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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA, ) Case No. 1:22-cv-00236-DCN  
)  
Plaintiff, ) **UNITED STATES' STATEMENT OF**  
) **UNDISPUTED FACTS**  
)  
v. )  
)  
STATE OF IDAHO; IDAHO )  
DEPARTMENT OF WATER RESOURCES, )  
an agency of the State of Idaho; and GARY )  
SPACKMAN, in his official capacity as )  
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 )  
SENATE; and CHUCK WINDER, in his )  
official capacity as President Pro Tempore of )  
the Senate. )

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Plaintiff United States of America, in support of its Motion For Summary Judgment, presents the following undisputed facts:

**I. The Federal Grazing Programs on Bureau of Land Management (“BLM”) and National Forest System (“NFS”) Lands.**

1. The United States owns millions of acres of land within Idaho on behalf of the American people, and it makes most of those acres available for livestock grazing by federal permittees.

Price Decl. ¶¶ 9, 10, 13; Conant Decl.¶¶ 8, 9, 13.

2. From 1939 to 2017, Idaho statutes authorized BLM to “appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain.” Former I.C. § 42-501 (repealed 2017). During this time period, like today, the United States owned few livestock; rather, the vast majority of livestock on public lands were privately owned livestock authorized to graze on federal land by BLM or the Forest Service. *See* Price Decl. ¶¶ 7, 10, 13, 14, 15; Conant Decl. ¶¶ 8, 9, 12-14.

3. The basic unit of BLM’s livestock grazing program is an allotment, which is an area of public land designated for grazing and made available via permits or leases, typically for ten-year terms (43 CFR § 4130.2(d)). BLM grazing allotments in Idaho can vary in size from just a few acres to hundreds of thousands of acres. BLM may authorize grazing for a single permittee or multiple permittees in a single allotment. Price Decl. ¶ 13.a.

4. A variety of water sources, including natural streams, artificial ponds, wells, or troughs fed by water pipelines, may provide water for livestock consumption on BLM grazing allotments. In Idaho, it is not uncommon for a water pipeline to provide water to multiple grazing allotments. Price Decl. ¶ 13.b. Through the Snake River Basin Adjudication (discussed below), the United States was decreed approximately 15,710 stockwater rights in connection with these livestock uses on grazing allotments on federal lands managed by the BLM. *Id.* ¶ 10.

5. The United States also holds approximately 9,000 decreed stockwater rights on NFS

lands in the State of Idaho. The Forest Service administers such rights located on grazing allotments on NFS lands in order to benefit the grazing program and for use by grazing permittees, and in some instances to benefit wildlife. Conant Decl. ¶ 8.

## **II. The Snake River Basin Adjudication and Federal Stockwater Rights**

6. The Snake River watershed is the tenth largest watershed in North America and covers 108,000 square miles in portions of six states (Wyoming, Idaho, Nevada, Utah, Oregon, and Washington). The largest part of the watershed is located in Idaho. Price Decl. ¶ 9.

7. The State commenced the SRBA as a general stream adjudication on November 19, 1987. *See* Price Decl. ¶ 9. In the SRBA, the United States sought and obtained decrees for thousands of water rights. The United States obtained some of these rights under the substantive law of the state (“state-based rights”), and others pursuant to federal laws that reserved them (“federal reserved rights”). The SRBA decreed to the United States thousands of state-based stockwater rights arising from the consumption of water by livestock owned by federal grazing permittees, who grazed their livestock on federal lands managed by the federal agencies. Price Decl. ¶¶ 7, 10, 13 14, 15; Conant Decl. ¶¶ 8, 9, 12-14.

