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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, 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, IDAHO HOUSE OF REPRESENTATIVES; MEGAN BLANKSMA, in her official capacity as Majority Leader of the House; IDAHO SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate, Intervenor-Defendants.	Case No. 1:22-cv-00236-DCN **IDAHO LEGISLATURE'S BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT [Dkt. 53] and RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [Dkt. 34]**

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I. INTRODUCTION

> I do not believe in any law that permits a man to appropriate a stream of water . . . and do nothing with it. . . . Perhaps that might be treated by the legislature in such a way that if a person were to take up a tract of land as suggested by Mr. Heyburn, and did not utilize the water within a certain time he should lose it.

2 Proceedings and Debates of the Const. Convention of Idaho (1889) ("Const. Proceedings"), Ex. 1, 1176 (I.W. Hart, ed., 1912) (Statement of Del. Willis Sweet).

Since Congress's 1890 ratification of Idaho's Constitution, the federal government has deferred to the State's constitutional and statutory authority over Idaho water. Now, by dint of their management of grazing lands in Idaho, the Bureau of Land Management ("BLM") and the U.S. Forest Service ("Forest Service") seek to permanently enjoin six Idaho water laws dating from 1903 so that they might retain rights to water their non-existent livestock. Thus, the federal agencies seek to become Aesop's fabled dog in the manger[1]—acquiring but not using stockwater rights while not wanting ranchers to acquire them. The agencies also seek to enjoin core elements found in all Idaho water rights including beneficial use, purpose and place of use, and appurtenancy. This Court should deny the United States' motion for summary judgment and instead grant summary judgment to the Intervenor-Defendants Idaho House of Representatives, et al., ("Legislature") and the State Defendants.

II. BACKGROUND

Since territorial days, Idaho has protected one of its most precious natural resources—water. With the exception of federally reserved water rights and navigational servitudes, not at issue in this case, the State has retained all property rights in its water but allows the water to be beneficially used through a carefully enacted system of appropriation. *California v. United*

[1] Const. Proceedings 1162 (statement of Del. John S. Gray); read.gov/aesop/081.html.

States, 438 U.S. 645, 662 (1978). Recognizing the importance of water to the livestock industry, the State appropriates stockwater as a beneficial use only so long as the appropriator continues to apply the water to the purpose for which it was appropriated—watering livestock. *Cal. Or. Power Co. v. Beaver Portland Cement Co*., 295 U.S. 142, 154 (1935). Under Idaho law, if a stockwater appropriator fails to use its water for that purpose for a period of five or more years, the appropriator's usufructuary right is subject to forfeiture and reversion back to the State. Idaho Code ("I.C.") § 42-222(2). The Legislature established extensive procedures before a stockwater right can be subject to forfeiture in a state court. I.C. § 42-224.

Consistent with the Idaho Supreme Court's landmark 2007 decision in *Joyce Livestock Co. v. United States*[2] ("*Joyce*"), Idaho statutes recognize that stockwater rights on federal lands are appurtenant to the federal land permittees' real, or "base," property. *Id*. at 513-14; I.C. § 42-113(2)(b). At the same time, the statutes proscribe use of that water for any purpose other than watering livestock on the federal grazing allotment where the water is found. I.C. § 42-502.

Plaintiff United States of America, through BLM and the Forest Service (collectively, the "Agencies," or "United States"), acquired thousands of Idaho stockwater rights through the Snake River Basin Adjudication ("SRBA") to water its livestock. United States' Mem. in Supp. of Mot. for Summ. J. ("U.S. Br.") (Dkt. 34-1) 32.[3] The Agencies admit, however, that since 1939 they have owned few livestock on public lands. First Am. Compl. (Dkt. 11) ¶ 28. As authorized by I.C. § 42-224(1), three ranchers submitted four petitions to the Idaho Department of Water Resources ("IDWR") for orders to show why the Agencies had not forfeited certain

[2] 156 P.3d 502 (Idaho 2007), *reh'g denied* 2007 Ida. LEXIS 116 (March 30, 2007), *cert. denied* 552 U.S. 990 (Oct. 29, 2007).

[3] Citations to docket entries refer to the ECF-generated page numbers.

usufructuary stockwater rights for non-use. U.S. Br. (Dkt. 34-2) 2, 15, 28; (Dkt. 34-3) 2.[4] The verified petitions presented evidence of nonuse for the statutory five years preceding the petitions. Spackman Decl. (Dkts. 47-1, 47-2, 47-4, 47-5.) IDWR began processing the petitions. U.S. Br. (Dkt. 34-2, Dkt 34-3). At the Agencies' requests, IDWR stayed its proceedings pending the outcome of this litigation. State SOF (Dkt. 44) 15 at ¶ 25.

Fearful that they may, one day, forfeit some of their stockwater rights, the Agencies assert three federal constitutional claims, one state constitutional claim, and sovereign immunity as an affirmative claim against the State. But, as explained below, none of the Agencies' claims overcome the 121-year-old principle that "A person who is not applying the water to a beneficial purpose cannot waste it or exclude others from using it." *Joyce*, 156 P.3d at 520, *citing Hall v. Blackman*, 68 P. 19 (Idaho 1902). This explains why the Agencies have been actively soliciting ranchers to be their agents on federal grazing allotments. Price Decl. (Dkt. 36) ¶ 28; Conant Decl. (Dkt. 35-2) Ex. 2. The Agencies' related claims—beneficial use, appurtenancy, the purpose and place of use, and the Legislature's intent to comply with *Joyce*—fall away in turn.

III. STANDARD OF REVIEW

The Legislature adopts and incorporates by reference State Defendants' statement of the summary judgment standards. State. Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. and Resp. to U.S.' Mot. for Summ. J. (Dkt. 43-1) ("State Defs.' Br.") 28-29.

[4] *See*, *also*, State Defs.' Statement of Undisputed Facts and Resp. to U.S. Statement of Undisputed Facts (Dkt. 44) ("State SOF") 11 at ¶ 21. The Legislature adopts and incorporates by reference Dkt. 44.

IV. ARGUMENT[5]

A. Consistent with the Supremacy Clause, Congress has subjected the Agencies to Idaho's water laws

The Agencies claim that four Idaho statutes[6] violate the Supremacy Clause, U.S. Const. art. VI, cl. 2, because the statutes discriminate against the Agencies in violation of the Intergovernmental Immunity Doctrine. U.S. Br. (Dkt. 34-1) 24-25, 28-34. The Agencies actually allege preemption but disclaim that they are doing so. Neither theory supports their Supremacy Clause argument.

1. Idaho's water laws are not obstacles to the Agencies' grazing programs

The Agencies expressly disclaim that they are asserting the Supremacy Clause to preempt Idaho's laws, U.S. Br. (Dkt. 34-1) 25, n.9, preferring instead to frame their arguments under the Intergovernmental Immunity Doctrine. *Id*. at 28-34. Despite their disclaimer, the Agencies actually make preemption arguments. Preemption is a separate Supremacy Clause doctrine. *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 758 (9th Cir. 2022) (*en banc*).

"Obstacle preemption" does not consider whether the state law targets the federal government for discriminatory treatment; it considers whether the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Geo Grp*., 50 F.4th at 762, *quoting United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019) ("*California*") (*quoting Arizona v. United States*, 567 U.S. 387, 399). The *California* court, 921 F.3d at 880, distinguished intergovernmental immunity from obstacle preemption:

> [I]ntergovernmental immunity attaches only to state laws that discriminate against the federal government and burden it in some way. Obstacle preemption, by contrast, attaches to any state law, regardless of whether it specifically targets the federal government,

[5] The Legislature supports State Defendants' arguments but will avoid repeating them.

[6] I.C. §§ 42-502, 224(4), 113(2)(b), and 504. U.S. Br. (Dkt. 34-1) 30-34.

> but only if it imposes an obstructive, not-insignificant burden on federal activities.

Under obstacle preemption, the historical police powers of the States are not superseded unless that is the "clear and manifest purpose of Congress." *California*, 921 F.3d at 885-86; *Geo Grp*., 50 F.4th at 761 (citations omitted). A reviewing court must assume in the first instance a valid exercise of historical state police power, not preemption. *California*, 921 F.3d at 887. This presumption against preemption must be rebutted for the Agencies. Under intergovernmental immunity, the presumption is reversed in favor of the Agencies and the courts presume that Congress did not intend to allow the state laws to be enforced. The presumption can be overcome only by a showing of clear congressional mandate. *Geo Grp*., 50 F.4th at 762. Thus, by labelling their preemption arguments as intergovernmental immunity, the Agencies seek significant tactical advantage from the applicable presumptions and elements of proof.

When determining whether a state law obstructs a federal law, the Court must examine "the federal statute as a whole and identify[] its purpose and intended effects." *California*, 921 F.3d at 879 (citations omitted). A finding of obstacle preemption must clear a high threshold beyond a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Id*., *citing Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011).

The Agencies amply allege that Idaho's stockwater laws should be preempted as obstacles to their federal grazing programs. U.S. Br. (Dkt. 34-1) 11 ("A series of Idaho statutes . . . undermine the congressionally authorized federal grazing program"); *Id*. at 13-15 (describing the Agencies' grazing programs including the "critical importance of federally-owned water rights to the federal grazing program."); *Id*. at 47-51 ("[t]he forfeiture proceedings will result in significant negative impacts to the federal grazing program"); *Id*. at 52 ("decreeing the water rights to the United States protects the grazing program in the West"); *Id*. at 53 ("Livestock

grazing, and the use of water . . . fulfill Congressional directives. Restricting and divesting the United States of its decreed water rights will interfere with the ability of the United States to manage and administer public grazing lands, as directed by Congress."). *See also* Price Decl. (Dkt. 36) ¶¶ 14, 29, 30, 31, 33-38; Conant Decl. (Dkt. 35) ¶¶ 18, 19.

Idaho's water laws do not interfere with the Agencies' grazing programs under the Taylor Grazing Act or Federal Land Policy and Management Act. Forfeiture—the Agencies' primary concern—is not an obstacle to their administration of their grazing programs. Forfeiture will not frustrate the three purposes of the Taylor Grazing Act to (1) stop injury to public lands from overgrazing; (2) provide for public land use, improvement, and development; and (3) stabilize the public range livestock industry. Ch. 865, 48 Stat. 1269 (1934); *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 733 (2000). The stockwater will stay on the allotments under I.C. § 42-504. The livestock will still be regulated by BLM under 43 C.F.R. Part 4100. And inherent in the Idaho Constitution's enshrinement of beneficial use is that rancher control of the water rights, including appurtenancy to their ranches, will enhance the value of their permits and ranches and thus strengthen the industry. Idaho Const. art. XV, § 3.

