Paragraph 14.
    E. Paragraph 15.
    F. Paragraph 18.b.
    G. Paragraph 18.g, last sentence.
    H. Paragraph 18.h, second sentence.
    I. Paragraph 19.a.
    J. Paragraph 19.c.
    K. Paragraph 19.d.

2. Declaration of Frederic W. Price in Support of United States Motion for Summary Judgment:
    A. Paragraph 5.
    B. Paragraph 6.
    C. Paragraph 7.
    D. Paragraph 9, second sentence.
    E. Paragraph 13, second and third sentences.
    F. Paragraph 14.
    G. Paragraph 15.

H. Paragraph 16.
I. Paragraph 17.a.
J. Paragraph 18.a, last sentence.
K. Paragraph 19.
L. Paragraph 20, third and fourth sentences.
M. Paragraph 23, third through sixth sentences.
N. Paragraph 25, second sentence.
O. Paragraph 26.
P. Paragraphs 29-30.
Q. Paragraphs 33-38.