8. Many stockwater rights decreed to the United States in the SRBA were created by putting water to beneficial use without obtaining a prior permit or license from the Idaho Department of Water Resources (“IDWR”). Conant Decl. ¶ 13; Price Decl. ¶ 10. These rights were decreed consistent with the longstanding recognition under Idaho law of instream stockwatering as a beneficial use appropriate for federal acquisition of water rights. Water rights of this kind, which are based directly on the Idaho Constitution, are commonly called “constitutional” water rights (by contrast to water rights based on a prior permit or license). *See* Idaho Const. art. XV, § 3. Although such rights generally cannot be created today, in light of the enactment of the State’s mandatory surface water permitting code in 1971, constitutional rights acquired before 1971

remain valid.

9. Leading up to the SRBA, BLM held meetings with members of the livestock industry to talk about filing for stockwater in the adjudication. Many BLM grazing permittees did not file claims for stockwater on the federal allotments and relied on the BLM to secure these stockwater rights to cover the use by all permitted livestock. Price Decl. ¶ 20.

10. The State of Idaho objected to thousands of BLM's instream (undeveloped) stockwater claims in thirty-seven (37) of the forty (40) SRBA administrative basins. However, between 1999 and 2003, the State Attorney General's Office entered into settlement agreements with BLM resolving all of its objections to BLM stockwater claims. As a result of those settlements, the SRBA Court issued thousands of decrees for instream stockwater to BLM. The State of Idaho objected to 56 of the 57 BLM water rights that are at issue under the show-cause orders that led to these judicial proceedings, as discussed below, and all were resolved by settlement on June 6, 1999, July 1, 1999, and March 11, 2003. Price Decl. ¶ 22.

11. The Federal Stockwater Group ("FSG"), an informal association of federal land grazing permittees who claimed water rights on federal lands, also filed objections to federal. During the pendency of the litigation, BLM began meeting with affected grazing permittees outside of the FSG allotments, who eventually demanded that the FSG withdraw 493 objections to BLM claims within their allotments because they were relying on BLM's claims. In its letter, representatives of Bauscher Ranch, Inc., one of these affected grazing permittees, stated, "No one had any quarrel with the water rights being in the name of the land owner, including the federal government." As a consequence, FSG withdrew those 493 objections. In 2002, the FSG ultimately settled with the United States on the remainder. Price Decl. ¶ 23. The FSG settlement allowed both the United States and the FSG permittees to hold stockwater rights on water sources located on federal land and used by the permittees, with the permittees' rights typically

accorded a senior priority date relative to the United States' rights. The settlement also included explicit agreements by the permittees to withdraw their objections to the United States' stockwater claims, to withdraw their challenges to stockwater decrees already issued to the United States, and to refrain from challenges to any other stockwater decrees issued to the United States. Price Decl., Ex. 2.

12. The FSG and other settlements, along with the United States' uncontested claims, resulted in the adjudication of thousands of stockwater rights to the United States in the SRBA, through a series of partial decrees issued under Rule 54(b)(1) of the Idaho Rules of Civil Procedure. On August 25, 2014, the SRBA court entered a Final Unified Decree that incorporated all the partial decrees into one final order covering 158,600 water rights. *See* Final Unified Decree, *In Re SRBA*, Case No. 39576 (Idaho 5th Jud. Dist. Ct., Aug. 25, 2014). Under the Final Unified Decree, the United States received 27,427 partial decrees through seventeen different federal agencies. BLM received 16,939 partial decrees. The overwhelming majority of BLM's 16,939 partial decrees in the SRBA were for stockwatering and wildlife purposes and can be categorized by the following estimates: approximately 2,725 for diverted stockwater (i.e., diverted through a physical structure/facility into tanks, troughs, ponds, etc.); approximately 6,485 for instream stockwater; approximately 6,500 for stockwater under federal reserve rights (mostly based on the federal reserve known as Public Water Reserve 107); and approximately 1,212 for other purposes. Most of BLM's water rights that included a stockwater purpose of use (approximately 15,710 total (9,210 state based, 6,500 federal based)) are for small but important quantities of water due to the aridness of the lands and climate. Price Decl. ¶ 10. The Final Unified Decree also included nearly 9,000 stockwater rights decreed to the Forest Service, over half of which were for stockwatering at developed water sources. Conant Decl. ¶ 13.