Consistent with the Taylor Grazing Act and the Supreme Court's plurality decision in *North Dakota v. United States*, BLM's stockwater regulation does not preempt any state law; instead it "specifically envisions some regulation by state law." 495 U.S. 439, 442 (1990) (*plurality opinion*) ("*North Dakota*").[7] BLM's regulation[8] is clear: Any stockwater right

[7] Because it was a plurality opinion, only the result of the *North Dakota* opinion is binding. *Geo Grp.,* 50 F. 4th at 759.

[8] 43 C.F.R. § 4120.3-9 (2005). This brief cites the grazing regulations, 43 C.F.R. Part 4100, as they appear in the 2005 Code of Federal Regulations, unless otherwise specified, because the 2006 amendments, 71 Fed. Reg. 39,402 (July 12, 2006), were enjoined. *See W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd in relevant part*, 632 F.3d 472 (9th Cir. 2011), *cert. denied*, 565 U.S. 928 (2011).

acquired in the name of the United States on or after August 21, 1995 for use on public lands "shall be acquired, perfected, maintained, and administered under the substantive and procedural laws of the State within which such land is located."[9]

The 1995 regulation continued BLM's then-existing policy of seeking water rights under the states' substantive and procedural requirements, consistent with the Forest Service's policy at that time and the Federal Land Policy and Management Act ("FLPMA"). 60 Fed. Reg. 9,936-37 (Feb. 22, 1995); 43 U.S.C. § 1701 note (§ 701(g)(1)) (stating that FLPMA does not affect "in any way any law governing appropriation or use of, or Federal right to, water on public lands."). BLM intended the regulation to benefit range conditions by clarifying BLM's water policy and to promote multiple use of the public lands. *Id*. Consequently, until this lawsuit, BLM has not contemplated that Idaho's water laws obstruct its grazing programs. To the contrary, BLM has followed them. There is no obstacle preemption.

The Forest Service's stockwater rights are administered according to its manual on water use and development. The Forest Service Manual on "Watershed and Air Management" cites federal laws that protect water rights "recognized and acknowledged by local customs, laws and court decisions." Forest Serv. Manual § 2541.01 (Sept. 4, 2007).[10] The Manual expresses Forest Service policy to "obtain water rights under state law if the [federal reserved water rights] doctrine does not apply." *Id*. at §§ 2541.03(2), .22.

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[9] The Agencies acquired their rights at issue in this case upon entry of their partial decrees in the SRBA variously between January 3, 2000 and March 30, 2010. *See* Defs.' Answer to First Am. Compl. (Dkt. 13) 39-106 ("Water Rights"); U.S. Br. (Dkt. 34-1) 43. BLM's adjudicated rights are thus bound by its stockwater regulation effective August 21, 1995. 60 Fed. Reg. 9,894, 9,965 (Feb. 22, 1995). The Agencies assert beneficial use priority dates as early as 1874, Saxton Decl. (Dkt. 46-5) 3, but they have not alleged their livestock beneficially used the water rights.

[10] https://www.fs.usda.gov/im/directives/fsm/2500/2540_clear.rtf.dot. Forest Service Manuals do not bind the agency. *Mountain Cmtys. for Fire Safety v. Elliott*, 25 F.4th 667, 678 n.7 (9th Cir. 2022). The Manuals are "the primary source of administrative direction to Forest Service employees." https://fs.usda.gov/im/directives/.

> [W]ater rights obtained under state law . . . may be subject to loss if not exercised in accordance with state water laws. . . . Maintain water rights in accordance with state forfeiture or abandonment laws and regulations. Apply the water to the purposes and in the manner specified in the water right permit, license, or decree.

Id. at § 2541.34. Again, until this lawsuit, the Forest Service also has followed, not been obstructed by, Idaho's stockwater laws.

2. Even if the Intergovernmental Immunity Doctrine applies, Idaho's stockwater laws do not unconstitutionally discriminate against the Agencies

Under the Intergovernmental Immunity Doctrine, state laws must not discriminate against the federal government. *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022) (citations omitted). Congress can waive the Agencies' immunity from state regulation if done so clearly and unambiguously. *Id*. at 1984-85. A state law discriminates against the federal government if the law singles the government out for less favorable treatment or if it regulates the government unfavorably on some basis related to government status. *Id*. at 1984 (citations omitted). When the Court is asked to set aside a law or regulation at the core of the State's powers, it must proceed with particular care. *North Dakota*, 495 U.S. at 439-40.

a. Courts have consistently affirmed State primacy over State water

In *Bean v. Morris*, Justice Holmes wrote for a unanimous Supreme Court: "The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States." 221 U.S. 485, 487 (1911). And subject only to Supreme Court rulings and vested rights, the State "has full Legislative power over [the stream] while it flows within that State." *Id*. at 486.

In 1935, the Supreme Court held in *California Oregon Power Co.* that the federal government "silently acquiesce[ed]" to state and local control of water rights in the arid western states under the prior appropriation doctrine. That general policy was formally confirmed by

Congress in the Act of July 26, 1866 and subsequently in the Desert Land Act of 1877. 295 U.S. at 154-56. "[T]he authority of Congress to vest such power in the state, that it has done so by the legislation to which we have referred, cannot be doubted." *Id*. at 162. Furthermore, "[t]he Desert Land Act . . . simply recognizes and gives sanction . . . to the state and local doctrine of appropriation. . . . The public interest in such state control in the arid land states is definite and substantial." *Id*. at 164-65; s*ee also Ickes v. Fox*, 300 U.S. 82, 95 (1937) ("All nonnavigable waters were reserved for public use under the laws of the various arid-land states.").

In *United States v. U.S. Board of Water Commissioners*, the Ninth Circuit held that "there is no federal water law. Fundamental principles of federalism vest control of water rights in the states. Decreed rights are administered under applicable state law." 893 F.3d 578, 595 (9th Cir. 2018). Federal agency water rights "like the rights of all other diverters in the [] basin, are to be adjudged, measured, and administered in accordance with the laws of appropriation as established by the state…." *Id.*, *quoting United States v. Walker River Irrigation Dist*., 11 F. Supp. 158, 165-68 (D. Nev. 1935). The federal district courts apply state water law, affording the same level of deference state courts would afford the state agencies. *Id*. at 596.

The Idaho Supreme Court cited the Ninth Circuit for its recognition that Congress has plenary power over federal lands and their disposition, however, "'the states hav[e] jurisdiction to provide for the appropriation and beneficial use of the waters of the state….'" *City of Pocatello v. State (In re SRBA)*, 180 P.3d 1048 (Idaho 2008), *reh'g denied* 2008 Ida. LEXIS 69 (Idaho Apr. 3, 2008), *cert. denied* 555 U.S. 1068 (2008) (citation omitted). The Idaho Supreme Court recounted "the long-standing and firmly established policy of ["a century's-worth of federal deference to state law"] and absent express Congressional action to the contrary, state water law controls." *Id*. at 1054. "Thus, the appropriation of the nonnavigable waters within this

State, including those located on federal land, is a matter of state law." *Joyce,* 156 P.3d at 507. Tellingly, other than *Joyce*, the Agencies' do not cite any of these federal or state decisions establishing state primacy over state water.

b. Congress waived intergovernmental immunity from Idaho water laws

Idaho's Constitution declares the use of all waters in the state to be a "public use, and subject to regulation and control by the state" through the Legislature. Idaho Const. art. XV, § 1. Congress clearly and unambiguously waived its supremacy over Idaho water law when it "accepted, ratified, and confirmed" Article XV (and the rest of the Idaho Constitution) by the Idaho Admission Act, § 1, ch. 656, 26 Stat. 215 (1890). Congress declared that Idaho's Constitution "is in conformity with the Constitution of the United States." *Id*. at preamble. There could be no clearer waiver by Congress of its immunity from Idaho's water laws. Since 1890, Congress has only added to its clear and unambiguous deference to Idaho water law.

The Taylor Grazing Act of 1934, 43 U.S.C. § 315b, states:

> Nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for . . . agriculture . . . which has heretofore vested or accrued under existing law . . . or which may be hereinafter initiated or acquired and maintained in accordance with such law.

FLPMA § 701(g)(1), enacted in 1976, did not affect "in any way" Idaho's appropriation or use of water on public lands. Nor did it expand or diminish federal or state "jurisdiction, responsibility, interests, or rights in water resources development or control." 43 U.S.C. § 1701 note (§ 701(g)(2)).

Elsewhere, Congress has reiterated state primacy over water resources. Under the Clean Water Act, "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of . . . water resources." 33 U.S.C. § 1251(b). In 2009, Congress passed the SECURE Water Act supporting

the states' water conservation efforts because the "States bear the primary responsibility and authority for managing water resources of the United States." 42 U.S.C. § 10361(4).

c. Even if there has been no Congressional waiver, the Idaho stockwater laws do not discriminate against the Agencies

The Ninth Circuit considered the Intergovernmental Immunity Doctrine in *California*. It held that intergovernmental immunity only applies if the state law discriminates against the federal government *and* burdens it in some way. *California*, 921 F.3d at 880, *citing North Dakota*. It is not implicated when a state merely references, singles out, or incidentally "targets" federal activities in an otherwise innocuous enactment. *Id*. at 880-81. There is no discrimination if the state law does not treat someone else better than the federal government. *Id.* at 881.

"It is not appropriate to look to the most narrow provision addressing the Government." *North Dakota*, 495 U.S. at 438. A state provision that narrowly addresses the government may be constitutional when viewed in its broader regulatory context. *Id*. The entire regulatory system must be analyzed to determine whether it is discriminatory. *Id*. at 435. Even where discrimination exists, if the Agencies can readily avoid it by complying with Idaho's beneficial use laws, as every other stockwater right holder in Idaho must do, there is no unconstitutional discrimination. *Id*. at 444 (Scalia, J. concurring in the judgment.)

The Agencies have not alleged that the entire Idaho water code discriminates them; indeed, they availed themselves of it to obtain 24,000 stockwater rights through the SRBA. U.S. Statement of Undisputed Facts ("U.S. SOF") (Dkt. 37) ¶¶ 4-12. Only sixty-eight of those federal stockwater rights are at issue in this case. State SOF (Dkt. 44) ¶ 40.

The Agencies cite *United States v. State Engineer*, 27 P.3d 51 (Nevada 2001) (*en banc*), as support for their argument that the Idaho statutes discriminate against them. U.S. Br. (Dkt. 34-1) at 28, 48 n.16. The Nevada court held that BLM could obtain a Nevada stockwater right to

graze livestock on BLM land. *State Engineer*, 27 P.3d. at 590. Justice Becker clarified that "BLM can obtain a stockwater permit if *it* has a legal or proprietary interest in the actual livestock to be watered," just like any other person similarly situated. *Id*. at 605 (emphasis added). Thus, Nevada's stockwater law did not discriminate against BLM. *Id*. (Becker, J., concurring in part, dissenting in part). BLM did not preempt state law since BLM's stockwater regulation contemplated that beneficial use would be addressed through state law. *Id*. at 606, *citing* 43 C.F.R. § 4120.3-9. Here, BLM does not hold any interest in the livestock.

