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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,	)	Case No. 1:22-cv-00236-DCN **UNITED STATES' COMBINED RESPONSE AND REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

v.

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,

and

JOYCE LIVESTOCK CO.; LU RANCHING CO.; PICKETT RANCH & SHEEP CO.; IDAHO FARM BUREAU FEDERATION, INC.,

Intervenor Defendants.

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INTRODUCTION

Years after resolution of the parties' objections and a Final Unified Decree in the Snake River Basin Adjudication ("SRBA"), the State seeks to unlawfully terminate and otherwise diminish the United States' vested, state-law based stockwater rights, including those recognized by that decree. Despite the State having settled its objections to those very rights in the SRBA and despite there being no change in the use of the rights since their decree, the State asserts that it can now redefine and take away those rights from the United States. It cannot. The United States Constitution, the State Constitution, the limited waiver of sovereign immunity under the McCarran Amendment, the SRBA settlement agreements, the SRBA's Final Unified Decree, and principles of res judicata all preclude such efforts. The challenged statutes should be declared invalid and enjoined.

Defendants and Defendant-Intervenors (collectively "Defendants") raise two principal arguments in opposition to the United States' opening brief: (1) they assert that "the United States seeks to immunize" its state law-based water rights decreed in the SRBA "from forfeiture for non-use pursuant to Idaho law," State of Idaho *et al*. ("State Defendants") Opening Br. ("State Br.") 13, ECF No. 43-1; and (2) they posit that the United States seeks to relitigate the SRBA court's Final Unified Decree "to seek rulings in federal courts that re-adjudicate the nature and extent of decreed water rights." *Id*. at 14. Defendants not only err on both counts, but also completely distort the nature of this action brought by the United States.

This case does not concern whether the United States' vested stockwater rights are categorically immune from state water law, including forfeiture. The United States recognizes that its stockwater rights are subject to valid state laws, and the United States therefore has strictly adhered to those laws in perfecting and subsequently having thousands of its stockwater

rights recognized and decreed in the SRBA over the course of decades. The United States objects in this case only to those recently enacted state laws that violate federal law and/or the Retroactivity Clause of the Idaho Constitution.

Defendants are also simply wrong in asserting that the United States seeks to relitigate any aspect of the SRBA's Final Unified Decree. On the contrary, the United States contends that that decree must remain in full force and effect as a matter of law. It is the State that seeks to circumvent the Final Unified Decree by now redefining the approximately 24,000 vested and judicially decreed stockwater rights and requiring "proof of agency agreements" between the United States and its grazing permittees to avoid their forfeiture, where none was previously required. There is no dispute that the United States has long held those water rights for the use and benefit of its grazing permittees under the federal grazing program. Now, years later, the Idaho Legislature seeks to retroactively (and unlawfully) impose additional conditions on those vested rights, most notably by creating a new process specifically designed to forfeit the United States' rights, despite there being no change in their use and despite years of adherence to the SRBA decisions setting forth the parameters of the rights decreed to the United States. These legislative efforts violate both federal and state law.

First, the State's legislative attempt to divest the United States of thousands of court decreed water rights through newly manufactured "forfeiture proceedings" violates the Supremacy Clause and the doctrine of intergovernmental immunity because these proceedings discriminate against the United States. Second, the new forfeiture proceedings violate federal law by seeking to compel the United States' participation in a targeted, collateral proceeding for which Congress has not waived sovereign immunity under the McCarran Amendment or otherwise. Because these proceedings take place outside the SRBA and seek to terminate rather

than administer the United States' decreed rights, they are neither a comprehensive adjudication of all rights on a stream system, nor administration of previously decreed rights, as is necessary for the waiver of sovereign immunity under the McCarran Amendment to apply. 43 U.S.C. § 666. Third, the challenged statutes violate the Property Clause by seeking to retroactively divest the United States of decreed property rights and retroactively impose conditions on the continued validity of those rights where Congress has not expressly and unequivocally consented. Fourth, the challenged statutes violate the Contract Clause by undermining the United States' settlement agreements and the resulting Final Unified Decree that the SRBA court issued in conformance with those settlements. Finally, the challenged statutes violate the Retroactivity Clause of the Idaho Constitution by retroactively diminishing the United States' decreed rights.

ARGUMENT

I. The United States is Entitled to Summary Judgment as a Matter of Law

A. The Challenged Statutes Unlawfully Discriminate Against the United States in Violation of the Doctrine of Intergovernmental Immunity

"The Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it." *United States v. Washington*, 142 S. Ct. 1976, 1982 (2022). Relevant to this motion, "preventing discrimination against the Federal Government lies at the heart of the Constitution's intergovernmental immunity doctrine." *Id*. at 1985. "This immunity prohibits States from enacting discriminatory laws *unless* Congress clearly and unambiguously waives it." *Id*. at 1986.

A state law discriminates against the Federal Government and those with whom it deals if "it treats someone else better than it treats them." *Washington v. United States*, 460 U.S. 536, 544–45 (1983); *see also United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (disallowing municipal ordinances that "specifically target and restrict the conduct of [federal]

military recruiters"). As the Supreme Court recently explained, "[a] state law discriminates against the Federal Government or its contractors if it 'single[s them] out' for less favorable 'treatment,' or if it regulates them unfavorably on some basis related to their governmental 'status.'" *Washington*, 142 S. Ct. at 1984 (second alteration in original) (citations omitted) (invalidating state law that "explicitly treat[ed] federal workers differently than state or private workers"). "When a state law implicates intergovernmental immunity, courts presume that Congress did not intend to allow the state law to be enforced." *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 762 (9th Cir. 2022).

State laws can discriminate against the federal government even if they do "not target the federal government alone." *Arcata*, 629 F.3d at 991 (discussing *Blackburn v. United States*, 100 F.3d 1426 (9th Cir. 1996)). Further, even a facially neutral statute may violate the doctrine where "the inevitable effect" of the statute would discriminate against the United States or its agents and leave them worse off than other regulated entities. *See U.S. Postal Serv. v. City of Berkeley*, 228 F. Supp. 3d 963, 968-69 (N.D. Cal. 2017) (discussing *United States v. O'Brien*, 391 U.S. 367 (1968) (finding that City zoning ordinance that appeared to apply to all private parties "effectively discriminate[d]" against the U.S. Postal Service "because its only effect [was] to frustrate the USPS's attempts to sell the post office")). Finally, courts do not recognize a de minimis exception to the intergovernmental immunity doctrine. *See United States v. California*, 921 F.3d 865, 883 (9th Cir. 2019) ("We agree with the United States that Supreme Court case law compels the rejection of a de minimis exception to the doctrine of intergovernmental immunity.") (discussing *Dawson v. Steager*, 139 S. Ct. 698 (2019)). If a statute has *any* discriminatory effect on the United States, the statute violates the doctrine.

Each of Idaho's recently enacted stockwater laws challenged in this action violate the

intergovernmental immunity doctrine because they discriminate against the federal government.

1. The New Forfeiture Provisions of I.C. § 42-224 Unlawfully Discriminate Against the United States

When the Idaho Legislature enacted its initial forfeiture legislation in 2018, it made it unmistakably clear that it was part of a single legislative scheme to divest the United States of its stockwater rights, including those already decreed by the SRBA. Indeed, the Legislature added its new forfeiture process to the statute now codified at I.C. § 42-501, a statute enacted in 2017 that describes the intent of the new stockwater legislation. *See* 2018 Idaho Laws Ch. 320 (H.B. 718). Among its various provisions, Section 501 recites:

- "A rancher is not unwittingly acting as an agent of a federal agency simply by grazing livestock on federally managed lands when he files for and receives a stockwater right."
- "It is the intent of the Legislature to codify and enhance" various purported holdings in "the *Joyce* case to protect Idaho stockwater right holders from encroachment by the federal government in navigable and nonnavigable waters."[1]
- "Further, in order to comply with the *Joyce* decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture pursuant to sections 42-222(2) and 42-224, Idaho Code."

I.C. § 42-501.

Taken collectively, these statements make clear that the Legislature enacted its new forfeiture proceedings, as subsequently amended and now codified at I.C. § 42-224, to target the United States' stockwater rights and to relitigate their validity, notwithstanding that the SRBA court had already decreed them as valid. The recitation of legislative intent in I.C. § 42-501 focuses on federally owned stockwater rights, not private or state-owned rights, and it describes how the Legislature targets these rights for termination in the name of preventing "encroachment" by the federal government. Further, in describing its intent to allow a

[1] As explained below, the new legislation is not required by and does not codify *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007). *See* note 3 and Section I.C.2.iii.

redetermination of whether rights "acquired in a manner contrary to the *Joyce* decision" should now be deemed invalid, the Legislature confirms that it enacted the statute to provide a process for unlawfully and retroactively divesting the United States of its vested rights because it now prefers that the SRBA court not have decreed them in the first instance. The State cannot now argue that the legislation is neutral in the face of this express articulation of discriminatory intent.

In addition to the discriminatory intent reflected in Section 42-501, I.C. § 42-224 on its face unlawfully discriminates against the United States and its decreed stockwater rights. First, it establishes a forfeiture process that applies only to stockwater rights, not other types of water rights. Legislation that creates a special process to forfeit only one type of right – while leaving all other rights subject only to the longstanding and rarely applied, general forfeiture provisions of I.C. § 42-222(2) – plainly targets stockwater rights for discriminatory treatment. The State offers no lawful justification for such discriminatory treatment, nor can it, as the special process created by this legislation reflects its discriminatory purpose, as stated in Section 42-501.

Second, the statute includes a mandatory notice provision that applies only to "federal or state grazing lands." I.C. § 42-224(4). This provision states that, if a show-cause "order affects a stockwater right where all or a part of the place of use is on federal or state grazing lands, the director must mail by certified mail with return receipt a copy of the order to show cause to the holder or holders of any livestock grazing permit or lease for said lands." *Id*. The legislation includes no similar provisions for privately owned lands, such as where a private lessee rather than the landowner holds stockwater rights on the leased lands. This provision affirms that the new administrative proceedings are not directed at the forfeiture of stockwater rights on private lands or the meaningful participation of private lessees in any proceedings that may nonetheless be commenced as to privately owned lands. Rather, by creating a process that encourages only

government permittees to participate in show-cause proceedings, the legislation again affirms that it targets government-owned stockwater rights for forfeiture. Nor is the statute saved by the fact that it also applies to state-owned lands, as statutes may still violate intergovernmental immunity where they also target other parties. *See*, *e.g.*, *Arcata, 629 F.3d at 991 (citing Blackburn*, 100 F.3d at 1435) (holding that a state statute violated the doctrine of intergovernmental immunity, even where it "did not target the federal government alone."). The inclusion of a special notice provision that applies only to federal or state grazing lands again evidences the State's discriminatory intent.

Third, I.C. § 42-224 makes clear that it solely seeks to determine whether the United States and the State hold written agency agreements with their permittees, not to create a neutral forfeiture process to determine whether there has been actual livestock watering on all grazing lands generally, whether state-, privately-, or federally owned. Specifically, for stockwater rights "where all or a part of the place of use is on federal or state grazing lands," the statute states:

> the director shall not issue an order to show cause where the director has or receives written evidence signed by the principal and the agent, prior to issuance of said order, that a principal/agent relationship existed during the five (5) year term mentioned in subsection (1) of this section or currently exists between the owner of the water right as principal and a permittee or lessee as agent for the purpose of obtaining or maintaining the water right.