### III. Idaho's Stockwater Legislation.

13. In 2015, IDWR started asking BLM and USFS to show compliance with the Idaho Supreme Court decision in *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007), when filing applications for permit or in response to filing proof of beneficial use, which are uses of developed water. *Joyce Livestock* dealt exclusively with claims related to a single class of stockwater rights – constitutional stockwater rights acquired through instream stockwatering (without developments of any kind) – and held that, “[u]nder 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 the water right.” *Id.* at 519. The State Attorney General’s Office responded asserting that *Joyce* does not apply to either the statutory method of appropriation or to diverted stockwater but only to instream stockwater. The Attorney General’s Office response further asserted that under the statutory method, an agency relationship was unnecessary for a landowner to establish a stockwater right that is used by the landowner’s customers. Price Decl. ¶ 26.

#### A. S.B. 1111: The State of Idaho attempts to terminate federal stockwater rights.

14. On March 27, 2017, the State enacted its first significant modification to its stockwater rights regime through S.B. 1111. *See* 64th Leg., 1st Reg. Sess., 2017 Idaho Sess. Laws 408 (repealing and replacing Chapter 5 of Title 42 of the Idaho Code). S.B. 1111 declared that “[n]o 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.” I.C. § 42-502 (2018). The statute also prohibited federal grazing permittees from acting as “agent[s] of the federal government” to obtain stockwater rights. *Id.* Finally, S.B. 1111 repealed I.C. § 42-501 (2016), which had provided that the BLM “may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain.” *See* S.B. 1111 § 1. Section 42-501

had been in effect in Idaho since its enactment in 1939.

**B. H.B. 718: Forfeiture of decreed federal stockwater rights.**

15. In March, 2018, the Secretaries of the Interior and Agriculture, who oversee the BLM and the Forest Service, respectively, each received a letter from the Idaho Governor, the Speaker of the Idaho House of Representatives, and the President Pro Tem of the Idaho Senate. The letter advised that “[a]dditional legislation [was] pending to clarify that federal stockwater rights not put to beneficial use will be forfeited under State law.” The letter went on to “strongly urge [the Secretaries] to instruct [their] departments to abandon all their Idaho stockwater rights acquired based on a claim of beneficial use.” The letter included as an attachment a form from IDWR entitled “Notice of Abandonment of Water Right.” Price Decl. ¶ 27.a.

16. In March, 2018, the State enacted H.B. 718, which had two purposes. First, it gave retroactive effect to S.B. 1111 by expressing the intent of the legislature “that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture.” *See* H.B. 718 § 1, 64th Leg., 2d Reg. Sess., 2018 Idaho Sess. Laws 747 (amending I.C. § 42-501). Second, it created a new administrative procedure devoted solely to eliminating federal stockwater rights previously decreed to the United States by the SRBA court. *See id.* § 2 (amending I.C. § 42-503).

17. The procedure created by H.B. 718 applied to all constitutional stockwater rights held by the United States, whether instream or developed, but not to licensed statutory rights. *Id.* H.B. 718 did not apply to stockwater rights owned by anyone other than the United States.

18. H.B. 718 required IDWR, within ninety days, to compile a list of water rights owned by the United States purportedly subject to forfeiture and send the list “to the appropriate federal agencies.” *Id.* (enacting I.C. § 42-503(1)). Thereafter, if the governor approved the list, H.B. 718 required IDWR to issue orders to show cause as to “why the stockwater right or rights should not be lost or forfeited.” *Id.* (enacting I.C. § 42-503(2)).



19. The statute gave the federal agencies three weeks after a show-cause order to request an administrative hearing before the IDWR or risk forfeiture of the listed water rights. *Id.* (enacting I.C. § 42-503(5)). H.B. 718 authorized judicial review in Idaho state court of any resulting forfeiture decision by IDWR. *Id.* (enacting I.C. § 42-503(6)).