The Agencies argue that four Idaho statutes discriminate against them. U.S. Br. (Dkt. 34-1) 28-34. They are analyzed in the order presented in the Agencies' brief.

i. I.C. § 42-502 was amended *in favor of* the Agencies

Idaho Code § 42-502 states:

> No agency of the federal government 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 of livestock.

The provision was added to the Idaho Code in 2017 (2017 Idaho Sess. L., ch. 178, p. 409)[11] and amended in 2020. The amendment repealed a prohibition on grazing permittees acting as agents of the Agencies to acquire stockwater rights when the Agencies do not own livestock. 2020 Idaho Sess. L., ch. 253, p. 740.

The Agencies facially challenge the law as prejudicial because it requires only federal agencies to own livestock, thus allowing others to acquire stockwater rights without owning

[11] Post-1944 Session Laws are available at https://legislature.idaho.gov/statutesrules/sessionlaws/.

livestock if acquired by an agent.[12] U.S. Br. (Dkt. 34-1) 30. But the Agencies can also acquire stockwater rights via an agent under I.C. § 42-224(4), discussed in the next section.

The I.C. § 42-502 requirement that the Agencies must beneficially use their stockwater rights is the same for both a constitutional and a permitted right and for all Idaho stockwater right holders. *McInturff v. Shippy*, 447 P.3d 937, 945 (Idaho 2019) ("To have a valid water right in Idaho, both the constitutional and statutory methods of appropriation require the appropriator to apply the water to a beneficial use."). In other words, *all* Idaho stockwater appropriators must put the appropriated water to the beneficial use for which it was appropriated and failure to do so terminates the water right. I.C. § 42-104. When a person holds a stockwater right and that person waters the livestock, it is deemed a beneficial use of the water. I.C. § 42-114. The Agencies do not challenge (or cite) these statutes. Idaho Code § 42-502 merely reiterates the application of I.C. §§ 42-104, 114 to federal agency stockwater appropriations. That reiteration was a proper legislative function given the Agencies' acquisition of over 15,000 BLM stockwater rights and nearly 9000 Forest Service stockwater rights through the SRBA to water "few" livestock, First Am. Compl. (Dkt. 11) ¶¶ 28, 37, and the importance of water to the State, Idaho Const. art. XV, § 1.

The Agencies' citation to a memorandum sent from the Deputy Attorney General for the Idaho Department of Lands to IDWR defending the Department of Lands' water rights is unavailing. U.S. Br. (Dkt. 34-1) 31. The Agencies suggest that the memorandum evidences the discriminatory nature of I.C. § 42-502 because the Department of Lands, or any other non-Federal water right holder, can acquire a stockwater right via the permit system and rely on the

[12] The Agencies also make an as-applied challenge to the statute, but they do not provide any facts demonstrating that the statute has prevented them from acquiring stockwater rights. First Am. Compl. (Dkt. 11) ¶ 110(b); U.S. SOF (Dkt. 37) ¶¶ 41-48.

holder's lessee's use of the water to meet the holder's beneficial use requirement.

The memorandum (Dkt. 36-5) was written in 2015 before the Legislature amended I.C. § 42-502 in 2020 to repeal the prohibition on a permittee acting as an agent of the Agencies. Thus, the memorandum is superseded by statute. It is also contrary to the Idaho Supreme Court's 2019 decision in *McInturff,* a case specifically addressing a licensed water right. The court cited its decision in *Joyce* to reiterate that a lessee's water right does not belong to the lessor unless the lessee was acting as the lessor's agent when appropriating the right. *McInturff*, 447 P.3d at 945. Thus, contrary to the attorney's conclusion in 2015, the court held that "merely allowing the tenant to use the water on the land owned by the landlord does not equate to the landlord putting the water to beneficial use." *Id*. at 946. Pointedly, in the absence of evidence of a principal/agent relationship, "the failure to put the [licensed] water to beneficial use is fatal to [a landlord's] claim of [water right] ownership." *Id*. Likewise, the failure of the Agencies to show any difference in I.C. § 42-502's application to it and how all other stockwater right holders are treated under Idaho law is fatal to their claim of discrimination.

ii. The principal/agent provisions of I.C. § 42-224(4) codify common law and protect the Agencies from unwarranted forfeiture proceedings

The Agencies admit that I.C. § 42-224 applies to any Idaho stockwater right holder, regardless of ownership. First Am. Compl. (Dkt. 11) ¶ 64; U.S. Br. (Dkt. 34-1) 24; I.C. § 42-224(9). Subsection (4) benefits the Agencies by exempting federal stockwater rights from potential forfeiture if an agent procured the rights for the federal or state agency. Thus, the Agencies are treated *better* than other stockwater right holders by enjoying this codified exemption from the forfeiture process.

The Agencies contend that I.C. § 42-224(4) illegally discriminates against them by limiting their ability to assert an implied principal/agent relationship as a defense to forfeiture

whereas no such restriction affects private stockwater rights holders. U.S. Br. (Dkt. 34-1) 33. The verified petitions, filed pursuant to I.C. § 42-224(1) and that initiated the administrative process that the Agencies seek to enjoin, state that the petitioners are not, and have not been, agents of the federal government for the purpose of acquiring water rights for the agency on the agency's grazing allotments where the petitioners are permitted to graze their livestock. Spackman Decl. (Dkt. 47-1) ¶ 11; (Dkt. 47-2) ¶ 11; (Dkt. 47-4) ¶ 11; (Dkt. 47-5) ¶ 11. The Agencies fail to appreciate that Idaho's principal/agent common law is subject to the police power of the Idaho Legislature. The Agencies also misread I.C. § 42-224(4).

Joyce, 156 P.3d at 519, denied BLM's claim to a rancher's stockwater rights in part because BLM presented no evidence that the rancher had acted as BLM's agent. The court held, "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 the agent of the owner in obtaining that water right." Idaho Code § 42-224(4) codified this common law in the context of stockwater rights. It prevents IDWR from issuing a show cause order if IDWR possesses written evidence that any principal, *including a federal agency*, obtained or maintained the stockwater right via its agent.

The Agencies cite an Idaho district court Notice expressing the court's reliance on the *Joyce* court's recognition of the "longstanding rule under Idaho law" that a rancher can act as an agent to acquire a stockwater right for the Agencies. U.S. Br. (Dkt. 34-1) 33, *citing* Notice of Court's Intent, *In re SRBA, Case No. 39576, #74-15468* (Idaho Dist. Ct. Feb. 28, 2007) (Dkt. 36-4). The Notice simply recognized the *Joyce* decision's holding eighteen days earlier that BLM cannot appropriate a beneficial use water right solely through its management of grazing allotments but it can acquire a right via a principal/agent appropriation. *Id*. at 1. The stockwater

right at issue in the cited Notice was claimed by the United States, not by any rancher/agent. *Id*. The district court apparently assumed a principal/agent relationship in the absence of any factual inquiries. *Id*. at 1-2. Consequently, the Notice merely supports the tautology that if the *Joyce* principal/agent relationship is in place, it is consistent with *Joyce*. The Notice thus does not contradict *Joyce* or I.C. § 42-224(4). The Legislature did not contradict the Notice; it codified it. But, in practice, the Agencies flip this rule on its head by acting as an agent acquiring SRBA stockwater rights for the benefit of the ranchers.

Joyce states that a federal agency as *principal* may own a water right if its rancher/agent acquired the water right for the agency. *Joyce*, 156 P.3d at 519. The Forest Service claims one instance where a permittee agreed to be its agent by using the Forest Service's water right for the permittee's livestock, purportedly "establishing and maintaining stockwater rights for the United States within the grazing allotments." Conant Decl. (Dkt. 35) ¶ 16, (Dkt. 35-2) 2. Yet, in the Forest Service/rancher agreement, the United States obtained the water rights *for the benefit of the permittee's livestock*. Dkt. 35-2, 2 ("The Parties wish to continue utilizing state-based stockwater rights obtained by the United States . . . so that the use of water . . . can be used by livestock owned by the Permittee."). Consequently, the Agencies flip on its head the *Joyce* holding that a rancher/agent may acquire a water right for the agency/principal. That the Agencies have been actively seeking these topsy-turvy principal/agent agreements[13] underscores their admission that they need a rancher to obtain or maintain a stockwater right because the Agencies cannot put the water to beneficial use.

In 2019, the Idaho Supreme Court emphasized the need for express principal/agent relationships in *McInturff*, 447 P.3d at 945. It held that "Merely allowing the tenant to use the

[13] *See* Price Decl. (Dkt. 36) ¶ 28 (35% of BLM permittees signed agreements).

water on the land is also not enough to establish an agency relationship between landowner and tenant." *Id*. at 946. The Legislature codified in I.C. § 42-224 the basic elements of an express principal/agent relationship. In so doing, it also addressed the Legislature's intent expressed in I.C. § 42-501 that such a relationship is not unwittingly created simply by the tenant's use of the landlord's property, consistent with the holding in *McInturff*.

The Agencies fault the procedures in I.C. § 42-224, alleging that the statute was "designed to target federally owned stockwater rights." U.S. Br. (Dkt. 34-1) 21; First Am. Compl. (Dkt. 11) ¶ 66. Not so. The statute at most incidentally "target[s]" a federal activity in an innocuous fashion and is not discriminatory. *California*, 921 F.3d at 880-81.

iii. Idaho Code § 42-113(2)(b) properly makes the stockwater rights appurtenant to a grazing permittees' private property without changing the place of use

Idaho Code § 42-113(2)(b) states:

> 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.

Idaho Code § 42-113(2) was amended in 2018 to add the new subsection (b). 2018 Idaho Sess. L., ch. 146, p. 303. Prior to the 2018 amendment, Subsection 113(2), codified in 1998, addressed priority dates for stockwater rights associated only with federal grazing allotments. 1998 Idaho Sess. L., ch. 344, p. 1095. Paradoxically, the Agencies have never claimed discrimination from that federally-focused 1998 provision. The new subsection likewise applies only to federal grazing allotments and makes a stockwater right on an allotment appurtenant to the grazing permittee's base property.[14] There is no discrimination where the 2018 legislation

[14] "Base property" is private land or water used to support a public land ranching operation. *See* U.S. Br. (Dkt. 34-1) 20, n.6 for a complete explanation of the term.

amends a code section that has, since 1998, only applied to federal grazing permits.

The 2018 amendment codified several key elements of the *Joyce* decision that reiterated a general rule dating back to 1904 that a water right is not necessarily appurtenant to the land on which it is used and may be separated from it. *Joyce*, 156 P.3d at 519, *citing First Security Bank of Blackfoot v. State*, 291 P. 1064, 1065 [sic: 1066] (Idaho 1930) (citations omitted). The *Joyce* court noted that the Taylor Grazing Act "expressly recognizes that the ranchers could obtain their own water rights on federal land." *Id*. The court explained at length why stockwater rights that ranchers obtain by watering their livestock on federal lands are appurtenant to their private, base property and such rights can be conveyed with that base property. *Joyce*, 156 P.3d at 513-15. Idaho Code § 42-113(2)(b) codifies those holdings. None of the Idaho Code provisions cited by the Agencies change the outcome of the *Joyce* decision. U.S. Br. (Dkt. 34-1) 31-32. As the Supreme Court explained, ranchers use stockwater to improve their ranches. The stockwater "would be of little use apart from the operations of their ranches." *Joyce*, 156 P.3d at 514.