I.C. § 42-224(4). By these terms, relative to federal and state lands, the forfeiture process terminates upon proof of a written agency agreement without any inquiry into actual beneficial use of stockwater on those lands. In other words, the State does not seek to demonstrate that no water is actually being used for stockwater purposes on these lands – the essence of forfeiture – but rather whether the Director has evidence of a principal/agent relationship prior to issuance of a show-cause order. Plainly, the legislation does not seek to determine actual beneficial use, but only to identify those federal or state lands for which no written agency agreements exist.

Finally, as with Section 224, generally, subsection 224(4) addresses written agency agreements only in the context of stockwater rights, not all water rights. Under longstanding Idaho law, all water rights are subject to forfeiture for non-use, *see* I.C. § 42-222(2), not just stockwater rights. There is nothing unique about stockwater rights, much less government-owned stockwater rights, that could justify such disparate treatment. In fact, for many types of rights, such as irrigation rights, the beneficial user may differ from the water rights claimant. For instance, for irrigation projects, a ditch company, irrigation district, or government agency may have appropriated water rights for the use and benefit of its shareholders or contractors, who are the ultimate end users. And yet, Section 42-224 creates an administrative process to determine the existence of written agency agreements only as to stockwater rights on federal or state grazing lands, not as to private lands and not as to other water uses, such as irrigation. Such targeted legislation violates the doctrine of intergovernmental immunity.

2. I.C. §§ 42-113(2)(b), 42-502, and 42-504 Facially Discriminate Against the United States by Singling it out for Less Favorable Treatment

Sections 42-113(2)(b), 42-502, and 42-504 likewise facially violate the United States' intergovernmental immunity because they each single out the federal government for unequal treatment, and there is no set of circumstances under which the statutes would be valid.

i. I.C. § 42-113(2)(b) discriminates against the United States by only applying to federal lands and by making stockwater rights on federal lands appurtenant to private property

Section 42-113(2) applies to stockwater rights "associated with grazing on federally owned or managed land" and now requires that "[t]he water right shall be an appurtenance to the base property." *See* I.C. § 42-113(2)(b). The statute facially discriminates against the United States because it applies only to stockwater rights on federally owned land (not privately or State-owned land) and treats those rights less favorably than other stockwater rights by making

them appurtenant to private land, rather than their place of use, which is, and has been since at least 1900, a tenet of Idaho water law. *See Follett v. Taylor Bros.*, 294 P.2d 1088, 1094 (Idaho 1956) (citing cases for Idaho's "appurtenance doctrine"); I.C. § 42-101 (water rights "shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied"); I.C. § 42-1402 ("In allotting the waters of any water system by the district court according to the rights and priorities of those using such waters, such allotment shall be made to the use to which such water is beneficially applied, except where water rights established under federal law are involved, in which case the allotment shall be made in accordance with federal law. The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used . . . ."). The SRBA court previously decreed thousands of these rights to the United States in accordance with Idaho's appurtenance doctrine without any such requirement, which is at odds with this tenet of Idaho water law. The State's new enactments purport to retroactively change these rights by redefining this element of the rights and shifting their control to private parties.

State Defendants contend that because the statute does not contain any expressly retroactive language, "it clearly applies only prospectively." State Br. 71.[2] Assuming the State now concedes that the statute only applies to new stockwater rights acquired after the enactment of the statute, not valid existing rights that pre-dated it, the law still unconstitutionally discriminates against the United States. In emphasizing the statute's allegedly prospective effect, State Defendants focus on the wrong issue for the discrimination analysis. The relevant question here is instead whether the law singles out the United States for unequal treatment on its face.

[2] Citations to ECF filings are to the ECF pagination, not the internal pagination on the filings.

This law clearly does. Based on the explicit language in the statute, the new appurtenancy rule would never apply to private- or state-owned lands, so the law will always treat others "better" than it treats the United States. *Washington*, 460 U.S. at 545. Under the new statute, stockwater rights on federally owned or managed lands are appurtenant to the grazing permittees' property, even new stockwater rights acquired in the name of the United States through an agency agreement. No such limitation applies to stockwater rights associated with private- or state-owned lands, such as those leased to a third party for grazing. There are no circumstances where the law could have a nondiscriminatory application.[3]

ii. I.C. § 42-502 facially discriminates against the United States by requiring ownership of livestock as a condition to the acquisition of stockwater rights by the federal government, but not other claimants

Section 42-502 is also facially discriminatory because it prohibits any agency of the federal government, but no other entity, from acquiring new stockwater rights "unless the agency owns livestock and puts the water to beneficial use." State Defendants argue Section 42-502 is not facially invalid because it can be constitutionally applied based on the *Joyce* decision. State Br. 73. Private Intervenors also argue that the statute only codifies *Joyce*. Priv. Br. 20. Both are

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[3] Contrary to the contentions of State Defendants (State Br. 71-72) and Defendant-Intervenors Joyce Livestock Co. *et al.* ("Private Intervenors") (Private Intervenors' Opening Brief ("Priv. Br.") 20-21, ECF No. 55), Section 42-113(2)(b) does not merely codify *Joyce*, as nothing in *Joyce* requires that the United States be subjected to the discriminatory treatment that appears on the face of the statute. The Court in *Joyce* held that "[u]nder Idaho law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right." 156 P.3d at 519. But this holding did not require that stockwater rights acquired *in the United States' name* through an agency agreement (or otherwise) be appurtenant to the grazing permittees' base property. The State's contention that, under *Joyce*, "*when a federal permittee* establishes a new stockwater right on federal land" through the constitutional method of appropriation, "it is 'appurtenant' to the permittee's 'base property' as a matter of law," says nothing about stockwater rights held by the United States. State Br. 71 (emphasis added). Section 42-113(2)(b) goes far beyond *Joyce* and discriminates against the United States in violation of its intergovernmental immunity by creating a different rule for stockwater rights on federal lands.

wrong. *Joyce* does not require the explicit discrimination against the United States expressly set forth in Section 42-502. *See* U.S. Opening Brief ("U.S. Br.") 30-31, ECF No. 34-1. Further, as *Joyce* acknowledges, stockwater rights may be acquired in the United States' name where its grazing permittee acts as its agent. *Joyce*, 156 P.3d at 519. Yet Section 42-502 does not allow this. Finally, *Joyce* only applied to instream stockwater rights on undeveloped sources acquired through the constitutional method of appropriation, not to developed stockwater rights or to stockwater rights acquired by permit. U.S. Br. 30-31. Again, Section 42-502 is not so limited. Thus, Section 42-502, like Section 42-113(2)(b), does not merely codify *Joyce* – it goes far beyond that decision by singling the United States out for less favorable treatment and precluding it from obtaining new stockwater rights, even where other landowners could do so through an agency agreement. State Defendants' and Private Intervenors' attempts to use the *Joyce* decision as a justification for discriminating against the United States fail.[4]

iii. I.C. § 42-504 discriminates against the United States by prohibiting changes to the type or place of use of stockwater rights held by federal agencies or their grazing permittees

Section 42-504 is likewise facially invalid because it prohibits the United States and its permittees, but not other water right holders, from changing the purpose or place of use of their decreed stockwater rights. Specifically, the law unlawfully limits only the United States and its permittees from using stockwater rights "for any purpose other than the watering of livestock on the federal grazing allotment that is the place of use for that stockwater right." I.C. § 42-504.

State Defendants argue these limitations on changes "have always been part of Idaho's water code." State Br. 73; *see also* Priv. Br. 29 ("Earlier Idaho stockwater permits and licenses

[4] Private Intervenors also argue that Section 42-502 is not subject to an as-applied challenge because the statute has not been applied to the United States. Priv. Br. 19. But the United States has not brought an as-applied challenge to that statute.

to the United States were conditioned on compliance with these terms."). Defendants are incorrect. As they acknowledge, the pre-2017 version of Idaho Code § 42-501 stated "*any permit or license* issued to the BLM [Bureau of Land Management] for stockwatering on the public domain 'shall be conditioned that the water appropriated shall never be utilized thereunder for any purpose other than watering of livestock without charge therefore on the public domain.'" State Br. 73 (citing 1939 Idaho Sess. Laws 412-13) (emphasis altered). Defendants' argument fails to account for the fact that the quoted statutory language did not apply to the vast majority of the United States' previously perfected stockwater rights, including those decreed in the SRBA, because those rights were generally acquired through the constitutional method of appropriation, not a permit or license. Section 42-504 applies a new rule to those existing rights.

Further, prior to the recent enactment of Section 504, the United States could change these decreed stockwater rights pursuant to Section 42-222, which provided an administrative process for all water right holders to apply for changes to their water rights, including changes in purpose and place of use. However, with the enactment of I.C. § 42-504, the United States may not now utilize the statutory change process, even though it remains available to the State and private parties. In any event, even if prior Idaho law were also discriminatory, this would only mean that such prior law also violated the United States' intergovernmental immunity. Because Section 42-504 is a new prohibition that unlawfully targets the United States for discriminatory treatment, the statute facially violates the doctrine of intergovernmental immunity.

3. None of Defendants' Other Arguments Defeat the United States' Showing of Discrimination and Violation of Intergovernmental Immunity

i. The United States does not assert obstacle preemption

In their opening argument, Defendant-Intervenors Idaho House of Representatives *et al.* ("Legislature Intervenors") contend that the United States actually seeks to invalidate the

challenged statutes based on obstacle preemption rather than intergovernmental immunity. Legislature Intervenors' Opening Brief ("Leg. Br.") 13-17, ECF No. 54. This is a straw-man argument. Nowhere does the United States assert obstacle preemption as a basis for invalidating the Legislature's newly enacted forfeiture statute, and the Court should assess the United States' motion based solely on the merits of the actual arguments it raises, including intergovernmental immunity. Though the United States identifies various harms to the federal grazing program that would result from allowing the State's unlawful legislation to stand, those harms pertain to the United States' entitlement to injunctive relief rather than any challenges based on obstacle preemption. If anything, the Legislature's argument on this point only highlights its recognition that the presumption favors the federal agencies in their intergovernmental immunity challenge, a point that the Legislature apparently wishes to reverse by seeking to saddle the United States with an argument it does not make.[5] *Id*. at 14 ("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.").

ii. I.C. § 42-224 violates intergovernmental immunity and impairs the United States' interests, both on its face and as applied

[5] The Legislature goes so far as to remarkably contend that the termination of the thousands of stockwater rights decreed to the United States will somehow have no adverse effects on the federal grazing program and, as supposed evidence of this contention, notes that the BLM and Forest Service had never suggested that Idaho laws might interfere with the grazing program until these lawsuits. Leg. Br. 16-17. Of course, the federal agencies had no occasion to challenge the laws until the Legislature enacted its recent statutes. Nor is the Legislature correct that "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." *Id*. at 16 n.9. The United States perfected the rights long before the commencement of the SRBA, as evidenced by their much earlier priority dates, and the SRBA merely confirmed their existence. The flatly incorrect suggestion that these rights are of recent vintage does not justify the State's attempts to use this legislation to retroactively diminish longstanding federally-owned stockwater rights.