20. On July 9, 2018, Governor Otter sent letters to the Secretaries of the Interior and Agriculture informing them that “[t]he Director of the Idaho Department of Water Resources has begun compiling a list of stockwater rights held by” the agencies, as required by H.B. 718. On August 28, 2018, the BLM, the Forest Service, and several other federal agencies received a spreadsheet from the Director of IDWR that listed 17,995 purportedly federally owned water rights allegedly subject to the forfeiture process established by H.B. 718.

21. Although IDWR compiled this list purporting to identify water rights owned by the United States that were subject to forfeiture, the Governor of Idaho never formally approved the list compiled by IDWR, as required to trigger H.B. 718’s forfeiture proceedings. As described below, the State subsequently amended its stockwater legislation several times, to eliminate the State Executive Branch’s discretion over the initiation such forfeiture proceedings.

**C. S.B. 1305: Federal stockwater rights made appurtenant to private property.**

22. At the same time that the State enacted H.B. 718, it also enacted S.B. 1305, 64th Leg., 2d Reg. Sess., Idaho Sess. Laws 303. S.B. 1305 amended I.C. § 42-113(2). This statute deals with “rights to the use of water for in-stream or out-of-stream livestock purpose, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation.”

23. S.B. 1305 added a new provision, according to which “[t]he water right shall be an

appurtenance to the base property.”<sup>1</sup> See I.C. § 42-113(2)(b). The statute also purports to authorize the owner of the base property – rather than the federal agency – to convey the water right if the federal grazing permit “is transferred or otherwise conveyed to a new owner.” *Id.* S.B. 1305 therefore modified existing, federally owned stockwater rights by making those water rights appurtenant to the permittees’ privately owned base property.

24. The statutory changes enacted through S.B. 1305 remain in place to this day.

**D. H.B. 592.**

25. In March 2020, the State enacted H.B. 592, 65th Leg., 2d Reg. Sess., Idaho Sess. Laws 738, which made substantial amendments to the sections of the Idaho Code previously created or modified through S.B. 1111 and H.B. 718. H.B. 592 did not change the section of the Idaho Code created through S.B. 1305.

26. H.B. 592 amended the forfeiture proceeding created by H.B. 718 to remove the requirements that IDWR compile a list of federally owned stockwater rights and that the Governor approve that list. Instead, H.B. 592 provided that whenever the director of IDWR “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 show cause to the owner of the stockwater right. H.B. 592, § 1 (codified at I.C. § 42-224 (2020)). After service of the IDWR director’s order to show cause, the stockwater right owner would once again have twenty-one days to “request in writing a hearing” before IDWR. If the owner did not request such a hearing, the stockwater right “shall be considered forfeited.” *Id.* at § 42-224(5).

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<sup>1</sup> Under the Taylor Grazing Act and associated regulations, the federal government gives a preference to owners of stock who own “base property,” *i.e.*, private land or water rights sufficient to support their herds on federal lands. See, *e.g.*, *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000); 43 U.S.C. § 315b.

27. While the forfeiture procedures created by H.B. 592 were not limited to stockwater rights owned by the United States, the statute did contain special notice provisions applicable only when “the order affects a stockwater right where the place of use is a federal grazing allotment.” I.C. § 42-224(4). In such an instance, “the director [of IDWR] shall provide a copy of the order to the holder or holders of any livestock grazing permit or lease for said allotment.” *Id.*

28. Before the enactment of H.B. 592, a longstanding provision of the Idaho Code, section 42-222(2), provided that “[a]ll 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.” Until H.B. 592 was enacted in 2020, however, no specific statutory procedures existed for applying I.C. § 42-222(2), and the provision was rarely applied.