The Agencies also assert that *Joyce* only addressed stockwater rights owned by ranchers while the 2018 amendment applies to stockwater rights owned by the United States. U.S. Br. (Dkt. 34-1) 32. The Agencies argue that if they legitimately hold a stockwater right and beneficially use it to water their livestock on a grazing allotment, then their stockwater right should not be subject to transfer to another rancher upon transfer of a grazing permit. *Id*. The Agencies misread the plain language of the statute. The statute specifically applies to the transfer of a grazing permit and, therefore, can only apply to ranchers as holders of permits. I.C. § 42-113(2)(b) ("When a federal grazing permit is transferred. . . ."). The Agencies are not permittees; they are the permitting agencies under the Taylor Grazing Act (BLM) and the Granger-Thye Act (Forest Service). 43 U.S.C. § 315b ("Preference shall be given in the issuance

of grazing permits to those within or near a district who are landowners engaged in the livestock business."); 16 U.S.C. § 580l (The Secretary of Agriculture . . . is authorized . . . to issue permits for the grazing of livestock."). Thus, this provision would not apply to a stockwater right held by an agency and used to water agency livestock on the agency's lands. In that scenario, there is no federal grazing permit. The Agencies are not disadvantaged by the statute.

iv. Idaho Code § 42-504 benefits the Agencies by preventing ranchers from using their stockwater rights for any purpose other than watering livestock on the federal lands

Idaho Code § 42-504 states:

> 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 on the federal grazing allotment that is the place of use for that stockwater right.

Two elements of an Idaho water right are (i) the purpose for which the water will be used and (ii) a legal description of the place where it will be used. I.C. § 42-1411(2)(f), (h). Idaho Code § 42-504 applies equally to the federal and non-federal stockwater right holders. It requires the stockwater user to use the water on the grazing allotment identified in the water right and only for the purpose for which it was acquired—the watering of the right holder's livestock.

The Agencies facially challenge[15] this statute claiming discrimination on behalf of both themselves and the ranchers who, they say, are disadvantaged compared to other stockwater right holders who do not have livestock on federal lands and thus are free to seek a change in the water's purpose and place of use. U.S. Br. (Dkt. 34-1) 34. Surely the Agencies are not asking that they and their federal grazing permittees should be free to move stockwater off the allotment

[15] The Agencies also make an as-applied challenge to the statute, but they do not provide any facts demonstrating that it has been applied to them to their detriment. First Am. Compl. ¶ 110(b).

where it is used and for a purpose other than watering livestock. Indeed, the Agencies elsewhere bemoan a Nevada rancher who tried to dewater his allotment by piping stockwater off federal lands and onto his private property. U.S. Br. (Dkt. 34-1) 48-49. The Agencies speculate that "the challenged Idaho [forfeiture] legislation poses a similar threat." *Id*., ignoring I.C. § 42-504's limits on the place and purpose of use. In short, to the extent there is discrimination between types of stockwater right holders, that discrimination favors the Agencies.

B. Consistent with the Property Clause, the Agencies' unperfected usufructuary rights are subject to State water law

The Agencies claim the Property Clause, U.S. Const. art. IV, § 3, cl. 2, is expansive and "without limitations," arguing that their stockwater rights are property of the United States that cannot be divested except by Congress. U.S. Br. (Dkt. 34-1) 26-27, 41-42, *quoting Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

The Agencies' claim turns on the nature of the stockwater rights granted to them by the State of Idaho and their nonuse of those rights. "Because the [U.S.] Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Phillips v. Wash. Legal Found*., 524 U.S. 156, 164 (1998) (quotations and citations omitted).

In other words, the State defines the nature and scope of the Agencies' stockwater rights; the Agencies' authority over their stockwater rights is not without limitation, rendering the Agencies' reliance on *Kleppe* inapposite. Importantly, *Kleppe* was not a water rights case. It involved a dispute over state authority to manage wildlife and federal authority to manage habitat on the federal public lands, a factual setting inapposite to the Agencies' present claims and inconsistent with their limited rights in their state-law based stockwater rights. The pertinent holding of *Kleppe* in the context of state water rights is that "Although the Property Clause does

not authorize 'an exercise of a general control over public policy in a State,' it does permit 'an exercise of the complete power which Congress has over particular public property entrusted to it.'" *Kleppe*, 426 U.S. at 540. The Agencies argue that the Property Clause entrusts to Congress complete power over western states' water on public lands.[16] That expansive reading is contrary to *Kleppe*'s admonition that the Clause does not authorize Congress's general control over a State's public policy. Congress has entrusted power over the nature and scope of the stockwater rights to the states. *See* § IV(A)(2)(b), above. The nature and scope of the Agency's property interest in stockwater rights must be understood, next.

1. The United States holds only a usufructuary interest in Idaho Stockwater that may be forfeited for non-use

Idaho's Constitutional Convention adopted without debate the maxim that the use of Idaho water is a "public use, and subject to the regulations and control of the state in the manner prescribed by law." Idaho Const. art. XV, § 1; Const. Proceedings, Ex. 1, 1115. The United States, plaintiff here, ratified this provision upon Idaho's admission to the Union. Article XV, § 3, as amended in 1928, forms the foundation of Idaho's water appropriation and beneficial use requirements found in the Idaho Code provisions that the United States seeks to enjoin. It provides, in relevant part, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . ."

The Idaho Constitutional Convention debated at length the priority among competing water users. But there was little discussion and no debate over the following propositions: Taking water from a stream and using it for a particular purpose vests that water use in the user. There is no right to water and no such thing as property in water. It is a usufructuary—or use—right. If the purpose for which the water is appropriated changes, the right is lost. Const.

[16] This case does not involve federal reserved water rights on public lands.

Proceedings, Ex. 1, 1127-29 (Statement of Del. J.W. Poe). "It is just and clear . . . that a man cannot take and hold water without he does it for a useful purpose. He cannot hold it just because he has taken it; that does not give him a right . . . and if he is not using it, it must go below to the neighbor. *It is not a property, it is only a use, that we have in this water*." *Id*. at 1168 (Statement of Del. John S. Gray) (emphasis added).

In *State v. Hagerman Water Right Owners*, 947 P.2d 409 (Idaho 1997), the Idaho Supreme Court held that "Title 42 of the Idaho Code is the vehicle by which the Legislature set out to effectuate [art. XV, § 3] and other constitutional principles regarding the use and administration of water in the state." *Id*. at 416. "[T]he doctrine of beneficial use is a concept that is constitutionally recognized and that permeates Idaho's water code. . . ." *Id*. The United States has agreed that beneficial use is the proper measure of a water right and furthermore, a water right is not simply a right to use water, the use must be beneficial. *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1348, 1350 (Fed. Cir. 2013).

The Legislature has prescribed that the State's water is "essential" to the State's prosperity including all agricultural development in the State. I.C. § 42-101. The State allows appropriators to use its water if used beneficially. *Id*. at § 42-103. An appropriator's use of the State's water is not a property right, rather it is a usufructuary right appurtenant to the land to which it is applied. *Id*. at § 101. The appropriation must be for some beneficial purpose and if the appropriator fails or ceases to use the water for the beneficial purpose for which it was appropriated, the use right ceases. *Id*. at § 42-104. The Legislature has also enacted a statutory scheme whereby the Director of IDWR must inventory the water resources of the state, as well as enforce rules and regulations pertaining to IDWR's duty to conserve and develop use of the state's water resources. *Hagerman Water Right Owners*, 947 P.2d at 414 (citations omitted).

Federal laws and cases also acknowledge the limited, usufructuary nature of state water rights. *See, e.g*, 43 U.S.C. § 666(a) (consent to sue the United States regarding "rights to the use of water of a river system"); 43 C.F.R. § 4120.3-9 (regarding "use [of] water on public land for the purpose of livestock watering on public land." The Agencies have "no legal entitlement to water that is diverted but never beneficially used." *Casitas*, 708 F.3d at 1353.

Since 1903, if a stockwater appropriator fails to water its livestock for the statutory period of years, the appropriator forfeits its usufructuary right. I.C. § 42-222(2); *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 70 P.3d 669, 674 (Idaho 2003). Generally, water right forfeitures are not favored under Idaho law. *Sagewillow*, 70 P.3d at 674; State Defs.' Br. (Dkt. 43-1) 67. At the same time, however, where the rights are acquired in a manner contrary to the Idaho Supreme Court's decision in *Joyce*, Idaho's forfeiture laws should apply. I.C. § 42-501. If an Idaho district court finds clear and convincing evidence that a forfeiture has occurred, then the forfeited use right reverts to the State and is again available for appropriation. I.C. §§ 42-222(2), 224(12). The Idaho Supreme Court held that "the [Idaho] legislature has enacted a specific statute which provides for the loss of water rights for failure to apply the water to a beneficial use. I.C. Section 42-222 . . . provides for the loss of a water right for non-application to a beneficial use." *Hagerman Water Right Owners*, 947 P.2d at 416.

The Agencies cannot hold more in the bundle of rights for their usufructuary water rights than they are given by the State. At most, they possess use rights that must be perfected and are expressly subject to forfeiture for non-use.

2. Water rights must be perfected through beneficial use

If the Agencies do not perfect their use right, it is contingent and may be modified by the Legislature. The holder of a water right possesses "only an inchoate or contingent right which [is] vulnerable to being abridged or modified by law." *Hardy v. Higginson*, 849 P.2d 946, 948

(Idaho 1993), *citing and quoting Big Wood Canal Co. v. Chapman*, 263 P. 45, 52 (Idaho 1927) "Such right is merely a contingent right, which may ripen into a complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property. It is merely a consent given by the state to construct and acquire real property." The right vests when the proper steps have been taken to perfect the right. *Big Wood Canal Co.*, 263 P.2d at 52.

In *United States v. Pioneer Irrigation District*, 157 P.3d 600, 608 (Idaho 2007), the United States correctly asserted that Idaho law determines water right ownership, a position they now inexplicably oppose. The court held that a water right holder must apply the water to beneficial use before the right is perfected. *Id*. at 607. In other words, without beneficial use, there is no perfected water right and no real property. This requirement is repeated throughout the Idaho Code and explained in I.C. § 42-101, "Nature of property in water." The statute states that the right to use the State's water is "not considered as being a property right in itself." *Id*. And when the appropriator ceases to use the water for its beneficial purpose, the right ceases. I.C. § 42-104. In *McInturff*, 447 P.3d at 945, the court held that an Idaho water right can only be claimed "where it is applied to beneficial use in the manner required by law." (citations omitted). "Failure to put the water to beneficial use is fatal to [a] claim of ownership [of a] water right." *Id.* at 946. And "[m]erely allowing the tenant to use the water on the land owned by the landlord does not equate to the landlord putting the water to beneficial use." *Id*.