The State Defendants contend that the United States has not shown how I.C. § 42-224 is either facially invalid or has been unconstitutionally applied.[6] State Br. 61-62, 64-70. The State is incorrect. For the reasons explained above, I.C. § 42-224 is unlawful on its face, as it discriminates against the United States by targeting federally owned stockwater rights for forfeiture. Given this, "no set of circumstances exists under which [the] statute would be valid" relative to the United States' intergovernmental immunity claim. *Id*. at 63 (cleaned up). And, consistent with the unlawful directive in the statute, the State is also unlawfully applying the statute to the United States through its show-cause orders, in which the Director determined that petitioners have made a *prima facie* showing of forfeiture based solely on lack of evidence of a written agency agreement.

The State Defendants contend that "Idaho Code § 42-224 is a purely procedural statute that expressly incorporates and confirms the well-established standards of Idaho Code § 42-222(2)." *Id*. at 43; *see also* Priv. Br. 28-29 ("I.C. § 42-224 is, as its text demonstrates, a purely procedural statute, and effects no substantive change whatsoever to the long-established legal standards by which the United States has (or has not) forfeited any stockwater rights by lack of beneficial use."). Not so. The new forfeiture statute discriminates against the United States by creating a process expressly designed to terminate the United States' decreed rights based solely on the lack of written agency agreements, not to create a neutral forfeiture process to determine whether there has been actual livestock watering on federal grazing allotments. Nor are the Private Intervenors correct in contending that the show-cause orders issued by the Idaho Department of Water Resources ("IDWR") have "no legal effect on the United States" because

[6] The State makes these same arguments for I.C. § 42-222(2), but the United States does not challenge that statute in this case.

they only serve as *prima facie* evidence in judicial proceedings. Priv. Br. 29. By effectively changing the burden of proof and requiring the federal agencies to defend against an unlawful forfeiture proceeding, the orders have a substantive and adverse legal effect on the United States.

The Legislature Intervenors argue that I.C. § 42-224 does not discriminate against the United States because "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." Leg. Br. 23. Likewise, Private Intervenors contend that this provision treats the United States and the State better than other stockwater right holders because "[t]hey would otherwise be subject to a show-cause letter even if the director were in possession of such evidence" as a written agency agreement. Priv. Br. 22. This argument overlooks that the United States' stockwater rights would not even be at issue, but for the targeting of the rights under the new forfeiture legislation. A process designed to result in the mass forfeiture of the rights plainly does not benefit the United States. Indeed, the statement of discriminatory intent in I.C. § 42-501 and the many ways in which the statute targets the United States' stockwater rights for forfeiture, but not private rights and not water rights held for other purposes, belie these attempts to put a positive spin on an inherently discriminatory statute.

These same factors likewise rebut the Legislature's contention that I.C. § 42-224 "at most incidentally 'target[s]' a federal activity in an innocuous fashion and is not discriminatory." Leg. Br. 26 (citation omitted). It is unsupportable to suggest that the specific targeting and permanent termination of the United States' long-held and heavily relied upon stockwater rights is either "innocuous [or] nondiscriminatory." Finally, the Private Intervenors' contention that, but for Section 42-224(4), the Director would otherwise proceed with a show-cause letter against the

United States, even if in possession of an agency agreement, ignores that the statute's purpose, as reflected in I.C. § 42-501, is to divest the United States of its decreed rights for lack of such an agreement. Again, there would be no forfeiture proceeding in the first place, but for this statutory directive. The Defendants' inaccurate contentions that I.C. § 42-224(4) benefits the United States defy the statute's inherent hostility to the federal agencies' stockwater rights.[7]

Likewise, State Defendants err in contending that I.C. § 42-504 does not discriminate against the United States because it actually benefits the federal grazing program by ensuring that stockwater rights on federal lands can never be moved off those lands or used for other purposes. State. Br. 74. But the State Legislature has no authority to dictate how the United States' interests are best served. Surely, the State would not argue that imposing such restrictions on stockwater rights on private lands would benefit all private landowners because they have an interest in ensuring that their rights remain available only for their current use at their current location in perpetuity. Plainly, restrictions that apply only to stockwater rights on federal lands unlawfully discriminate against the United States.

The State Defendants contend that "[i]t is well established, as the United States admits, that legislative intent or 'motive' is irrelevant to an Intergovernmental Immunity analysis." State Br. 65. The State is mistaken on multiple levels. First, the United States did not characterize motive as "irrelevant" to the analysis. The cited portion of the United States' opening brief states:

> State laws can discriminate against the federal government even if they do not appear to do so in the text of the statute. . . . And, while a discriminatory *motive* alone is not enough to violate the intergovernmental immunity doctrine, a facially-neutral statute may violate the doctrine where "the inevitable effect of a

[7] The Private Intervenors also argue that I.C. § 42-224(14) favors the United States because it exempts from the provisions of the section "stockwater rights decreed to the United States based on federal law." Priv. Br. 23. Of course, the United States does not challenge this provision – which merely reflects established federal law – as discriminatory. But the lawfulness of this provision does not negate the discriminatory effect of the other challenged aspects of the statute.

> statute" would discriminate against the United States or its agents and leave them worse off than other regulated entities.

U.S. Br. 29 (citations omitted). Put differently, if a state law is neutral on its face, proof of discriminatory motive alone is not enough to show that the law violates intergovernmental immunity. But discriminatory motive can still be relevant, where, as here, the discriminatory intent is expressly stated in the statutory text of Section 501 and shows how the new forfeiture proceedings will have their intended effect – namely, the termination of thousands of stockwater rights owned by the United States. The discriminatory intent expressed by I.C. § 42-501 further supports a finding that the new forfeiture proceedings are unlawful.

The State Defendants argue "nothing in Idaho Code §§ 42-222(2) or 42-224 states that stockwatering by federal permittees 'no longer … constitute[s] beneficial use.'" State Br. 44 n.30. However, the State fails to disclose that it is plainly applying the statutes to disallow evidence of beneficial use by cattle owned by federal permittees, absent proof of an agency agreement. Tellingly, the State never disclaims an intent to apply the statute in this manner. In fact, IDWR's granting of the petitions that led to the filing of this case confirms that is precisely how the State is applying the statute. As the State Defendants acknowledge, based upon information before IDWR, including particularly allegations in the petitions that "the United States had not grazed or watered its own livestock on" the allotments at issue and "the Petitioners had not acted as agents of the United States for purposes of acquiring the stockwater rights [,] . . . the Director determined there was 'prima facie' evidence that sixty-eight (68) of the United States' state law-based stockwater rights had been lost to forfeiture pursuant to Idaho Code § 42-222(2)." *Id*. at 26-27 (citation omitted). Granted, the State is correct that "[o]nly the SRBA District Court can legally determine if the stockwater rights have been forfeited." *Id*. at 62. But this does not change the fact that IDWR is applying Section 42-224 in an unlawful manner by

making forfeiture determinations without any inquiry into whether livestock watering continues on the grazing allotments at issue. The United States should not be subjected to the burdens of defending itself in these unlawful proceedings simply because the Idaho Legislature has decided it wants to allow opposing parties a second opportunity to challenge federal stockwater rights decreed in the SRBA.

The State Defendants assert that reserved rights "are the *only* stockwater rights that Congress deemed necessary to support grazing programs on federal public lands in Idaho." State Br. 32. This misstates the law and reveals that the State's underlying motive in the challenged legislation is to defeat federal ownership of state-law based stockwater rights. As the SRBA court confirmed through its decree of thousands of stockwater rights to the United States for use in connection with the federal grazing program, the United States is entitled to ownership of stockwater rights under both federal and state law.

The Private Intervenors contend that, "[u]nless and until the unlikely event that a court applies this statute retroactively to such decreed rights, the United States' challenge is not ripe. This Court therefore lacks jurisdiction to hear it." Priv. Br. 26. Similarly, Legislature Intervenors assert that the federal agencies "do not allege any concrete injury to any right at issue in this case; instead, they fret about 'wholesale divestment of federal stockwater rights.'" Leg. Br. 36 (quoting U.S. Br. 44). But the Legislature has made clear its intent to seek large-scale termination of these rights through its statements in I.C. § 42-501. And IDWR has affirmed this intent by initiating the statutory forfeiture process for the rights that are subject to the show-cause orders, notifying the federal agencies of these proceedings, and determining that petitioners have made a *prima facie* showing that the United States has forfeited the rights at issue under those orders. It is only by virtue of the stay of those administrative proceedings to

allow resolution of this case that those proceedings have not concluded. Absent an order enjoining enforcement of I.C. § 42-224, the United States faces actual and imminent risk of having its rights forfeited. Where its stockwater rights are subject to show-cause orders, the government should not have to wait for judicial invalidation of the rights before seeking recourse against these unlawful proceedings.

The Legislature Intervenors assert "[t]he entire regulatory system must be analyzed to determine whether it is discriminatory[,]" but "[t]he Agencies have not alleged that the entire Idaho water code discriminates [against] them; indeed, they availed themselves of it to obtain 24,000 stockwater rights through the SRBA." *Id*. at 20. This argument incongruously faults the United States for proceeding in conformity with state law in the SRBA, while not now challenging Idaho's entire water code in these proceedings. It goes without saying that the United States need not challenge every water law ever enacted by the Legislature to succeed on its intergovernmental immunity claim. The United States has properly challenged only recently enacted state water laws that unlawfully discriminate against it on their face and as applied.

iii. Congress has not waived intergovernmental immunity from discriminatory state laws

The Legislature Intervenors contend that "[t]here could be no clearer waiver by Congress of its immunity from Idaho's water laws" than Congress's declaration that Idaho's Constitution, which states "the use of all waters in the state to be a 'public use, and subject to regulation and control by the state,'" conforms "with the Constitution of the United States." *Id*. at 19. (citations omitted). The Legislature improperly conflates two distinct concepts – state water law and intergovernmental immunity. Congress's approval of the Idaho Constitution, including its general provisions pertaining to water law, does not constitute consent to future legislation expressly discriminating against the United States. Nor does the State fare any better in pointing

to language in several other federal statutes – for instance, the statement of non-interreference with existing rights in the Taylor Grazing Act of 1934 and language in the Federal Land Policy and Management Act of 1976 that the statute did not expand or diminish federal or state "jurisdiction, responsibility, interests, or rights in water resources development or control" – as somehow waiving intergovernmental immunity from state water law. *Id.* (citations omitted). The cited provisions generally only preserved existing rights and the status quo relative to federal and state control over water resources. However, those matters are not at issue here, as the United States does not seek to terminate any existing third-party rights in these proceedings and has proceeded in conformity with state water law in acquiring its state-law based stockwater rights. Rather, the United States asserts intergovernmental immunity only as to the Legislature's recently enacted statutes, for which Congress has not given its consent. The cited statutes in no way consent to discrimination against the United States in the area of water rights legislation.

B. The United States is Not Subject to Idaho's Forfeiture Proceedings Because it has not Waived Sovereign Immunity Under the McCarran Amendment

Under the McCarran Amendment, the United States may be joined only to comprehensive general stream adjudications to determine competing state water rights claims within a river system, and for the subsequent administration of the rights determined in the prior general stream adjudication. 43 U.S.C. 666(a). The Idaho forfeiture proceedings do not constitute a general stream adjudication nor the subsequent "administration" of water rights decreed in the SRBA. Therefore, the United States has not waived its sovereign immunity.