29. H.B. 592 also removed the portions of Idaho Code section 42-502 introduced by S.B. 1111 that prohibited permittees from serving as agents on behalf of the federal agency, but retained a prohibition against an “agency of the federal government” acquiring a stockwater right “unless the agency owns livestock and puts the water to beneficial use.” H.B. 592, § 3 (modifying I.C. § 42-502). In place of the omitted provision, H.B. 592 specified that a forfeiture order would not be issued under the new procedures if a livestock grazing permittee “asserts a principal/agent relationship with the federal agency managing the grazing allotment.” H.B. 592, § 1 (creating I.C. § 42-224(10)). The statute did not specifically recognize the right of the United States, rather than the permittee, to “assert[]” such a relationship.

30. Finally, H.B. 592 modified I.C. § 42-504 by removing the ability of the State to approve a purpose of use for the water right other than “watering of livestock,” and instead adding language to limit in perpetuity the place of use for a stockwater right currently located on a federal allotment to “the federal grazing allotment that is the place of use for that stockwater right.” H.B. 592, § 5 (modifying I.C. § 42-504).

**E. H.B. 608.**

31. On March 24, 2022, the State of Idaho enacted yet another new statute – H.B. 608, 66th Leg., 2d Reg. Sess., Ch. 215. H.B. 608 provides that “[w]ithin thirty (30) days of receipt . . . of a petition or other information” seeking forfeiture of a stockwater right, IDWR “must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture.” I.C. § 42-224(1). If IDWR determines that the petition “contains prima facie evidence of forfeiture due to nonuse,” it “must within thirty (30) days issue an order to the stockwater right owners to show cause . . . why the stockwater right has not been lost through forfeiture.” I.C. § 42-224(2). As under the prior laws, the owner of the stockwater right has twenty-one days to respond to the order. I.C. § 42-224(6).

32. Second, H.B. 608 states IDWR “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 [preceding the petition] or currently exists between the owners of the water right as principal and a permittee or lessee as agent for the purpose of obtaining or maintaining the water right.” I.C. § 42-224(4).

33. Finally, H.B. 608 now provides that any determination by IDWR that a stockwater right has been forfeited “shall have no legal effect” on its own. *See* I.C. § 42-224(9). Instead, such a determination triggers a mandatory provision according to which “the state of Idaho, by and through the office of the attorney general, *must* initiate a civil action” in State court within sixty days of IDWR’s determination. *See* I.C. § 42-224(10) (emphasis added). In the subsequent judicial proceedings, IDWR “shall not be a party,” but its determination of forfeiture “shall constitute prima facie evidence that the right has been forfeited.” *See* I.C. § 42-224(11).

**III. IDWR’s Show Cause Orders.**

34. On October 27, 2021, IDWR issued its first show-cause order to the United States under

the State's new stockwater forfeiture laws. Specifically, IDWR issued an order to the Forest Service to show cause before the Director why forty-five stockwater rights held by the United States have not been lost through forfeiture ("the October 2021 Order"). The October 2021 Order further provided that if the United States did not respond to the Order within twenty-one days, the stockwater rights would be forfeited.

35. The stockwater rights at issue in the October 2021 Order were decreed by the SRBA, and supported grazing by two Forest Service permittees. *See* Conant Decl. ¶¶ 16, 16.a On November 5, 2021, two weeks after IDWR's October 2021 Order, one of the two permittees signed an agreement with the Forest Service stating as follows: "The Parties agree that the availability of water on the listed grazing allotments is critical for the grazing management of the allotments, and when domestic livestock owned by the Permittee and located on the listed grazing allotments make use of water by drinking from places, or sources located on [Forest Service] lands, that such use will be deemed beneficial under Idaho state law, and is made by the Permittee acting as a limited agent of the United States for the purposes of establishing and maintaining stockwater rights for the United States within grazing allotments located on [Forest Service] lands, and for no other purposes." Conant Decl. ¶ 16.b.