Here, the Agencies have failed to perfect their contingent water rights through beneficial use. Thus, their claims of ownership of property fail and with it their Property Clause claim.

3. Perfected water rights are subject to State water laws[17]

Even if perfected, a federal stockwater right remains subject to the State's retained authority over its water. In *City of Pocatello v. State (In re SRBA)*, the Idaho Supreme Court held that the Property Clause, art. IV, § 3, cl. 2, empowers Congress to dispose of the public domain, but "the states have jurisdiction to provide for the appropriation and beneficial use of the waters of the state." 180 P.3d at 1052, *quoting Twin Falls Salmon River Land & Water Co. v. Caldwell*, 272 F. 356, 357 (9th Cir. 1921), *affirmed* 266 U.S. 85 (1924) (cleaned up).

As explained above regarding the Supremacy Clause, in *Cal. Or. Power Co.*, 295 U.S. at 163, the Supreme Court held that "Nothing we have said is meant to suggest that the [Desert Land Act of 1877], 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." The Supreme Court added,

> [F]ollowing the [Act], if not before, all nonnavigable 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.

Id. at 163-64 (emphasis added).

In *California v. United States*, the Supreme Court held that the history of western water revealed a "consistent thread of purposeful and continued deference to state water law by Congress." *California,* 438 U.S. at 653. The Court noted Idaho's statutory assertion of absolute ownership over water in the state. *Id*. at 654 n.9, *citing* I.C. § 42-101. Even prior to Idaho

[17] State forfeiture procedures do not apply to stockwater rights decreed to the United States based on federal law, such as Public Water Reserve 107 rights. I.C. § 42-224(14). This renders inapposite the Agencies' citation to *United States v. State*, 959 P.2d 449 (Idaho 1998) (U.S. Br. (Dkt. 34-1) 14-15) that addressed PWR 107 water rights.

statehood, the Court stated in *United States v. Rio Grande Dam & Irrig. Co*., 174 U.S. 690, 709 (1899), "Unquestionably the State . . . has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the [river] be disturbed."

The Agencies cite *United States v. Orr Water Ditch Co*., 256 F.3d. 935, 942 (9th Cir. 2001) for the proposition that subjecting existing water rights to new state forfeiture laws raises Property Clause concerns. U.S. Br. (Dkt. 34-1) 41-42. But that decision actually supports Idaho's forfeiture framework. The Ninth Circuit examined Nevada's forfeiture statute codified in 1913 that forfeited water rights not used for a five-year period, much like Idaho's 1903 statute does, I.C. § 42-222(2). The court held that Nevadans who acquired their water rights prior to 1913 could not be subjected to the 1913 forfeiture statute lest it constitute an unlawful taking of property without just compensation. 256 F.3d at 942. In the present action, Idaho's 1903 forfeiture statute predates the existence of the Agencies and their water rights. *Orr Water Ditch Co*. amply illustrates that the Ninth Circuit will look to state water law to adjudge the United States' claims related to forfeiture. *Orr Water Ditch Co*., 246 F.3d at 941-44. The Agencies' unperfected use rights are defined by Idaho law that subjects them to modification for failure to perfect them or loss for failure to use them, fully consistent with the Property Clause.

C. The Agencies' settlement agreements did not and cannot countermand preexisting state law

The Agencies argue that Idaho's water code impairs agreements among them and ranchers settling SRBA claims. U.S. Br. (Dkt. 34-1) 27, 42-44. While they vaguely sweep "the revised Idaho statutes" within the scope of the Contract Clause, U.S. Const. art. I, § 10, cl. 1, the Agencies argue that only one statute—I.C. § 42-113(2)(b)—violates the Clause by making stockwater rights appurtenant to base property. U.S. Br. (Dkt. 34-1) 43. Without explanation, they conclude the statute undermines their agreements and lacks any legitimate public purpose.

Id. at 43-44. They do not allege any concrete injury to any right at issue in this case; instead, they fret about "wholesale divestment of federal stockwater rights." *Id*. at 44.

BLM filed three settlement agreements to make their argument.[18] Price Decl. (Dkt. 36-3). Yet, two of the agreements state that the United States will appropriate stockwater rights "pursuant to State law," *id*. at 5, 58, which includes IDWR's administration of those rights. The third is silent on this point. Appurtenancy is nowhere addressed in the agreements. The Agencies are relitigating the *Joyce* ruling, this time concerning appurtenancy, that was affirmed by other Idaho Supreme Court decisions prior to the Taylor Grazing Act and later codified in § 42-113(2)(b). *Joyce,* 156 P.3d at 513-515, *citing*, *e.g.*, *Bothwell v. Keefer*, 27 P.2d 65 (1933). If the Agencies are claiming that Idaho's forfeiture statute violates the Contracts Clause, I.C. § 42-222(2) (1903) predates their settlement agreements by 96 to 100 years. 1903 Idaho Sess. L., Ex. 2, at 234. The parties to the settlement agreements did not and could not contractually repeal statutory forfeiture of water rights for non-use, and those agreements were entered into against the backdrop of that long-extant legal framework.

The Agencies cite *Sveen v. Melin* for its two-step test to determine if a state law violates the Contract Clause. Step one asks whether the laws substantially impair the parties' contractual relationship. 138 S. Ct. 1815, 1821-22 (2018). The SRBA settlement parties' bargain was subject to preexisting Idaho law on forfeiture and appurtenancy. If the Agencies harbored expectations to the contrary, they did so unreasonably. Moreover, the Agencies could have safeguarded their rights by using them to water their livestock, which they did not do (First Am. Compl. (Dkt. 11) ¶ 28), or by entering into principal/agent relationships to acquire the rights,

[18] Significantly, the agreements state the United States will not use them "in any manner" in "any other case or controversy," nor do they represent the legal or factual position of the United States in any other case or controversy. Price Decl. (Dkt. 36-3) 9, 14, 62. Thus, the agreements are limited by their terms and are of little, if any, evidentiary value here.

Conant Decl. (Dkt. 35) ¶ 16(b); I.C. § 42-224(4).

Even if they could pass *Sveen's* first step, the Agencies stumble on step two because Idaho's stockwater laws are drawn in an appropriate and reasonable way to advance Idaho's significant and legitimate purpose of safeguarding Idaho's stockwater. *Sveen*, 138 S. Ct. at 1822. Water rights are so important to Idaho that they are enshrined in its Constitution and an entire title of the Idaho Code. The appurtenancy statute at I.C. § 42-113(2)(b) was modelled after the Idaho Supreme Court's unanimous holding in *Joyce* and its antecedents. The forfeiture statute at I.C. § 42-222(2) dates from 1903 with its antecedents in the Idaho constitutional proceedings of 1889. Const. Proceedings, Ex. 1, 1176 (Statement of Del. Willis Sweet). Idaho's significant and legitimate purposes regarding stockwater cannot be gainsaid. As the Supreme Court concluded in *Sveen*, "not all laws affecting pre-existing contracts violate the Clause." 138 S. Ct. at 1821.

D. Idaho's water laws comport with Idaho's Constitution regarding retroactivity

The Agencies argue that four Idaho statutes—§§ 42-113(2)(b) (appurtenancy), 42-222(2) (forfeiture), 42-224 (forfeiture process), and 42-504 (limits on use)—violate Idaho's Constitution, art. XI, § 12. U.S. Br. (Dkt. 34-1) 27, 44-46. The pertinent part of § 12 prohibits the Legislature from passing a law "for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation."

Analysis of statutory retroactivity is often difficult. "[A] great diversity of opinion exists in the minds of even great lawyers as to what a retroactive law would be." Const. Proceedings, Ex. 1, 1065 (Statement of Del. Alex E. Mayhew). The U.S. Supreme Court expressed similar concerns a century later in *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990), "It will remain difficult, in many cases, to decide . . . whether a particular application *is* retroactive." (Scalia, J., concurring) (emphasis supplied). Also, courts should follow the cardinal principle to construe the statutes so as to avoid a constitutional question. *Campbell v.*

United States, 809 F.2d 563, 571 (9th Cir. 1987), *citing United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982).

The Ninth Circuit held in *Campbell v. United States*, 809 F.2d 563, 571 (9th Cir. 1987) that a law is not retroactive merely because events occurring prior to its passage are implicated in subsequent proceedings under it. The Idaho Supreme Court agrees. In *Frisbie v. Sunshine Mining Co.*, 457 P.2d 408, 411 (Idaho 1969), the court likewise held, "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment…." (citation omitted).[19]

1. The Agencies argue § 42-113(2)(b) (appurtenancy) is retrospective because it is being applied to the water rights they acquired prior to the section's 2018 enactment (U.S. Br. (Dkt. 34-1) 44 n.15). But they provide no record support for this statement. The Agencies' real complaint is with the *Joyce* decision. Thus, contrary to the Agencies, there has not been any recent unconstitutional "shift" in Idaho's water law.

The Agencies conjure a constitutional violation because the appurtenancy statute's requirements are not stated in their decreed water rights. U.S. Br. (Dkt. 34-1) 44. All but two of the rights at issue predated the 2007 *Joyce* decision. Water Rights (Dkt. 13) 88, 110. The elements of a water right reported by IDWR to the SRBA court are listed in I.C. § 42-1411(2) but nowhere does the statute say these are the only elements of a water right. Indeed, the IDWR may include other provisions. I.C. § 42-1411(3). In 2007 in *Joyce*, the Idaho Supreme Court

[19] For example, "Would it be retroactive for a new rule [of evidence] to apply to a trial conducted after its enactment but dealing with an alleged crime committed before its enactment? No, because retroactivity ought to be judged with regard to the act or event that the statute is meant to regulate. Because this law was meant to regulate the admission of evidence at trial, it would be retroactive only if applied to trials completed before its effective date." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 263 (2012).

applied Idaho's common law of appurtenancy, in place since before the Taylor Grazing Act. *Joyce*, 156 P.3d at 513-515, *citing, e.g.*, *Bothwell*, 27 P.3d at 65 (Idaho 1933). The Legislature prospectively codified this long-standing common law principle in 2018, the same year it expressed its intention to codify other elements of the *Joyce* decision. 2018 Idaho Sess. L., ch. 146, § 1, p.303; I.C. § 42-501.