1. The Idaho Forfeiture Proceedings do not Constitute a Comprehensive Water Rights Adjudication and are not Part of the SRBA

A general stream adjudication must be "comprehensive" to satisfy Section (a)(1) of the McCarran Amendment. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S.

800, 819 (1976) (the McCarran Amendment "bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights. . . ."). To be comprehensive, an adjudication must include "all" water right claims on a stream system. *Dugan v. Rank*, 372 U.S. 609, 618-19 (1963) (McCarran's waiver does not apply when "all of the claimants to water rights along the river are not made parties," or when "priorities [are not] sought to be established."). Proceedings that resemble a private suit, with just a few parties, are not comprehensive for purposes of the McCarran waiver. *See United States v. District Court In and For Water Div. No. 5*, 401 U.S. 527, 529 (1971) (The McCarran Amendment "does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants.").

The SRBA falls within the waiver of sovereign immunity under the McCarran Amendment because the SRBA is a comprehensive general stream adjudication of the Snake River system to which all claimants within the system were joined. *See* Final Unified Decree at 8 ¶ 4, ECF No. 45-2 ("The United States is a party to *this* proceeding under 43 U.S.C. § 666.") (emphasis added). The forfeiture proceedings, by comparison, are not a comprehensive general adjudication because, *inter alia*, they do not include all claimants or water rights on the stream system. The Legislature set up the new forfeiture scheme after the SRBA primarily concluded,[8] not with the goal of adjudicating all water rights on a stream system for potential forfeiture, but to terminate previously decreed stockwater rights held by the United States.

The forfeiture proceedings also do not comply with Title 42, Chapter 14 of the Idaho Code, which governs the adjudication of water rights in Idaho. *See* Idaho Code §§ 42-1401 et seq. The SRBA complied with these requirements, *see* Final Unified Decree at 6 ¶ 6, but the

[8] While the Final Unified Decree is conclusive as to claims above the statutory *de minimis* standard, the SRBA is still adjudicating *de minimis* claims that some claimants elected to pursue.

new forfeiture procedures are conducted entirely outside this adjudication scheme. These procedures include none of the elements of the Idaho adjudication scheme, including, for example, joinder of "all" water rights claimants (I.C. § 42-1408(c)), examination of the "water system" and claims (I.C. § 42-1410), the Report of the Director on the "water system" (I.C. § 42-1411), the filing of objections to the Director's Report and responses to objections (I.C. § 42-1412), and the filing of a final decree (I.C. § 42-1413). Instead, the forfeiture proceedings involve only a limited number of parties, a limited number of water rights, and far less than all claims on a stream system. *See* I.C. § 42-224(10) ("the stockwater right holder [] shall be named as the defendant."). In fact, far from involving all competing water right claimants, the proceedings require individual motions to intervene rather than automatic joinder from interested third parties who seek to participate. The State of Idaho is not examining all claims in the Snake River Basin; it is targeting a subset of the stockwater rights in the Basin with the stated intent of terminating those rights. In effect, the statutory scheme established under I.C. § 42-224 mirrors a traditional two-party, plaintiff-defendant proceeding, not a comprehensive general stream adjudication. The forfeiture proceedings therefore do not fall within the limited waiver of sovereign immunity in Section (a)(1) of the McCarran Amendment.

Instead of arguing that the forfeiture proceedings constitute a comprehensive general adjudication under Section (a)(1), State Defendants and Private Intervenors contend no additional waiver of sovereign immunity is needed because the United States' waiver for the SRBA can be used for the forfeiture proceedings through the SRBA's retained jurisdiction provision. State Br. 53-54; Priv. Br. 16. Although the SRBA and forfeiture proceedings are conducted by the same state court, that is where the overlap ends, as the forfeiture proceedings

are entirely outside the scope of the SRBA and the McCarran Amendment's waiver.[9] The SRBA's retained jurisdiction provision simply does not apply because the forfeiture proceedings constitute neither a comprehensive adjudication of water rights nor, as discussed below, the administration of rights previously decreed in the SRBA.

Under Defendants' argument, the United States' waiver of sovereign immunity under the SRBA includes any state proceeding that relates in any way to the United States' water rights decreed in the SRBA. But that overly broad reading of the McCarran Amendment contradicts congressional intent and violates the tenets of statutory construction. *See S. Delta Water Agency v. United States*, 767 F.2d 531, 542 (9th Cir. 1985) ("The McCarran Amendment was . . . not an attempt to resolve the whole field of water rights litigation."); *see United States v. Idaho*, 508 U.S. 1, 6-7 (1993) (McCarran's waiver must be strictly construed in favor of the United States). In sum, State Defendants fail in their attempts to bootstrap and extend the United States' limited waiver of sovereign immunity in the SRBA into a wholly different proceeding.

2. The New Forfeiture Proceedings do not Constitute "Administration" Under Section (a)(2) of the McCarran Amendment

Under Section (a)(2) of the McCarran Amendment, the United States waives its sovereign immunity for "any suit" for the "administration of such rights" decreed in a comprehensive adjudication such as the SRBA. 43 U.S.C. § 666(a). The Idaho forfeiture proceedings do not constitute such a suit to administer water rights previously decreed in the SRBA, but instead seek to altogether terminate the vested federal property rights. Congress did

[9] State Defendants cite *Klump v. United States*, 50 Fed. Cl. 268, 271-72 (2001), to argue "[n]o additional waiver of sovereign immunity is necessary." State Br. 54; *id*. n.36. However, *Klump* is clearly inapposite, as it dealt with the BLM's application to a state agency to have privately held water rights transferred, which the private entity wrongly attempted to claim amounted to a Fifth Amendment "taking." It thus addressed what could be a taking, rather than the waiver of sovereign immunity under McCarran in a water rights adjudication.

not subject the United States to such piecemeal adjudication of the continued validity of the United States' previously decreed rights. Quite the contrary, "[t]he clear federal policy evinced by . . .[the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." *Colo. River*, 424 U.S. at 819. "Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings." *Id.* (citation omitted). Here, construing "administration" to include the selective re-adjudication of particular claims for the purpose of terminating them would squarely violate the policy established by Congress. As the Ninth Circuit has held, "[t]o administer a decree [for McCarran Amendment purposes] is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *See S. Delta*, 767 F.2d at 541 (citation omitted). This definition excludes from a "suit for administration" a newly minted proceeding instituted precisely to terminate rights decreed in the prior adjudication.

State Defendants and Intervenors nonetheless advocate for an expansive reading of "administration" under this section, arguing that the forfeiture proceedings are the type of proceeding Congress envisioned in Section (a)(2). State Br. 54-57; Leg. Br. 44-45; Priv. Br. 16. But "a condition to the waiver of sovereign immunity . . . must be strictly construed." *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 94 (1990). And, particularly for an application of state law that threatens to result in the impairment or divestiture of federal property interests, for a waiver of sovereign immunity to apply, the language must be "unequivocal" in its expression of congressional intent to subject federal property to that impairment or divestiture. *United States v. Lewis Cnty.*, 175 F.3d 671, 677-78 (9th Cir. 1999).

In *Lewis County*, the United States challenged the County's imposition of "taxes, interest and penalties upon twenty parcels of farm property acquired by the" Farm Services Agency

("FSA") and its subsequent foreclosure "on one of the parcels," *id.* at 673, allegedly under the authority of 7 U.S.C. § 1984. Section 1984 "partially waives the immunity of the federal government from state taxation by authorizing state and local governments to tax farm property owned by the [FSA] 'in the same manner and to the same extent as other property is taxed.'" *Id.* at 673. The United States argued Section 1984 did "not authorize the County to collect interest and penalties, or to foreclose in the event of delinquency." *Id.* at 674. The Ninth Circuit agreed.

In so holding, the Court cited precedent in which "[t]he Supreme Court has . . . repeatedly stated that waivers of sovereign immunity must be strictly construed in favor of the sovereign." *Id*. at 677 (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992); *McMahon v. United States*, 342 U.S. 25, 27 (1951)). The Court concluded that the language in Section 1984 consenting to state taxation of FSA property "in the same manner and to the same extent" as private property did not "unequivocally consent" to the assessment of interest and penalties against the United States. 175 F.3d at 677. The Court reasoned that, instead of consenting to interest and penalties, this language could instead "refer to the time when the tax is due, the manner of valuation, or any number of other elements of the state taxing process other than the imposition of interest, penalties and foreclosure." *Id.* at 677-78. The Court held "[t]his plausible interpretation is sufficient to render the phrase 'in the same manner' ambiguous and preclude us from accepting it as an unequivocal waiver of immunity from" interest and penalties. *Id.* at 678.

The Court likewise ruled that Section 1984 did not consent to foreclosure due to the FSA's failure to pay state taxes. The Court reasoned that "[f]oreclosure against federally-owned property is a suit against the United States, which cannot be prosecuted without its consent." *Id.* (citing *United States v. Alabama*, 313 U.S. 274, 282 (1941)). As with the County's attempted assessment of interest and penalties, the Court concluded "we cannot accept that phraseology as

an unequivocal waiver of immunity." 175 F.3d at 678.

Lewis County and other governing precedent require an "unequivocal" expression of congressional intent to subject federal property to impairment or divestiture. Defendants wholly fail to meet this standard, as Section (a)(2) does not unequivocally state that Congress intended to subject the United States to collateral, post-adjudication forfeiture proceedings that are in effect private suits to terminate the United States' decreed rights. Simply put, "administration" of the rights under Section (a)(2) does not unequivocally include termination of the rights. A strict construction of "administration" precludes such a reading.

The SRBA court has confirmed that it shares this interpretation. Before the SRBA court entered the Final Unified Decree, the court issued a decision that addressed numerous challenges to its form and content ("SRBA Order"). *In re SRBA, Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree* (June 28, 2012, Id. Dist. Court), attached as Ex. A. Relying on an Idaho Supreme Court case, the SRBA Order clarifies what constitutes administration under Idaho law:

> The Court [in *American Falls Reservoir Dist. #2 v. IDWR*, 154 P.3d 433 (Idaho 2007)] acknowledged the difference between water rights administration and water adjudications: 'water rights adjudications neither address, nor answer, the questions presented in delivery calls.' Further that water adjudications do not determine whether waste is taking place or how each water right on a source actually is diverted and used and how it affects rights on that source.

SRBA Order 15 (quoting *American Falls*, 154 P.3d at 447 (internal citations omitted)). Thus, according to the SRBA court, administration includes "delivery calls" on the stream and determinations about "whether waste is taking place" and "how each water right on a source is diverted and used and how it affects [other] rights on that source." Adversarial proceedings that target government-owned stockwater rights for forfeiture based on the existence (or lack thereof) of an agency agreement do not fall into any of these categories.

The SRBA court further explained that its tolling of the forfeiture period during the pendency of the adjudication did not address any water rights administration matters:

> [T]he tolling rule was limited solely to preventing forfeiture actions that relied on any period of nonuse following the filing of the claim through the entry of partial decree. The tolling rule did not address water rights administration and what evidence of pre-decree use, if any, may or may not be relevant in any subsequent administrative proceeding. Given this limited purpose, the Court rejects the argument that an inference can be drawn that the tolling rule somehow has implications regarding the ability of the Director to consider pre-decree evidence in responding to a delivery call or other administrative proceeding.