36. On November 12, 2021, IDWR issued an order withdrawing its October 2021 Order, on grounds that the agency agreement executed between the Forest Service and the permittee satisfied the agency-relationship defense codified under H.B. 592. Conant Decl. ¶ 16.c.

37. On April 25, 2022, following the Idaho legislature's enactment of H.B. 608 on March 24, 2022, IDWR issued three show-cause orders requiring the United States to show cause within twenty-one days why eighty-one federally owned stockwater rights used on lands managed by the BLM should not be forfeited. The April 2022 Orders were served on the United States on April 28, 2022. *See* Price Decl. ¶ 39.

38. On May 10, 2022, the United States informed the Idaho Attorney General’s office that twenty-four of the federally-owned stockwater rights listed in the April 2022 Orders were decreed based on federal law. On May 13, IDWR withdrew, amended, and reissued the three Orders, deleting the twenty water rights, stating that they “should not have been included in the list of water rights subject to the order to show cause.” May 2022 Orders, each Order at 1. The May 2022 Orders were served on the United States on May 16, 2022. Price Decl. ¶ 41. Under I.C. § 42-224(6) and (7), the United States therefore had until June 6, 2022, to respond to the orders, or face an administrative forfeiture determination by default. To avoid this default determination, on June 3, the United States, through the Office of the Solicitor of the Department of the Interior, filed a letter specially appearing before IDWR to request hearings, but noting that the United States contests jurisdiction and requesting that the hearings be stayed pending completion of this litigation. On June 24, IDWR issued orders staying all three administrative hearings, “pending the outcome of [this case] or until otherwise ordered by the Director.”

39. On June 22, 2022, IDWR issued a fourth show-cause order requiring the United States to show cause within twenty-one days why eleven federally-owned stockwater rights used on lands managed by the Forest Service should not be forfeited. *See* June 2022 Order. The June 2022 Order was served on the United States on June 27, 2022.

40. All of the water rights listed in the orders to show cause are water rights decreed to the United States in the SRBA, except for four: 75-4241, 75-7279, 75-7288, and 75-7335, which are “licensed” or “statutory” rights. Conant Decl. ¶ 17.b.

#### **IV. Federal Land Management and Grazing Program Implications.**

41. Particularly in circumstances where multiple permittees share an allotment, which is common in Idaho, or in the event of resource shortages, the availability of stockwater under federally-held rights is essential to allow effective land management, for the protection of

sensitive areas, to spread livestock across allotments as needed for forage, and to allow for management of livestock that may congregate at particular water sources. It also prevents one permittee from excluding one or multiple other permittees' use on the same allotment; requiring payment from the successor to use the water; and from transferring a water right away from an allotment onto other land, hindering water use by multiple and successive permittees and by wildlife. Ultimately, private ownership of the waters used on federal grazing allotments could result in the de-watering of the federal lands, rendering the lands useless for future grazing.

Conant Decl. ¶ 8; Price Decl. ¶¶ 32-39.

42. The vast majority of grazing permittees in Idaho have not filed for water rights, and rely on the government to hold the rights and provide water for stock. Price Decl. ¶ 20; Conant Decl. ¶ 12.c. For allotment areas where the United States is the only water right holder forfeiture of the United States' water rights would terminate the only stockwater rights that provide water for the United States' permittees.

43. In Nevada, ranchers have sought approval to move and use their privately-owned stockwater rights off of federal lands (*i.e.*, by transferring the water to the permittee's own land). Specifically, in July 2018, a private rancher, Wayne N. Hage, filed applications with the Nevada State Engineer seeking to change his point of diversion and place of use of numerous stockwater rights that are on federal allotments. Application 88145 (Ex. 3 to Motion for Summ. J.) and Application 88146 (Ex. 4 to Motion for Summ. J.), with supporting maps. Those applications sought to transport the water across National Forest System lands and BLM-administered public lands via pipelines that are many miles long to Mr. Hage's private property. *Id.* at 2. In August, 2019, the Nevada State Engineer granted the applications, which put tens of thousands of acres of federal grazing allotments in the Humboldt-Toiyabe National Forest and on public lands at risk of being dewatered and likely unsuitable for future grazing for all time. *See* Permits 88145

(Ex. 5 to Motion for Summ. J.) and 88146 (Ex. 6 to Motion for Summ. J.).