2. Regarding I.C. §§ 42-222(2) (forfeiture) and 42-224 (forfeiture procedures), the Agencies make only one retroactivity argument that is within the scope of the Idaho Constitution—that Idaho ranchers will benefit from forfeiture of the Agencies' water rights because the ranchers could theoretically seek to appropriate those forfeited rights. U.S. Br. (Dkt. 34-1) 46. The Agencies provide no evidence that their water rights have been forfeited under § 42-222(2). Nor is I.C. § 42-222(2) retroactive; it has been prospective since it was codified in 1903, preceding the Agencies' federal stockwater rights and even the Agencies themselves and precluding any factual predicate for retroactivity. Section 42-222(2)'s 5-year look-back for beneficial use prior to forfeiture is not retroactive.

3. Section 42-224 is also prospective, requiring procedures when IDWR receives a petition to forfeit water rights under § 42-222. *See also* I.C. § 73-101. The Agencies' reliance on *In re Hidden Springs Trout Ranch*, 636 P.2d 745 (Idaho 1981) is misplaced. U.S. Br. (Dkt. 34-1) 45. Like the unvested water permit in that case, an unperfected water right is not vested and a change in the law setting forfeiture procedures under § 42-224 is not a retroactive law.

Four petitions were filed under § 42-224(1), prompting the Agencies to file this litigation. U.S. SOF (Dkt. 37) ¶¶ 37, 39. In response, IDWR issued four show cause orders on May 13, 2022 and June 22, 2022. *Id.* If IDWR had fully processed these petitions before § 42-224 became law and the Legislature had then passed § 42-224 to alter that process, that might have

been a retroactive application of the law. But that didn't happen.

Idaho Code § 42-222(2) is not self-executing. *Sagewillow, Inc.,* 70 P.3d at 680. Consequently, § 42-224 prospectively provides procedural due process when a party asserts forfeiture of federal or non-federal stockwater rights. These procedures safeguard the Agencies' stockwater rights to the detriment of ranchers who might file petitions seeking their forfeiture by adding significant procedural hurdles before a court can forfeit a stockwater right.

4. Idaho Code § 42-504 mandates that any stockwater right on a federal grazing allotment cannot be moved off the allotment, for example to private lands, and cannot be used for any purpose other than the beneficial use for which it was granted, watering livestock on federal lands. Pursuant to I.C. § 73-101, this provision is prospective only. The Agencies incorrectly state that the provision does not apply to non-federal parties—any "holder or holders of any livestock grazing permit or lease on a federal grazing allotment" is subject to the law. Nor do the Agencies allege that any other party is benefitted by § 42-504, only that they are harmed. Without a beneficiary, Idaho Constitution Article XI, § 12 is not applicable.

E. The Agencies' sovereign immunity assertion is not a claim, not ripe, and lacks merit

1. The Agencies raise a defense as a claim and neither are ripe

The Agencies' McCarran Amendment argument contains the seeds of its undoing. They write, "As a sovereign, the United States and its agencies may only be sued when Congress has consented to suit." U.S. Br. (Dkt. 34-1) 25, *citing Block v. North Dakota*, 461 U.S. 273 (1983). Later, they posit that "a plaintiff has the burden of establishing that a specific waiver of sovereign immunity exists." U.S. Br. (Dkt. 34-1) 34. The inescapable fact is that the United States is the plaintiff in this action, not a defendant. Rather than asserting sovereign immunity as a defense to a non-existent plaintiff's non-existent claims, the United States seeks to raise this defense as a claim itself. *See* First Am. Compl. (Dkt. 11) 26 ("FIRST CLAIM FOR RELIEF

(Federal Sovereign Immunity)").

Block states the "well-established principle[]" that states cannot sue the United States absent an express waiver of immunity by Congress. *Block*, 461 U.S. at 280, 287. The United States' waiver allows plaintiffs to name the United States "as a party defendant in civil action." *Id*. at 276. The United States also cites *Miller v. Jennings*, 243 F.2d 157 (5th Cir. 1957), *cert. denied* 355 U.S. 827 (1957); U.S. Br. (Dkt. 34-1) 36. That case commenced when a municipal corporation and individuals sued the Bureau of Reclamation and others. *Id.* at 158. At issue was whether the United States had "given its consent [under the McCarran Amendment] to be joined *as a defendant* in every suit involving water rights." *Id*. at 159 (emphasis added).

The McCarran Amendment, 43 U.S.C. § 666(a), only applies where the United States is a defendant in a lawsuit. ("(a) Consent is given to join the United States as a *defendant* in any suit.") (emphasis added). At best, the Agencies are anticipating the day when they are sued by the State under I.C. § 42-224(10) following an IDWR determination that their stockwater rights have been forfeited under § 42-224(11). Numerous procedural steps precede any such suit:

- IDWR notification of any affected ranchers (§ 4)
- IDWR receipt of request for a hearing, hearing is held, and IDWR determines that forfeiture has occurred (§ 8)
- Any IDWR determination has no legal effect except as evidence of forfeiture (§§ 9, 11)
- Within 60 days after IDWR finds a forfeiture has occurred, the Idaho Attorney General must file and serve a lawsuit in state court requesting a declaration of forfeiture (§ 10)

Until these conditions precedent are met, the United States' as-applied sovereign immunity defense based on the McCarran Amendment is not ripe.

The Agencies attempt to segregate the administrative proceedings from the judicial proceedings under I.C. § 42-224 to envision a lawsuit to which their sovereign immunity defense

would apply. U.S. Br. (Dkt. 34-1) 35. The IDWR proceedings to date cannot be framed as a suit against the United States because a lawsuit, if any, can only be filed by the Idaho Attorney General and that has not occurred. I.C. § 42-224(10). Any IDWR finding would have no legal effect except as evidence in any subsequent lawsuit. I.C. §§ 42-224(9), (11). Consequently, the Agencies' claim is unripe and may be dismissed *sua sponte*.[20] *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. This deficiency may be raised sua sponte if not raised by the parties." (cleaned up)).

2. The McCarran Amendment waives the Agencies' sovereign immunity

If the Court allows this purported claim to proceed, the McCarran Amendment provides the requisite waiver of sovereign immunity for the application of Idaho's forfeiture statutes to the United States' stockwater rights. A McCarran Amendment waiver must be strictly construed in favor of the United States and not enlarged beyond the statute's requirements. *United States v. Idaho,* 508 U.S. 1, 6-7 (1993) (citations omitted). At the same time, a court should not narrow the waiver that Congress intended. *Id*. (citations omitted). The scope of the waiver can be ascertained from underlying Congressional policy. *United States v. Oregon, Water Resources Dep't,* 44 F.3d 758,765-66 (9th Cir. 1994). The waiver prevents the United States from pleading that state procedural and substantive water laws are inapplicable. *Idaho*, 508 U.S. at 8.

In *California v. United States*, the U.S. Supreme Court referenced the McCarran Amendment's legislative history and quoted the "most eloquent expression of the need to observe state water law" from the Senate Report on the bill. 438 U.S. at 678-79:

[20] If a lawsuit is filed against the United States under I.C. § 42-224(10), the preceding administrative proceedings will also fall under the McCarran Amendment waiver because they will be part of an integrated proceeding. *See* State Defs.' Br. (Dkt. 43-1) 57-60.

> Since is it clear that the States have the control of water within their boundaries, it is the 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." S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951)."

The United States obtained water rights via Idaho law and therefore must, under the McCarran Amendment, be amenable to proceedings under that law regarding administration of those rights. Also, the Agencies' position proves too much. In their view, the Agencies would *never* be subject to state forfeiture laws unless raised in the context of a general stream adjudication. But the McCarran Amendment is not so narrow.

a. The McCarran Amendment's consent to stream adjudication litigation is irrelevant to the Idaho Code provisions at issue

The McCarran Amendment, 43 U.S.C. § 666, consents to a suit against the United States for two types of suits: subsection (a)(1) adjudication of water rights of a river system and subsection (a)(2) administration of such rights.[21] The McCarran Amendment's § (a)(2) consent is the United States' recognition that it cannot avoid the administration of state water laws.

The Agencies first argue that they have not waived their immunity to a forfeiture suit under I.C. § 42-224 pursuant to the McCarran Amendment's § (a)(1) waiver for the adjudication of a river system. U.S. Br. (Dkt. 34-1) 35-37. That argument is spurious. The Agencies cite *United States v. Idaho ex rel. Dir., IDWR*, 508 U.S 1 (1993). U.S. Br. (Dkt. 34-1) 26, 34, 35. That case holds that, "The McCarran Amendment allows a State to join the United States as a defendant in a comprehensive water right adjudication." *Idaho*, 508 U.S. at 3 (citation omitted). The Idaho statutes challenged by the Agencies do not adjudicate their rights—that was

[21] In this brief, these two types of consent are referred to as "§ (a)(1)" or "§ (a)(2)" consent. These shorthand references are to the first pair of subsections (1) and (2) in the McCarran Amendment, not the second pair of subsections (1) and (2).

completed in the SRBA. They challenge administration of those rights.

b. The United States has consented to Idaho's administration of the Agencies' stockwater rights obtained through the SRBA

The McCarran Amendment subjects the Agencies to both Idaho's substantive and procedural water laws. *Idaho*, 508 U.S. at 8. Subsection (a)(2) bars the United States from pleading that Idaho laws are inapplicable to Idaho's administration of adjudicated water rights. If a lawsuit is filed in state court under I.C. § 42-224(10), it will be for the administration of water rights adjudicated in the SRBA and fall within the scope of the McCarran Amendment.

Idaho's procedures for water right forfeiture in I.C. § 42-224 are a unitary system containing two interconnecting tracks that seamlessly proceed from an IDWR administrative review to a state judicial forum within the scope of the McCarran Amendment. *See United States v. Puerto Rico*, 287 F.3d 212, 219 (1st Cir. 2002); State Defs.' Br. (Dkt. 43-1) 58-60.

In *South Delta Water Agency v. U.S. Dep't of Interior, Bureau of Reclamation*, the Ninth Circuit adopted a district court's analysis of the McCarran Amendment's § (a)(2) consent to water right administration litigation:

> To 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. Once there has been such an adjudication and a decree entered, then one or more persons . . . can . . . subject[] the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction.

767 F.2d 531, 541 (9th Cir. 1985), *quoting United States v. Hennen*, 300 F. Supp. 246, 263 (D. Nev. 1968). In *Hennen*, the district court proceedings under the McCarran Amendment's § (a)(2) waiver of sovereign immunity commenced thirty-five years after the stream adjudication.

In 1978, the Colorado Supreme Court considered § (a)(2) in a case brought against the federal government to quiet title to water rights. *Fed. Youth Ctr. v. Dist. Ct. of Cnty. of*

Jefferson, 575 P.2d 395 (Colo. 1978). The court noted nearly every McCarran case deals with § (a)(1) stream adjudications rather than § (a)(2) water right administration. *Id*. at 398. Citing *United States v. Hennen* and the Senate Report, the court held that:

> It would be difficult to draft a provision more all-inclusive than § 666(a)(2). . . In short, a suit for the 'administration' of water rights could be virtually any action concerning the status of those rights as they had been previously adjudicated. Clearly, a suit designed to determine the true ownership of a particular water right falls within this broad language since its determination affects any continued water use by each of the various claimants involved.