Id. at 16. This language distinguishes between forfeiture actions and water rights administration – for example, "responding to a delivery call or other administrative proceeding." Again, the SRBA court explained what constitutes administration and it comports with the United States' interpretation. *See* U.S. Br. 39-40. To administer the United States' water rights under the SRBA means to enforce those rights in priority relative to other SRBA rights. The new forfeiture proceedings do not constitute such priority administration, nor do they interpret the language of any stockwater decrees or resolve any conflicts as to their meaning – instead, they seek to altogether terminate federal stockwater rights. Under the SRBA court's own interpretation, administration does not encompass such a proceeding.

State Defendants also wrongly assert that the United States' own arguments demonstrate that forfeiture questions are matters of "administration" under Section (a)(2) because these questions "hinge on" interpretation of the SRBA decree. State Br. 56. State Defendants either misunderstand or incorrectly state the United States' position. The United States argued that the forfeiture proceedings seek to unlawfully divest federal property under the pretext of forfeiture, even though there has been no change in the use of these federally owned rights and the rights comply with federal law. U.S. Br. 42. There is no dispute that these rights are being put to beneficial use in exactly the same manner as when the SRBA court decreed them. There are also

no disputes related to actual administration of stockwater rights under the SRBA, such as how they are enforced within the call regime, alleged waste, the decreed place of use, or diversion amounts. The Court should reject the State's attempt to twist the United States' arguments to support the errant interpretation that forfeiture, which terminates decreed rights, is merely administration of the Final Unified Decree.

State Defendants and Intervenors rely heavily on *Federal Youth Center v. District Court*, 575 P.2d 395 (Colo. 1978), for their argument that the forfeiture proceedings constitute "administration." State Br. 55-57, 68; Leg. Br. 44-45; Priv. Br. 17. The case is distinguishable and actually demonstrates why the forfeiture proceedings are not a "suit" for the "administration" of SRBA water rights. As an initial matter, the Ninth Circuit has on numerous occasions rejected arguments concerning the purportedly broad reach of Section (a)(2) of the McCarran Amendment that are analogous to those raised by State Defendants and Legislature Intervenors, based on selective quotations from this opinion (State Br. 56-57; Leg. Br. 45). *See Klamath Irrigation Dist. v. U.S. Bureau of Reclamation*, 48 F.4th 939, 946 (9th Cir. 2022) ("An 'administration' of water rights under 43 U.S.C. § 666(a)(2) occurs after there has been a 'prior adjudication of relative general stream water rights.' However, not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment." (quoting *S. Delta Water Agency*, 767 F.2d at 541)); 48 F.4th at 946 ("In sum, the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations . . . ." (quoting *San Luis Obispo Coastkeeper v. U.S. Dep't of the Interior*, 394 F. Supp. 3d 984, 995 (N.D. Cal. 2019), *aff'd* 827 F. App'x 744 (9th Cir. 2020)). Here, where the forfeiture proceedings seek to re-adjudicate the

United States' rights, not to enforce the rights determined in the SRBA, they do not constitute administration under Section (a)(2) of McCarran.

Next, *Federal Youth Center* actually supports the United States' position. There, the Colorado Supreme Court held that the McCarran waiver allowed the joinder of the United States in a Quiet Title Act action because the question presented "[n]ecessarily involved . . .the determination of the relative rights of *all* parties claiming water from the particular water source . . . ." 575 P.2d at 401 (emphasis added). The Colorado court distinguished the case from *Dugan v. Rank*, where the Ninth Circuit held the McCarran waiver did not apply because the suit only concerned the rights of plaintiffs and the United States. *Id.* at 400-01. The new Idaho forfeiture proceedings are like the private suit in *Dugan v Rank*, not the comprehensive administration in *Federal Youth Center* that would "settle disputes to all the parties who claim rights in the water at issue." *Id.* Here, the forfeiture proceedings do not include "all" parties, nor are they intended to settle disputes among all parties on the stream or to effect orderly use on the ground. They have one purpose – to terminate previously decreed federal stockwater rights in piecemeal proceedings. The McCarran Amendment does not apply to such proceedings, as *Federal Youth Center* confirms.

Legislature Intervenors argue that "[t]he 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." Leg. Br. 43. The United States does not dispute that it would be subject to a suit that actually seeks "administration" of its water rights decreed in the SRBA within the meaning of McCarran, but that is not what the forfeiture proceedings do. Again, the forfeiture proceedings seek to terminate the rights, not administer them in priority.

State Defendants and Private Intervenors unconvincingly try to analogize the forfeiture

proceedings to Oregon's Klamath Basin general water rights adjudication. State Br. 57-59; Priv. Br. 17. They argue that, like Oregon's statutory scheme which the Ninth Circuit upheld in *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994), Idaho's forfeiture proceedings include both the participation of an administrative agency and a traditional judicial component and therefore satisfy McCarran. Defendants miss the point. The mere fact that a statutory scheme contains both administrative and judicial elements does not automatically satisfy the waiver of sovereign immunity under the McCarran Amendment, as *Oregon* demonstrates. Defendants' arguments to the contrary incorrectly conflate a comprehensive adjudication under McCarran Section (a)(1) that includes both administrative and judicial elements with the "administration" of previously decreed water rights under McCarran Section (a)(2).

In *Oregon*, the issue was whether Oregon's statutory scheme constituted a general stream adjudication within the scope of the McCarran waiver of sovereign immunity, even though it was not a "traditional" lawsuit tried before a judge in the first instance. 44 F.3d at 765. The Court said yes, because like Colorado's statutory scheme, *id.* at 768, the touchstone issue was whether the Oregon proceedings were sufficiently "comprehensive." *Id.* at 766-769. The Court found Oregon's hybrid procedures (an administrative determination by a state agency of *all* federal reserved and pre-statutory state-law surface rights on a stream system, followed by judicial review of the agency's determinations) were sufficiently comprehensive to satisfy the conditions to the waiver of sovereign immunity under McCarran Section (a)(1). *Id.* at 770. However, the Court did not address the separate question of what constitutes "administration" under McCarran Section (a)(2) once the rights are adjudicated. Here, unlike the comprehensive proceedings in *Oregon*, the forfeiture proceedings at issue are akin to a private suit, do not include all claimants on the stream, and seek to re-adjudicate certain settled determinations under the guise of

"administration" pursuant to the McCarran Amendment. The Oregon scheme satisfied Section (a)(1) of McCarran there because it was comprehensive, regardless of whether it contained administrative and judicial components. *Id.* at 768.

At bottom, the forfeiture proceedings at issue here are the exact type of piecemeal proceeding that Congress intended to shield the United States from under the McCarran Amendment. Under Sections 42-224(1)-(9), the administrative portion of the forfeiture proceeding is between the IDWR Director and the owner of the stockwater right. The judicial portion of the proceeding is then conducted between the stockwater owner and the Idaho Attorney General's Office. I.C. § 42-224(1). These private proceedings are not a "suit" for the comprehensive adjudication of all SRBA rights. Because McCarran Section (a)(1) requires a comprehensive adjudication, a subsequent suit to determine the continued validity of decreed rights also must meet this requirement. Nor does termination of the United States' previously decreed rights constitute "administration" within the meaning of Section (a)(2) of McCarran. Because the new forfeiture proceedings fall outside the scope of McCarran's waiver of sovereign immunity, they cannot lawfully be imposed upon the United States.

3. The United States' McCarran Amendment Argument is Properly Before the Court

Legislature Intervenors argue that because the United States is the Plaintiff in this case, not the Defendant, the United States cannot claim, or raise as a defense, that the McCarran Amendment bars application of Section 42-224. Leg. Br. 40-42; *see* ECF No. 1, ¶¶ 86-89 (United States' first claim). This ripeness argument is meritless and contradicted by the purpose of the Declaratory Judgment Act ("DJA").

Under the DJA, "[a]ny court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such

declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The DJA does not "require a plaintiff to expose himself to liability before bringing suit to challenge the basis for that threat," and forcing the challenger to choose between "abandoning his rights or risking prosecution . . . is a 'dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2006) (quoting, in part, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967)). Further, whether a claim is ripe turns on whether the issue is fit for decision and whether the parties will suffer hardship if the court withholds review. *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1434 (9th Cir. 1996) (finding claims ripe where organization, which arranged trips to Cuba, challenged regulation restraining right to travel there, even though organization had not applied for nor been denied, the specific license required under the regulation).

As detailed in the United States' opening brief, there is an actual and significant controversy between the United States and Defendants regarding the forfeiture proceedings. U.S. Br. 22-24. In an attempt to subject the United States's stockwater rights to forfeiture, Idaho issued four show-cause orders that the United States contested on several grounds, including that the IDWR did not have jurisdiction over the United States because there has been no waiver of sovereign immunity. *Id.* at 23-24. In late June, 2022, the IDWR stayed all the hearings related to those orders, pending the outcome of this case. *Id.* at 24.

The United States seeks a declaratory judgment in this case that Section 42-224 is invalid, in part, because there has been no waiver of sovereign immunity. This is a pure question of law, within the ambit of the DJA, and plainly ripe because the United States is at risk of losing valuable stockwater rights that they spent decades obtaining. Nevertheless, the Legislature Intervenors argue this claim or defense is not ripe unless the United States is a defendant in a live

lawsuit. Leg. Br. 41. This argument undermines the purpose of seeking declaratory judgment, which is to have a court declare legal rights when there is an actual controversy – clearly the case here. Not only is there threatened action against the United States, but the action has already started with the enactment of Section 42-224 and the subsequent show-cause orders. The United States does not need to wait until it is a defendant in the judicial forfeiture proceedings, considering the United States' position is that it is not subject to the proceedings under the McCarran Amendment in the first place. The United States is entitled to a declaration that the recently enacted forfeiture legislation is invalid because it seeks to subject the United States to process for which there is no waiver of sovereign immunity under the McCarran Amendment.

C. The Challenged Forfeiture Statute Violates the Property Clause

1. Congress has Plenary Power over the Disposition of Federal Property Under the Property Clause

Under the Property Clause of the U.S. Constitution, "Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Courts have consistently interpreted this power conferred upon Congress to be expansive and "without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citing cases); *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965) (" 'The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." ' ") (citations omitted). These cases make clear that the federal government cannot be divested of its property without the express permission of Congress. As the Supreme Court has explained, the "[p]ower to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution." *Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941) (citations omitted); *see also Warren v. United States,*

234 F.3d 1331, 1338 (D.C. Cir. 2000) ("In the first place, the Government cannot abandon property without congressional authorization."). "Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." *Royal Indem. Co*., 313 U.S. at 294.

In *Lewis County*, 175 F.3d 671 (9th Cir. 1999), the Ninth Circuit affirmed that there could be no waiver of sovereign immunity by implication when applying a state statute to federal property; rather, any such waiver must be express and unequivocal. In so ruling, the Court acknowledged that the Supreme Court in *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 208 (1946), had recognized "that '[c]oncepts of real property are deeply rooted in state traditions, customs, habits, and laws.'" *Id.* at 677. But the Court concluded that, notwithstanding a general policy of federal deference to state real property law, when it comes to *federal* real property "there is a strong federal interest in the question whether the United States should be subject to state-imposed interest, penalties and foreclosures, and we doubt that Congress intended the outcome to depend upon varying characterizations of state law." *Lewis Cnty.*, 175 F.3d at 677 (footnote omitted). The Court also relied upon its finding that "[f]oreclosure against FSA property would also interfere with the statutory mission of that agency." *Id.* Accordingly, the Ninth Circuit rejected the approach of some other circuits and affirmed that Congress must expressly and unequivocally waive sovereign immunity before the application of state law may potentially impair or terminate federal property interests.