44. Some stockwater rights are dependent on infrastructure financed by federal funding. Over half of the water sources for the approximately 9,000 stockwater rights decreed to the United States for NFS lands have been developed by the Forest Service, with significant investments in troughs, pipes, tanks, wells, and other infrastructure, often funded by federal appropriations. The Forest Service likely would not have made such investments without being able to rely on the certainty afforded by holding these decreed water rights. Conant Decl. ¶ 13.

45. Likewise, federal funding may not be available for future water infrastructure development or maintenance if no underlying federal water rights exist. Although water pipelines are often employed to support the needs of livestock in the arid climate of Idaho and over the vast distances associated with many BLM allotments, Price Decl. ¶ 13(b), those pipelines need dependable water supplies to fill them. However, the Idaho forfeiture legislation threatens the water rights needed to incentivize continued investments in such improvements by the BLM and other federal agencies. For example, in 2012, BLM established a policy (now expired) in Nevada that generally prohibits expenditure of public funds for construction and infrastructure development where the water right is solely owned by non-BLM entities. *See, e.g.*, BLM Instruction Memorandum No. NV-2013-007 (Dec. 19, 2012). Such policies reflect that the BLM may not be willing to build water infrastructure improvements, such as livestock watering troughs or water pipelines, if it lacks federally-owned water rights that may provide the water that can be used and transported through such improvements. Price Decl. ¶¶ 37-38.

46. Recent changes to Idaho water law have also affected day to day federal land administrative actions related to water right applications. In 2015, IDWR started asking BLM and USFS to show compliance with the *Joyce* decision when filing applications for permit or in response to filing proof of beneficial use, which are uses of developed water. Price Decl. ¶ 25.



47. For example, an Application for Permit (Application) to develop stockwater was filed by the Forest Service on August 4, 2014. The Application described the proposed use of water as stockwatering and the diverting works to include a well with pump to 10,000-gallon storage tank piped to 4 stock troughs with floats. On September 16, 2014, IDWR issued a Permit to Appropriate Water (Permit) to the Forest Service without any request for additional information. The Forest Service relied upon issuance of the Permit to install a 6-inch diameter well and pump that flows to a 10,000-gallon storage tank, then distributes water to 4 troughs through a pipeline system. The cost of this improvement was \$67,800 and included substantial staff time. On July 30, 2021, IDWR sent a letter to the Forest Service that included a Notice to Federal Agencies Regarding Proof of Beneficial Use for Permits Authorizing Stockwater Use. That Notice, based on recent changes to Idaho water law codified at I.C. § 42-502, requires the Forest Service to show the agency's ownership of the livestock when submitting the Proof Statement. The development is in place and ready to be used by the current grazing permit holders, and IDWR's implementation of the recent statutory changes is preventing use from occurring. Conant Declaration ¶ 18.

48. The pendency of the show-cause orders creates uncertainty for federal grazing permittees who rely on federally-owned stockwater rights, and requires them to invest time and money to protect their interests. These permittees must monitor the ongoing proceedings before the IDWR to see what precedent those proceedings may set for the water rights on which they depend and must decide whether to take protective steps such as entering into a principal-agent relationship with the federal agency or seeking their own stockwater rights. *See* I.C. § 42-224(4). As of September 16, 2020, BLM has 554 authorized grazing permittees who have signed Limited Agency Agreements out of 1,585 permittees that are authorized to graze on BLM land in Idaho. This is roughly 35% of BLM's authorized permittees. Price Decl. ¶ 28.

Respectfully submitted this 16th day of December, 2022.

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