Id. at 398. So too, here, where a state forfeiture action would (if one is ever filed) determine if the Agencies still own their stockwater rights or if those rights revert to the State of Idaho for subsequent appropriation under I.C. § 42-222(2).

The court further held that to provide consent to suit for adjudication but not administration "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." *Fed. Youth Ctr.*, 575 P.2d at 399.

The Agencies cite *Hennen*, *United States v. District Court of County of Eagle*, other cases, and the dictionary to advance a crabbed definition of "administration" of water rights under the McCarran Amendment that would exclude I.C. § 42-224 from its scope. U.S. Br. (Dkt. 34-1) 37, n.13. They argue that § 42-224, which provides a process for forfeiture under § 42-222(2), does not administer rights, "but rather seeks to altogether take them away." *Id*. at 38. The Agencies overlook *Hennen*'s admonition to broadly construe § (a)(2) as well as the Supreme Court's holding that the § (a)(2) waiver applies to any water rights acquired by the United States through appropriation under state law, or by purchase, exchange, or "otherwise" acquired by the United States. *United States v. Dist. Crt. of Cnty. of Eagle*, 401 U.S. 520, 524 (1971), *quoting* § (a)(2). Consequently, the McCarran Amendment, 43 U.S.C. § 666(a)(2), waives the Agencies'

sovereign immunity from litigation in Idaho courts over administration of Idaho stockwater.

F. The United States is not entitled to permanent injunctive relief

1. The Court should bifurcate these proceedings if remedies are warranted

In an unprecedented request to federalize Idaho water law—contrary to longstanding principles of federalism regarding state water appropriation law and contrary to the bargain struck when Idaho was admitted to the Union—the United States seeks to permanently enjoin six Idaho water laws dating back to 1903. U.S. Br. (Dkt. 34-1) 46-53. If the Court nonetheless should find that the Agencies have prevailed on one or more of their claims, the Court should bifurcate these proceedings and invite briefing on the tailored remedy. A permanent injunction would upend the federal/state balance of power regarding Idaho water appropriation and beneficial use that has been carefully crafted over 130 years since Congress ratified the Idaho Constitution's declaration of state control over Idaho water. State Defendants explicate the effect that a ruling for the United States would have. State Defs.' Br. (Dkt. 43-1) 81.

As explained below, a federal court injunction of state law raises serious federalism, Tenth Amendment, judicial restraint, and tailored remedies concerns. These weighty considerations justify a bifurcated remedies phase that could include live testimony from legislators and state employees tasked with discharging the public's interest in Idaho's water.

2. The agencies do not meet the standard for permanent injunctive relief

The Agencies cannot obtain permanent injunctive relief unless (1) they have suffered an irreparable injury, (2) remedies at law such as monetary damages are inadequate to compensate them for the irreparable injury, (3) on balance, the Agencies deserve an injunction more than defendants deserve not to be enjoined, and (4) a permanent injunction will not disserve the public

interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (citations omitted).[22]

The U.S. Supreme Court has instructed that "principles of federalism which play such an important part in governing the relationship between federal courts and state governments . . . have applicability where injunctive relief is sought . . . against those in charge of an executive branch of an agency of [the] state." *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). "Highly contextual" considerations of comity and state agency competence are at play. *Stone v. City & County of San Francisco*, 968 F.2d 850, 860 (9th Cir. 1992). Comity requires the consideration of, without blind deference to, vindication of federal rights and interests in a manner that does not "unduly interfere with the legitimate activities of the States." *Id*. When "employing their broad equitable powers, federal courts should 'exercise the least possible power adequate to the end proposed.'" *Id*. at 861, *quoting Spallone v. United States*, 493 U.S. 265, 280 (1990); *Melendres v. Maricopa Cnty*., 897 F.3d 1217, 1221 (9th Cir. 2018) (tailoring the remedy is particularly important where it is sought against a state government). These "principles of restraint" do not automatically trump the Court's duty to enforce the U.S. Constitution, but they can be considered in fashioning a remedy appropriate to the facts of the case. *Id*.

Here, the Agencies seek an expansive, permanent injunction for alleged facial challenges to Idaho's laws on stockwater beneficial use, the purpose and place of use, and appurtenancy, First Am. Compl. (Dkt. 11) ¶ 84, and for as-applied challenges to these and three other laws addressing forfeiture, procedures for forfeiture, and an expression of legislative intent., *id*. at ¶ 83. Consequently, the Agencies claim that the Idaho Legislature has violated the federal and state constitutions as has the Idaho executive branch in its execution of the laws. *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021) (*en banc*) (*overruled on other grounds in New York*

[22] The Legislature adopts and incorporates by reference the State Defendants' remedies argument. State Defs.' Br. (Dkt. 43-1) 74-81.

State Rifle & Pistol Ass'n v. Bruen, 143 S. Ct. 2111 (2022)).

The Agencies fail the first test for a permanent injunction because they cannot succeed on the merits for the reasons stated above, § IV. The Agencies fail the second test because they do not explain how their grazing programs will be irreparably harmed when those programs direct them to comply with Idaho's laws on water right acquisition, perfection, maintenance, and administration (43 C.F.R. § 4120.3-9) and specifically forfeiture laws (Forest Service Manual, § 2541.34), as explained above, § IV(A)(1).

Nor can the Agencies show any harm due to loss of water rights for the watering of federal livestock. The "thousands of stockwater rights" they hold are "for use by such federally permitted, but privately owned, livestock." First Am. Compl. (Dkt. 11) at ¶ 28. Thus, the water does not sustain the agencies' livestock; it sustains the non-federal livestock owned by non-federal entities. The Agencies can continue to administer grazing allotments and permits without ownership of stockwater rights. *Joyce*, 156 P.3d at 521 (Non-federal ownership of stockwater rights on federal grazing allotments does not give the owner the right to interfere with the Agencies' administration of rangelands). The water will stay on the allotments for the watering livestock. There can be no "dewatering of federal lands." U.S. Br. (Dkt. 34-1) 48; I.C. § 42-504. The Agencies' fears (*id*. at 48-49) of a prior permittee preventing a current permittee from using water would be handled under the same statutory forfeiture processes that the Agencies challenge. The Agencies' concern for ranchers who want the Agencies to own the stockwater rights (*id*. at 50-51) is allayed by the statute and common law that allow ranchers to acquire water rights as an Agency's agent. I.C § 42-224(4). Lastly, the Agencies fret that the laws could lead to trespass. U.S. Br. (Dkt. 34-1) 51. This Nevada-based worry is directly refuted by *Joyce*, 156 P.3d at 520 ("Idaho law could not authorize anyone to trespass upon federal land.").

Under the third and fourth tests, the Agencies cannot balance the equities or public interest in their favor. "The Desert Land Act . . . simply recognizes and gives sanction . . . to the state and local doctrine of appropriation. . . . The public interest in such state control in the arid land states is definite and substantial." *Cal. Or. Power Co*., 295 U.S. at 164-65. Idaho's interest in control over its water dates to its territorial days. The federal public interest in Idaho's control over its water was also expressed by Congress in the Idaho Admission Act of July 3, 1890, the Federal Land Policy and Management Act, the Taylor Grazing Act, the Desert Land Act, and the McCarran Amendment, in BLM's grazing regulations and the Forest Service's water use manual, and in a bevy of federal court decisions, discussed above.

The Tenth Amendment to the U.S. Constitution precludes the Agencies from compelling the State to adopt the Agencies' latter-day reversal of that public interest via this litigation. *California*, 921 F.3d at 888, *citing Printz v. United States*, 521 U.S. 898, 925 (1997). Under the Anticommandeering Rule, a state can refuse to adopt preferred federal policies. *Id*. at 889, *citing Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018). BLM, by regulation, and the Forest Service, by agency manual, defer to state water law in their acquisition, perfection, maintenance, and administration of water rights. By this litigation, the Agencies are trying to impose their current policy preferences on Idaho and amend their deference out of their regulations and manual. But those are political, not legal, claims that cannot support the extraordinary remedy of permanent injunctive relief. Thus, the Agencies fail all four elements of the standard for permanent injunctive relief.

V. CONCLUSION

The Legislature's summary judgment motion should be granted and the Agencies' motion should be denied.

Respectfully submitted this 17th day of April, 2023.

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PROCEEDINGS AND DEBATES

OF THE

CONSTITUTIONAL CONVENTION

OF IDAHO

1889

Edited and Annotated by
I. W. HART
Clerk of the
Supreme Court of Idaho

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Exhibit 1

they will take the benefit on the one hand, and refuse to submit to the limitations of the constitution on the other. I think my friend has not carefully considered the language of section 8 (7).

Mr. MAYHEW. I don't think section 8 (7) will affect this at all. The matter was stated by the gentleman from Shoshone, Mr. Claggett, that before any corporation can have the benefit of any future action, it must accept this constitution in binding form with the secretary. That is, file what? File their charter setting forth what the corporation is for, whether railroad or any other corporation. The law in the territory now requires all corporations to file their charter,[1] having their place of business already in this territory, before they can have any effect, or have the right to sue or be sued. And this says it shall in the future be done. Section 8 (7) has no effect here. Section 13 (12) is in here for the purpose of preventing any legislature, notwithstanding they may have filed it, from taking from them any right which they may have by virtue of their charter filed with the secretary. It is to prevent the legislature passing any act in relation to those corporations that will be retroactive in its character. I hope the provision will not be stricken out.

I call the attention of the convention to the fact you will see that it is really necessary for this section to be in here to protect these institutions and other institutions against encroachment on their rights by the legislature. A great many times these things are an oversight; a great diversity of opinion exists in the minds of even lawyers as to what a retroactive law would be, and the effect of it upon individuals and corporations; but if this section remains, it settles it for all time that the legislature shall not infringe upon their rights, or destroy any rights a corporation may have acquired. The fact of the business is, if the gentleman thinks this law has no effect in the constitution because legis-

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[1]—Sec. 2587, Rev. Stat. 1887.

the committee on Agriculture and Irrigation, being number 10.

SECTION 1.

SECRETARY reads section 1, and it is moved and seconded that Section 1 be adopted. (Vote and carried).

SECTION 2.

Section 2 was read, and it is moved and seconded that section 2 be adopted. (Vote and carried.)

SECTION 3.

Section 3 was read, and it is moved and seconded that section 3 be adopted.

Mr. SHOUP. Mr. Chairman, I don't exactly understand that section, and if the chairman of the committee is present I would like to have him explain it. I understand by the reading of it that agriculture has the preference over mining.

Mr. CHANEY. Over manufacturing.

Mr. SHOUP. If any person or company has been using this water for mining, and any person desires to use it for agriculture, they shall have the preference over those using it for mining?