The Ninth Circuit has also recognized that retroactive changes to a state's water right forfeiture laws may not diminish vested water rights. *See United States v. Orr Water Ditch Co.*, 256 F.3d 935, 942 (9th Cir. 2001); *see also United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 806–07 (9th Cir. 2017) ("the Arizona Supreme Court explained [in *San Carlos Apache*

Tribe v. Superior Ct., 972 P.2d 179, 189 (1999)] that '[a] statute may not . . . "attach[ ] new legal consequences to events completed before its enactment." ' *Id.* at 189 (second alteration in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 [] (1994)). It further observed that 'legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events.' "). The Ninth Circuit in *Orr* specifically reasoned that the Nevada legislature had reasonably exempted pre-existing water rights from a forfeiture statute enacted in 1913 because the statute "made water rights more precarious" and "could work unfairly," or even "unconstitutional[ly]" if applied to existing rights:

> The passage of the Nevada forfeiture statute in 1913 made water rights more precarious. Prior to its passage, water rights could be lost only through abandonment; now they could also be lost through forfeiture. To the extent that a water right could be lost more easily after the passage of the forfeiture statute, one "stick" in the "bundle of sticks" that had previously comprised that water right had been taken away.
>
> For water-right holders whose rights had vested by 1913, or who had already initiated appropriations of their rights by that date, the new forfeiture statute could work unfairly because these holders had obtained or initiated appropriations of their rights on the understanding that those rights would not be subject to forfeiture. Indeed, with respect to those individuals, the statute could be more than just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property.

Id. at 942. This holding applies with even more force to federally owned stockwater rights where federal authority over use of its own property under the Property Clause is "without limitations," *Kleppe*, 426 U.S. at 539, and the new legislation makes thousands of stockwater rights recognized by the SRBA court "more precarious" than at the time of their perfection and subsequent decree. *Orr*, 256 F.3d at 942. As discussed below, Congress has not consented to this retroactive diminishment of these rights, where there has been no change in their use since the entry of the Final Unified Decree, the legislation discriminates against the United States, and the new forfeiture proceedings do not comply with the McCarran Amendment.

2. Congress has not Consented to the Retroactive Diminishment of the United States' Stockwater Rights Decreed in the SRBA

i. The SRBA Court did not require proof of agency agreements for the United States' decreed rights

The SRBA court recognized and decreed to the United States over 24,000 stockwater rights that had vested under state law without requiring any proof of agency agreements between the United States and its grazing permittees. ECF No. 34-1 at 5. For many of these rights, the State of Idaho and some of the Private Intervenors – Pickett Ranch & Sheep Co. and Joyce Livestock Co. – withdrew their objections to these claims in written settlements or withdrawal notices (ECF No. 30-1 ¶ 9, 10.b.-g.; ECF No. 36 ¶22) that did not require the federal agency to provide evidence that its grazing permittees acted as its agents as a condition to the validity of these rights. And yet now, the Idaho Legislature, in an effort to relitigate the validity of these rights and escape the consequences of the Final Unified Decree, has determined that these rights should not have been decreed in the first instance and should be declared invalid, absent proof of a written agency agreement. Idaho's attempt to amend its water law to impose this retroactive condition on the United States' vested stockwater rights – where the SRBA court required none at the time of the Final Unified Decree – violates the Property Clause.

Here, Congress has not consented to forfeiture of federal property through proceedings that both discriminate against the United States and implement a process that does not fit within the scope of the McCarran Amendment's waiver. And the State certainly may not enact legislation that is applied retroactively to require the United States to litigate the issue of whether an agency agreement is required, where the SRBA required none as a condition to the validity of the United States' decreed stockwater rights.

Idaho and the Private Intervenors could have previously litigated during the SRBA the

issue of whether the United States must produce evidence of an agency agreement as a condition to establishing the validity of its claimed stockwater rights. They instead chose to withdraw their objections to the United States' stockwater rights that the SRBA court subsequently confirmed. In fact, the State decided to withdraw its objections after unsuccessfully seeking to litigate this issue in an SRBA "test case." State Br. 21-22. As the State Defendants recite, the State "requested leave to amend its objections to assert that the United States was not entitled to *any* beneficial use-based stockwater rights, but this request was denied," and it subsequently settled with the United States. *Id.* at 22. They are bound by that decision and precluded from now seeking to retroactively reopen the Final Unified Decree to require affirmative proof of agency agreements to demonstrate the validity of the United States' rights. The Property Clause does not allow such retroactive diminishment of the United States' decreed rights, which would render the rights "more precarious" by making the rights "more easily [lost] after the passage of the forfeiture statute" and effectively take away "one 'stick' in the 'bundle of sticks' that had previously comprised" the rights at the time of the entry of the SRBA decree. *Orr*, 256 F.3d 935 at 942. Though the Legislature Intervenors attempt to distinguish *Orr* by arguing that I.C. § 42-222(2) enacted in 1903 pre-dated "the existence of the Agencies and their water rights," Leg Br. 35, they ignore that the United States does not challenge this statute, but instead challenges I.C. § 42-224 enacted in just the past several years.[10] The Legislature cannot reasonably claim that this

[10] For what it is worth, the Legislature is also incorrect that I.C. § 42-222(2) pre-dates the agencies and their water rights. The original act governing the administration of national forest lands is the Forest Service Organic Administration Act of 1897 (30 Stat. 34; 16 U.S.C. §§ 473-478, 479-482, and 551, as amended), and the General Land Office, the predecessor to the BLM, was established in 1812. Act of Apr. 25, 1812, 12 Cong. Ch. 68, 2 Stat. 716, Further, some of the water rights decreed to the agencies in the SRBA have priority dates long before 1903. *See*, *e.g.*, Final Unified Decree for Water Right No. 31-11322 (1886 priority date), http://srba.idaho.gov/FUDA2_02_U.HTM.

statute is somehow valid because it pre-dates the agencies' rights.

ii. The SRBA Court resolved the United States' claims on the merits

Nor can Defendants contend that the SRBA court did not confirm the validity of the United States' claims. Rather, prior to the issuance of the Final Unified Decree, the SRBA court expressly held that undisputed claims shall be deemed adjudicated on merits. In the SRBA Order, discussed above, the SRBA court addressed a challenge to the proposed Final Unified Decree by the City of Pocatello, which proposed including the following language in the decree:

> Each partial decree was the result of a specific factual investigation related to the underlying water right.
>
> Because the evidence considered for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding.

SRBA Order 9. The City of Pocatello argued that the proposed provisions "are 'necessary to guide future courts in disputes over the controlling effect of partial decrees to make clear that even though all partial decrees are included in the Final Unified Decree, each partial decree was litigated separately, and the litigation considered separate facts and may have been limited in its scope of inquiry by operation of law.'" *Id.* The City further asserted that "the proposed provisions are necessary to establish that litigants are bound only as to those specific issues that were actually litigated in the SRBA." *Id.* at 9-10.

The SRBA court rejected these contentions. First, the court determined that the proposed language would call into question the binding effect of the Final Unified Decree as to all uncontested water rights:

> First, including the proposed provisions in the Final Unified Decree is inconsistent with the operation of Idaho Code § 42-1420, which provides that subject to certain exceptions "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system . . . ." The proposed provisions would therefore have the unintended

> consequence of calling into question the conclusive effect of every uncontested right, as well as every uncontested element for those rights that were contested. In the SRBA, the majority of the water rights claimed and recommended were not contested. For those water rights that were contested, not every element of the right was necessarily contested. The proposed language would therefore not only undermine Idaho Code§ 42-1420 but would also undermine the very purpose of the SRBA by calling into question the binding effect of the partial decree as to all such uncontested rights and/or elements.

Id. at 10. Second and relatedly, the court reasoned that the proposed language failed to recognize that uncontested claims in the SRBA are deemed to have been "decided on the merits":

> Second, the proposed language misstates the significance of decreeing uncontested rights in the SRBA. Issuing partial decrees for uncontested rights in the SRBA is not identical to the issuance of a default judgment in a non-SRBA case. The significance of decreeing uncontested rights was previously explained in ***Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman (A.L. Cattle),*** Subcase No. 65-07267 *et. Al,* (Jan. 31, 2001). In that case, A.L. Cattle sought to set aside numerous state-law based partial decrees entered uncontested in favor the United States. In seeking to set aside the partial decrees, one of the arguments presented was the over-riding preference for having a case decided on its merits as opposed to the entry of default. The SRBA Court rejected this argument reasoning that in the SRBA even though a claim is uncontested the claim is nonetheless "decided on its merits. . . ."
>
> Accordingly, the language proposed by the City of Pocatello ignores the significance of SRBA procedure for processing uncontested rights and would have the unintended consequence of putting every uncontested right or element at issue in the future.

Id. at 10-11.

Consistent with this ruling, the State Legislature's attempt to require proof of an agency agreement to avoid forfeiture of federally owned stockwater rights – where the SRBA court required none for thousands of the stockwater rights recognized by the Final Unified Decree – would violate the Property Clause. As a matter of law, the thousands of uncontested stockwater rights decreed to the United States by the SRBA court are deemed to have been resolved on the merits and to have satisfied the element of beneficial use. Though the Idaho Legislature has sought to change the law to purportedly subject previously perfected and vested rights to the

ruling in *Joyce*, a change in law "does not authorize trial courts to re-open civil cases that have become final in order to apply the new rule of law announced in that decision." *BHA Investments, Inc. v. City of Boise*, 108 P.3d 315, 320 (Idaho 2004); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223–24 (1995) (under separation-of-powers principles, legislatures may not vacate final judicial decisions). It is now far too late in the day for the State to create a statutory regime designed to terminate these rights for lack of an agency agreement. The State Defendants themselves acknowledge "[u]nder Idaho law the *Final Unified Decree* is 'conclusive *as to the nature and extent* of all [pre-commencement] water rights' within the boundaries of the SRBA." State Br. 35 (emphasis added). Here, the State does not suggest that there has been any actual discontinuation of livestock watering on the allotment/decreed place of use, given that the rights continue to be used in the same manner as at the time of their decree. Rather, it seeks forfeiture based on the lack of an agency agreement. Congress has not consented to the imposition of such a new, retroactive condition on the continued validity of the United States' water rights, which threatens to divest the federal government of its decreed property interests.

iii. I.C. § 42-224 does not codify *Joyce*

Nor can the Legislature claim that it is simply seeking to codify the *Joyce* decision through the provisions of I.C. § 42-224. *See*, *e.g.*, Leg. Br. 24. *Joyce* was limited in its application to the particular rights at issue. It did not require the disallowance or forfeiture of other claims that were not before the Idaho Supreme Court, as evidenced by the thousands of partial decrees entered by the SRBA court for stockwater rights held by the United States without proof of an agency agreement and the Final Unified Decree issued in 2014 – seven years after *Joyce*. Further, as the Idaho Legislature has acknowledged, *Joyce* was about the *initial appropriation* of stockwater rights, not *subsequent forfeiture* of those rights. *See* I.C. § 42-501

("In the landmark case of *Joyce Livestock Company v. United States of America*, 144 Idaho 1, 156 P.3d 502 (2007) , the Idaho Supreme Court held that an agency of the federal government *cannot obtain* a stockwater right under Idaho law unless it actually owns livestock and puts the water to beneficial use.") (emphasis added). Though the United States may not now seek to resurrect the rights disallowed in *Joyce*, it continues to hold the thousands of other stockwater rights decreed in the SRBA without having to present affirmative proof of an agency agreement to avoid forfeiture. The SRBA has already determined that the United States "obtained" thousands of stockwater rights under Idaho law, and State may not now seek to turn back the clock on those determinations under the guise of forfeiture.

By requiring the United States to relitigate the validity of these rights in response to show-cause orders, the legislation attempts to create a retroactive cloud on the United States' title to the thousands of rights that the SRBA court decreed without this limitation. The Property Clause does not allow states to enact such measures to peremptorily put vested federal property rights in jeopardy of disposal or divestiture. This does not mean "[t]he Agencies argue that the Property Clause entrusts to Congress complete power over western states' water on public lands." Leg Br. 30. Rather, the agencies only challenge the Legislature's attempt to enact unconstitutional legislation, as if the State has no limits on what it can do so long as it purports to act under the auspices of state water law and invokes the McCarran Amendment's waiver. Nowhere in the McCarran Amendment or elsewhere has Congress consented to the retroactive and discriminatory forfeiture of the United States' decreed stockwater rights, as attempted by I.C. § 42-224.

The Private Intervenors' contention that "Congress rendered the United States subject to [state water] law for purposes of having its water rights decreed in an adjudication," Priv. Br. 24,

misses the point. Such an adjudication has already occurred in the SRBA, and the Idaho Legislature cannot now retroactively challenge court decisions it disagrees with by redefining property rights. By retroactively rendering the United States' decreed stockwater rights "more precarious," *Orr*, 256 F.3d 935 at 942, Section 42-224 violates the Property Clause.

D. The Challenged Statutes Violate the Contract Clause

The Contract Clause, U.S. Const. art. I, § 10, cl. 1, provides that "no State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." The challenged statutes violate this clause by impairing both the United States' settlement agreements and, particularly, the individual decrees that arose out of those settlements, which are effectively consent decrees. Indeed, consent decrees are accorded the protections of the Contract Clause. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992); *Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986); *Cnty. of Suffolk v. Long Island Lighting Co*., 14 F. Supp. 2d 260, 267 (E.D.N.Y. 1998). By undermining the United States' decreed rights that arose from the settlement agreements, the challenged statutes fail the two-step test for determining if a law affecting preexisting contracts "crosses the constitutional line." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). First, the statutes impose a "substantial impairment" on the United States' agreements with the State and other parties, as formalized in the Final Unified Decree. *Id.* Second, they do so without a "significant and legitimate public purpose" in the wholesale divestment of federal stockwater rights under I.C. § 42-224 or changes to the general rule of appurtenancy relative only to federal lands under I.C. § 42-113(2)(b). *Id.* at 1822.

State Defendants contend Section 224 does not violate the Contract Clause because nothing in the State's settlements with the United States "immunized the United States' state law-based stockwater rights from forfeiture, pursuant to Idaho Code § 42-222(2) or from any

other component of Idaho water law." State Br. 70. But the United States does not assert under this claim that its stockwater rights are exempt from any component of valid Idaho water law; rather, it asserts that Section 224 violates the Contract Clause by defeating the United States' settlements with the State and others, which the SRBA court memorialized in the Final Unified Decree. By seeking to forfeit and/or put new restrictions on the water rights that the SRBA decreed consistent with those settlements, the State has violated the Contract Clause.

The Legislature Intervenors argue that "[t]he parties to the settlement agreements did not and could not contractually repeal statutory forfeiture of water rights for non-use," where "I.C. § 42-222(2) (1903) predates their settlement agreements by 96 to 100 years." Leg. Br. 36; *see also* Priv. Br. 25. However, the United States does not challenge and is not seeking to repeal I.C. § 42-222(2). It instead challenges the recently enacted forfeiture legislation at I.C. § 42-224, which undermine the settlements into which the State entered in full recognition that the United States' permittees owned the cattle that made consumptive use of the claimed water rights.

The Private Intervenors argue that the United States "points to no provision of any such settlement agreement that is in any way undermined, let alone abrogated, by the challenged statutes." Priv. Br. 25. This argument overlooks that I.C. § 42-224 seeks to abrogate the rights confirmed by the Final Unified Decree, which arose out of those settlements. As the Private Intervenors acknowledge, "The United States correctly notes that the clause applies to settlement agreements *and consent decrees*." *Id.* (emphasis added).

The Legislature Intervenors contend that "[t]he SRBA settlement parties' bargain was subject to preexisting Idaho law on forfeiture and appurtenancy." Leg. Br. 36. However, with respect to appurtenancy, the general rule in Idaho is that water rights are appurtenant to the lands comprising the place of use. *See* I.C. § 42-101; I.C. § 42-1402. This appurtenancy rule is

therefore part of the United States' decreed stockwater rights. And the State knew that the United States did not own the cattle that consumptively used stockwater on federal allotments and yet it withdrew its objections to the United States' claims in written settlements with the United States. The SRBA court confirmed those rights in accordance with those settlements, and the Defendants may not contest those rights as inconsistent with Idaho law.

The Legislature Intervenors assert that "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" and that "Idaho's significant and legitimate purposes regarding stockwater cannot be gainsaid." Leg. Br. 37. But the issue is not whether the State has an interest in water, but whether mass divestiture of the federal government's stockwater rights is a valid exercise of government power. There is no valid state interest in the termination of the federal government's decreed stockwater rights used to support the federal grazing program or in rendering the United States' stockwater rights appurtenant to their grazing permittees' lands instead of their decreed place of use. The recently enacted stockwater legislation violates the Contract Clause by constituting a "substantial impairment" of the State's contractual settlements with the United States, as adopted through the Final Unified Decree, and without a "significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822.

E. The Challenged Statutes Violate the Retroactivity Clause of the Idaho Constitution

Before its recent legislation, the State had long recognized that the BLM may appropriate stockwater rights with no requirement of proving agency. In fact, the State codified this in former Idaho statute section 42-501, which recognized from 1939 until its repeal in 2017 that BLM and its predecessor agency may "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain," without requiring evidence of an

agency agreement. To now require the United States to prove that its permittees are its agents imposes an unlawful retroactive restriction on the United States' appropriation, as the State may not retroactively apply *Joyce* in a manner that affects the validity of United States' vested and decreed stockwater rights. Nor may the Idaho Legislature through I.C. §§ 42-113(2)(b) and 42-504 retroactively make the United States' decreed stockwater rights appurtenant to private property rather than the federal lands comprising their places of use or prohibit the federal agencies or their permittees from using those rights for anything other stockwatering on federal lands. These limitations are nowhere found in the SRBA's Final Unified Decree.

As discussed above, a change in law "does not authorize trial courts to re-open civil cases that have become final in order to apply the new rule of law announced in that decision." *BHA Investments*, 108 P.3d at 320; *see also Plaut*, 514 U.S. at 223–24 (under separation-of-powers principles, legislatures may not vacate final judicial decisions). The State nonetheless now seeks to change the rules underlying the Final Unified Decree to say that beneficial use of water by cattle owned by federal grazing permittees no longer counts, even if it counted before. The State alleges it can do so based on *Joyce* and its alleged right to alter the law of appurtenancy – applicable only to rights on federal lands – and its alleged right to limit change applications on water rights – also applicable only to rights on federal lands. Such action imposes a retroactive restriction on the government's perfected stockwater rights that did not exist when the rights were decreed, in violation of the Retroactivity Clause of the Idaho Constitution. *See Frisbie v. Sunshine Mining Co.*, 457 P.2d 408, 411 (Idaho 1969) (a law is retroactive "when it operates upon . . . rights which have been acquired . . . prior to its passage.").

The Legislature Intervenors note that "[t]he 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." Leg. Br. 38. But that is not what the disputed legislation does. The legislation does not merely address rights that vested prior to its passage, but retroactively diminishes those rights. Likewise, the Legislature errs in contending that I.C. § 42-224 is lawful because it "prospectively provides procedural due process when a party asserts forfeiture of federal or non-federal stockwater rights." *Id.* at 40. The concern here is not with narrowly conceived procedural due process aspects of the forfeiture proceedings *per se*, but with the broader substantive unlawfulness of newly enacted legislation that retroactively diminishes vested and decreed rights.

The Legislature Intervenors argue that Section 42-224 is prospective, not retroactive, because it "require[es] procedures when IDWR receives a petition to forfeit water rights under § 42-222." *Id.* at 39. This argument similarly misses the point. Of course, Section 224 only applies to future forfeiture proceedings. But this argument ignores that the statute seeks to terminate long-perfected stockwater rights by placing retroactive conditions on their validity.

Defendants likewise contend that either Section 42-113(2)(b) or Section 42-504 or both are solely prospective in their operation. State Br. 71; Leg. Br. 39-40; Priv. Br. 26, 29-30. But Section 42-113(2)(b) applies to rights "established under the diversion and application to beneficial use method of appropriation." This definition includes the thousands of rights decreed to the United States in the Final Unified Decree. By purporting now to make such rights appurtenant to grazing permittees' base property, contrary to a basic tenet of Idaho water law, the statute violates the Retroactivity Clause. Further, Section 42-504 applies when an agency of the federal government "acquires a stockwater right," with no express limitation on when those rights are perfected, whether before or after enactment of the statute. Thus again, the statute appears to restrict the United States' ability to make changes to its stockwater rights, including

its existing, decreed rights. To the extent the State now disclaims any intent to apply these statutes retroactively, the Court may still resolve the dispute between the parties under this claim by declaring these statutes to have only prospective operation as to newly claimed or applied-for and not yet decreed water rights.[11]

The Legislature Intervenor asserts that "[t]he Agencies' reliance on *In re Hidden Springs Trout Ranch*, 636 P.2d 745 (Idaho 1981) is misplaced" because "[l]ike 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." Leg. Br. 39. This argument fails to recognize the fundamental difference between the United States rights' here and those at issue in *Hidden Springs*. The *Hidden Springs* court held that a change in the law could be applied to a water permit *application* without resulting in an impermissible retroactive application of the statute because a permit application gives the applicant no vested property right. The court suggested that a different result would apply if the right had been fully adjudicated, as have the federal water rights at issue here. *Id.* at 747. The Legislature may not retroactively diminish the United States' vested rights, including those that had already been perfected when the SRBA commenced and which the SRBA court subsequently recognized and confirmed.