The CHAIR. I don't know that the chairman of the committee is present. I will say to the gentlemen that I was on that committee, and the object of putting in that clause was, that where water had been used for the three purposes from one ditch, and the water ran short, the preference should be given first to domestic purposes, household use, and next to agricultural purposes, because if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost. That is the reason why the committee saw fit to state it in that manner.

Mr. SHOUP. It would then stop any person or company from using the water for mining purposes, provided they desired to use it for irrigation?

ment? I want to ask Mr. Wilson, the gentleman from Ada, if he withdrew his first amendment to strike out all after the word "purpose"?

Mr. WILSON. I did.

The CHAIR. The secretary will read the next amendment.

SECRETARY reads: Amend section 3 in line 3 by striking out "for the same purpose."

Mr. AINSLIE. That is the amendment I offered, Mr. Chairman, and I think it renders the section more consistent with itself by striking out those words.

The CHAIR. The gentleman from Nez Perce has the floor.

Mr. AINSLIE. I was speaking to my amendment. I thought he was speaking to the one that had been withdrawn.

Mr. POE. Well, I do not wish to occupy the floor only one time, and I will give my views upon this subject, and I will come to that place in the section to which I wish to speak. "Priority of appropriation shall give the better right as between those using the water." Strike out the words Mr. Ainslie suggests "for the same purpose;" I think it is perfectly proper that should be stricken out, because this simply says this, as a proposition of law, that "priority of appropriation shall give the better right as between those using the water." Now, there is no constitution and no law, no legislature, than can deprive a citizen of a vested right. A man who has once by prior appropriation used and taken the water from a stream and appropriated it for a particular purpose, either for the purpose of mining, the purpose of agriculture, or for a manufacturing purpose, so long as he uses it for that purpose his right is vested and no law can divest him of it. "But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose."

Now, that is merely a dictum interjected here which will never probably be denied by any man who has priority of right to the use of the water. He will never deny a man who has located along that stream or ditch the use of sufficient water for cooking and drinking and to water his stock; never deny him that purpose, that right and leave him there parched, dry and thirsty for the want of that water, and use it absolutely for manufacturing purposes. While I do not pretend to say that it is even within the power of this convention to deprive that man of the use of that water which he has taken from the stream and flows along in the ditch there—while I do not pretend to say that any law would take that away from him so long as he used it for the purposes for which it was originally taken, yet, at the same time I am satisfied that no man would ever deny the family who lived on that ditch, or would permit them to perish for the want of that water, and use it for agricultural purposes. Therefore, I should not be in favor of striking out "domestic purposes." Now, the next clause: "and those using the water for agrisultural purposes shall have preference over those using the same for manufacturing purposes." Now, the right to water; no man can acquire any right to water. There is no such thing as property in water. It is what is called a usufructuary right, or the right to the use. Now, a person who apropriates a stream of water, having the first right, and conveys it along the hillside by means of a ditch to a mill, is always required and always expected at the time of its location to state for what purpose he is taking it out. He either takes it out for mining or for agricultural or manufacturing purposes. What this law is intended to get at is that the man who takes water for manufacturing purposes, and appropriates that water while it is running along there in his ditch, has the right to the use of it during the time it is passing through his ditch. The moment it leaves his ditch it becomes subject to relocation. Now, what I claim, Mr. Chairman, is this:

that so long as that man uses that water for the purpose for which he took it out of its original bed, to-wit: for the purpose of manufacturing, he has the right to use that water for that purpose. So, if he has taken it out for mining purposes he has the right to use it for that purpose; and if he has taken it out for irrigation or agricultural purposes, he has the right to use it for that purpose; but the moment the manufacturer might conceive of the time when he could make the water more profitable for irrigating purposes than for manufacturing purposes, then he loses his priority right as a manufacturer, because he undertakes to appropriate it for a purpose which he never intended when he took it, and his priority right does not come in, and those men who have located along the line of that ditch then step in and say "here, we are first entitled to the use of this for agricultural purposes." We do not propose that we shall take the ditch away from him; the right to his work can never be forfeited; but the water was taken for a specific use, the use of manufacturing. He now undertakes to say that he has a priority right to use that water for another purpose; but the law, and in my opinion is that this article, if it is adopted, will confine him to the use for which he originally took it; and I am satisfied, Mr. Chairman, that if this article is adopted it will be of great benefit. There is no use in talking about depriving a man of a vested right; you cannot do that, however much you may attempt it. The only attempt here made is this: that that man having taken water for manufacturing purposes, so long as he uses it for that purpose and that alone he has a priority right, but if he should attempt to appropriate it for another purpose, then his priority right would be gone.

Mr. SHOUP. I will say to this committee that I have no interest in any manufacturing establishment anywhere. My business is agricultural—

Mr. GRAY. What do you raise?

Mr. SHOUP. —and nothing else, and I am opposed

5 and 6, so far as it ought to be covered. I don't believe there should be absolute priority in irrigation by any claimants, but let that right be limited as it is here, and in the other sections, so that when the first man comes in and takes up the water he is not going to be allowed to play the dog-in-the-manger policy. There may be in ordinary years enough water to supply all of the people that settle along a ditch or canal, which is being distributed, but when there comes a dry season, is one-half of the farms to be absolutely destroyed because the other man has an absolute priority, or is there to be an equitable distribution under such rules and regulations as may be provided by law? And sections 5 and 6 deal specifically with that question.

Mr. GRAY. I say, Mr. Chairman, that the man first in time is first in right. If he was there first, and the water is short, it is his. If there is more than he wants, he shall not be allowed to play the dog-in-the-manger policy. That is, if he does not need the water, as a matter of course, the general law will keep him from doing that; but if he was there first, he shall be first served, and when he has supplied his needs, then his neighbors below him can be supplied, and so on down.

Mr. AINSLIE. I have read these sections carefully, and it is not provided for in any other section; but if you contemplate making the agricultural interests of the territory superior to the manufacturing interests, as proposed in the section as it stands, without this amendment, then any person, who has appropriated water for manufacturing purposes alone, and is using it for that, and during a dry season the water becomes scarce, the farmers below the line of that ditch, if they have built another ditch appropriating those same waters, could deprive the manufacturer of his prior right to that water, deprive him of a prior appropriation without compensation. I go this far in a conservative way, and say while we may give them a prior right to use the water if there is not enough for the agriculturalist and the manufacturer both, give the

vention to say that the location of a mining claim or of a piece of property, which from the very nature of it contemplates the use of this water, shall be a prior appropriation. That is the object of the section.

Mr. GRAY. I don't see how we are defending the law.

Mr. HEYBURN. It is a declaration of a right.

Mr. GRAY. As I said before, we will have this constitution bigger than the Bible before we get through. It is just and clear, and a principle that has been decided before you and I were born, I expect—not before I was, but before you were—that a man cannot take and hold water without he does it for a useful purpose. He cannot hold it just because he has taken it; that does not give him a right; it does not give the factory a right, and if he is not using it, it must go below to the neighbor. It is not a *property*, it is only a *use*, that we have in this water, and I do think that we are lumbering up what we call a constitution with all these proceedings over a matter connected with it which should be for the statutes if we desire it at all.

Mr. HEYBURN. I would like to ask the gentleman a question. Does the gentleman understand me to take the position that a man acquires title to the water itself by reason of this section?

Mr. GRAY. That is the way I understand your contention.

Mr. HEYBURN. Then the gentleman fails to comprehend the meaning of the section. I am probably as familiar with the fact as the gentleman is that the courts have universally held that the title is not to the water itself, but to the use of it; it is not a principle that is peculiarly within the knowledge of the gentleman, notwithstanding his venerable age. The doctrine that the title is in the use of the water has nothing to do with the principle that is behind this section. This section is to protect the land owner in the right to use that water when he may see fit to use it, and when he is not using it it is open to the whole world to use it.

sequent locator except a little labor to hunt up the records.

Mr. SWEET. I do not see my way clear to support the additional section offered by Mr. Heyburn, because I do not see that the person who takes up the land is compelled to use it. I do not believe in any law that permits a man to appropriate a stream of water or a mining claim or anything else and do nothing with it, and at the same time prevent other people from using their property adjoining it by simply appropriating the land or the water or anything else. Perhaps that might be treated by the legislature in such a way that if a person were to take up a tract of land as suggested by Mr. Heyburn, and did not utilize the water within a certain time he should lose it. But on the broad proposition that he can take this land and hold it as long as he pleases and practically, if not absolutely, prevent men from making improvements farther up the gulch, it strikes me as bad policy.

("Question, question.")

The vote was taken on Mr. Heyburn's proposed section and the motion was lost.

Mr. CLAGGETT. I move the adoption of Section 3 as amended. (Seconded. Vote and carried).

SECTION STRICKEN OUT.

Section 4 was read, and it was moved and seconded that it be adopted.

Mr. CLAGGETT. I move to strike it out for the reason that it is all embodied in the Bill of Rights which we had up the other day. It is a duplication. (Seconded.)

Mr. STANDROD. I will state further that the section in the Bill of Rights, the gentleman will remember, was prepared as a substitute and offered after these reports had been prepared by the joint committee on Agriculture and Mining. ("Question.") (Vote.)

The CHAIR. The chair is in doubt. (On the rising vote, ayes 24, nays 3; and Section 4 is stricken out).

GENERAL LAWS

OF THE

STATE OF IDAHO

PASSED AT THE SEVENTH SESSION

OF THE

STATE LEGISLATURE.

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SECRETARY OF STATE.

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Exhibit 2

feet per second or less, such fee shall be (5) five dollars. For all ditches or canals having a capacity of more than ten (10) cubic feet per second, such fee shall be at the rate of thirty (30) cents for each second foot of such capacity.

For examining the ditches and lands of the user at the time of making final proof of the application of water, a fee of two (2) dollars shall be paid to the State Engineer at the time of making such proof for each legal subdivision of forty (40) acres or fraction thereof to which such water may have been applied. For examining the ditches or other works and the place where such water is used, when such use is not for irrigation, a fee of five (5) dollars shall be paid the State Engineer at the time of making such examination and taking the proof of such use: *Provided,* That in the case of water used for irrigation where two or more users, whose lands join or who take water from the same common lateral, join in the publication of the notice of their intention to make such proof of application, a fee of one (1) dollar for each legal subdivision of forty (40) acres or fraction thereof receiving such water shall be paid to the State Engineer at the time of making such proof. For making certified copies of any papers on file in his office the State Engineer shall charge a fee at the rate of twenty (20) cents per folio. All fees received by the State Engineer under the provisions of this act shall be recorded in a fee book and shall at once be turned over to the State Treasurer and placed in the general fund of the State.

SEC. 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 two 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 of 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 such 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 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 and certificate shall be recorded by such 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 commmissioner 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.

SEC. 12. Any person desiring to protest against the statements made by the person or persons submitting proof of the beneficial application of water in the published notice of their intention to submit such proof, shall file a statement with the State Engineer on or before the date set for such proof, stating clearly the reason for such protest, and stating the reason, if any, why a license should