The Private Intervenors contend that the Retroactivity Clause is not implicated because the Legislature enacted I.C. § 42-224 for the "public good," and "[t]he agencies make no attempt to identify the requisite 'individual or association of individuals' for whose benefit the challenged statutes are purportedly intended to operate." Priv. Br. 27-28. But in the next breath these intervenors acknowledge the agencies' argument "that any rights they have forfeited will

[11] Such relief would not negate the unlawfulness of these two statutes under the United States' intergovernmental immunity claim, given their inherently discriminatory nature.

be subject to appropriation by them or others." *Id*. at 28. This is not a "vague gesture at 'other water users' or 'third parties,'" *id*., but identifies the water users who the State purports to benefit – principally, federal permittees who seek to terminate the United States' stockwater rights so that they may have sole control over water use on federal grazing allotments.

The Idaho Legislature has violated the Retroactivity Clause by enacting retroactive legislation to divest the United States of its decreed rights for the benefit of those who object to federal ownership of stockwater rights.

II. Responses to Defendants' Other Arguments

A. The Challenged Legislation Forfeiture Violates Principles of Res Judicata and Judicial Estoppel

1. Defendants Seek to Relitigate the Validity of the United States' Rights Decreed in the SRBA

Defendants raise a series of arguments in which they contend that the United States' challenges to I.C. § 42-224 are somehow a collateral attack on the Final Unified Decree and violate the doctrine of res judicata. For instance, the State Defendants contend the "United States seeks a permanent injunction to undercut the Final Unified Decree and the partial decrees by effectively re-defining the nature and extent of the United States' state law-based stockwater rights." State Br. 45. Likewise, the Private Intervenors assert "the federal agencies' claims are largely barred by *res judicata*. They have asserted them before[] and lost" and do not now get "a second bite at the apple by effectively appealing here." Priv. Br. 13; *see also id.* at 15-16. Defendants have it completely backwards. The State Legislature seeks to redefine the rights by requiring proof of an agency agreement with federal permittees that the SRBA court did not require at the time of the Final Unified Decree. The stockwater rights recognized by the Final Unified Decree are settled, decreed rights, and it is the State that now seeks to relitigate their

validity with no change in their underlying use in violation of res judicata.

"[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada v. United States*, 463 U.S. 110, 129–30 (1983) (citations omitted). In accordance with this principle, a "final 'judgment puts an end to the cause of action, *which cannot again be brought into litigation between the parties upon any ground whatever*.'" *Id*. at 130 (citations omitted) (emphasis added). As the Supreme Court emphasized in *Nevada*, this principle carries particular force relative to settled property interests, including water rights:

> The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water. See *Arizona v. California*, 103 S.Ct. 1382, 1392 (1983); *United States v. California & Oregon Land Co.,* 192 U.S. 355, 358–359 (1904); 2 Freeman on Judgments § 874, at 1848–1849 (5th ed. 1925). As this Court explained over a century ago in *Minnesota Co. v. National Co.,* 3 Wall. 332, 18 L.Ed. 42 (1865):
>
> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change . . . . [W]here courts vacillate and overrule their own decisions ... affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." *Id.,* at 334.
>
> A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because "it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply." 3 Kinney on Irrigation and Water Rights § 1535, at 2764 (2d ed. 1912).

Nevada, 463 U.S. at 129 n.10 (cleaned up).

Here, the Idaho Legislature's adoption of I.C. § 42-224 violates these principles by

creating a process to relitigate an issue already settled by the Final Unified Decree – namely, whether the thousands of stockwater rights recognized by the decree without affirmative proof of an agency agreement are invalid based on the *Joyce* decision. Because the State and Private Intervenors could have pursued this challenge to the United States' claimed stockwater rights in the SRBA but elected not to do so through the withdrawal of their objections, the Idaho Legislature may not now bring this issue "into litigation between the parties upon any ground whatever" through its enactment of I.C. § 42-224. Then as now, the United States did not own the livestock that consumed water under the rights, as the State and Private Intervenors knew.

As discussed above, the United States' uncontested claims recognized by the Final Unified Decree are deemed to have been litigated on the merits, including those stockwater rights that were decreed following settlements between the United States and the State. It would violate res judicata now to allow these claims to be relitigated based on the State's change in position and its adoption of a new forfeiture process targeting federal rights, where there has been no change in their underlying use. It would also impose a condition on the continued validity of the United States' stockwater rights that the SRBA court did not require.

2. Defendants' Arguments to the Contrary are All Unavailing

The State Defendants assert "[t]he argument that additional congressional authorization is needed before the United States' state law-based water rights can be forfeited, . . . , is simply a collateral attack on the Final Unified Decree." State Br. 69. The State misstates the United States' position. The United States does not challenge the decree or state water law generally, but only the State's ability to enact discriminatory legislation that violates federal law, including the doctrine of intergovernmental immunity and the waiver of sovereign immunity under McCarran, as well as the Retroactivity Clause of the Idaho Constitution. Res judicata in no way

precludes these challenges.

State Defendants themselves acknowledge that the stockwater rights decreed to the United States were based upon beneficial use by cattle owned by the United States' permittees, not the United States itself. State Br. 19-20 ("The livestock that made the claimed 'beneficial use' of stockwater were not owned by the United States, however, but rather by private parties. . . . Even though the United States did not own the livestock that drank the water, IDWR generally recommended decreeing those claims to the United States. . . . This was a result of IDWR's then-longstanding policy of recommending that water rights be decreed in the name of the owner of the place of use.") (citations and footnote omitted); *id*. at n.13 ("IDWR subsequently abandoned this policy and now recommends that water rights be decreed in the name of the water user."). By now changing its position to require affirmative proof of an agency agreement to avoid forfeiture, the State unlawfully imposes a new condition on the continued existence of the United States' decreed rights in violation of res judicata.

Again, I.C. § 42-501 evidences that the Idaho Legislature enacted I.C. § 42-224 to allow parties to relitigate in a collateral proceeding the validity of rights already decreed in the SRBA. Section 42-501 reflects the Legislature's intent to allow a second adjudication of whether federally owned stockwater rights were "acquired in a manner contrary to the *Joyce* decision" and should be declared invalid, notwithstanding their confirmation in the SRBA. I.C. § 42-501. Res judicata does not allow such serial litigation of the validity of the United States' vested stockwater rights. Granted, permanent discontinuation of livestock watering on federal lands as the result of the retirement of a grazing allotment would end the decreed beneficial use. But that is not what the new legislation seeks to show, given that the new forfeiture proceedings shall terminate upon production of a written agency agreement without any inquiry into whether

livestock watering continues on the federal lands in question. I.C. § 42-224(4). The new proceedings violate res judicata by seeking to terminate the United States' decreed rights based upon an issue that the SRBA court already settled rather than any new showing that livestock watering on federal lands has been discontinued since the entry of the Final Unified Decree.

Private Intervenors contend that, "[h]aving lost on the substance of its claims [in *Joyce*], the federal agencies now seek *procedural* immunity from Idaho's state law, but they make the same arguments in favor of the same result: they ask to have their decreed rights recast as hybrid rights that transcend the state law, permanently impairing the rights of every other competing rights-holder." Priv. Br. 15. Contrary to these assertions, nothing in the United States' arguments seeks to "impair[] the rights of every other competing rights-holder." *Id*. The United States only seeks to protect its rights against unlawful legislation and does not challenge in this case any third-party rights held by its grazing permittees, as decreed in the SRBA or otherwise recognized. Further, these arguments ignore that *Joyce* concerned only the specific rights at issue in that case, and the United States generally prevailed on its thousands of other stockwater claims asserted in other sub-cases. In fact, in asserting that the United States "seeks to re-adjudicate the nature of the same water rights at issue in *Joyce and other SRBA litigation*, rendering them immune to the state law that the Idaho Supreme Court held applies to them," *id*. at 15-16 (emphasis added), the Private Intervenors make clear that they seek to treat the thousands of other rights that the SRBA court decreed to the United States as if they were at issue in *Joyce*. And yet, the Final Unified Decree confirmed the validity of those rights and their individual partial decrees, notwithstanding the *Joyce* decision. It is the Defendants who now seek to reverse those decrees and retroactively apply *Joyce* to these confirmed rights.

The Legislature Intervenors assert that the agencies only "possess use rights that must be

perfected" through beneficial use. Leg. Br. 32; *see also id*. at 29 ("Consistent with the Property Clause, the Agencies' *unperfected* usufructuary rights are subject to State water law.") (emphasis added). The Legislature goes so far as to state that "the Agencies have failed to perfect their contingent water rights through beneficial use." *Id*. at 33. These arguments constitute a collateral attack on the Final Unified Decree and reflect a continued refusal to acknowledge that the United States' rights placed at risk by the challenged legislation *have already been perfected*. The SRBA court has already determined that the United States has perfected the thousands of rights confirmed by the Final Unified Decree, and the present question is instead whether the Idaho Legislature may retroactively terminate these rights where there has been no change in their underlying use since their decree. For the many reasons already explained, it may not. The Legislature defeats its own argument in stating that, "[i]f the Agencies do not perfect their use right, it is contingent and may be modified by the Legislature." Leg Br. 32. Here, because the agencies have already perfected their use rights, the Legislature may not modify those rights through retroactive legislation.

The State Defendants argue: "It is impossible to award the United States the relief it seeks without undercutting the decisions of the SRBA District Court and the Idaho Supreme Court, thereby allowing the United States and other dissatisfied claimants to seek federal court rulings that effectively re-adjudicate the nature and extent of decreed water rights." State Br. 45. Again, it is the State, not the United States, that seeks to re-adjudicate the United States' decreed rights. The SRBA court decreed to the United States thousands of rights – many of which decrees were supported by a settlement with the State – without proof of an agency agreement. It is the State that now seeks to invalidate those decrees and change its prior litigation position by requiring affirmative evidence of an agency agreement to avoid forfeiture.

The Private Intervenors suggest that the United States somehow coerced grazing permittees into settling their objections to the United States' stockwater claims in the SRBA and more recently to enter into agency agreements. Priv. Br. 12. And yet these intervenors offer no evidence to support these contentions and ignore the fact that they were represented by counsel in the SRBA. The Private Intervenors also fail to acknowledge that many of the United States' grazing permittees in the SRBA supported the United States securing decreed stockwater rights and continue to do so by entering into agency agreements in recognition that the rights are for their use and benefit. ECF No. 36 ¶¶ 23, 28. In fact, the Private Intervenors argue the United States' decreed rights that arose from settlements resulted from IDWR's own recommendation policy, not from any undue influence exerted by the federal agencies. Priv. Br. 12 ("under SRBA settlements 'the United States was decreed thousands of beneficial use-based stockwater rights based solely on IDWR's [recommendation] policy'") (quoting State Br.). Far from evidencing any improper coercion, these allegations only underscore that the Private Intervenors seek to relitigate the validity of United States' stockwater rights due to their dissatisfaction with the result of the SRBA and the position that they and the State took in those proceedings.

The State and the Private Intervenors have already had ample opportunity to litigate their objections and ensure that federal grazing permittees were "not unwittingly acting as an agent of a federal agency simply by grazing livestock on federally managed lands." I.C. § 42-501. They may not now seek to revisit and unwind the SRBA Final Unified Decree, where the SRBA court required no affirmative evidence of an agency relationship between the United States and its permittees as a condition to entry of that decree (and the many accompanying settlements withdrawing objections to those rights that were incorporated into the decree). Simply put, there is no occasion to "protect Idaho stockwater right holders from encroachment by the federal

government in navigable and nonnavigable waters," I.C. § 42-501, where opposing parties have already had a full and fair opportunity to litigate their objections to federally owned stockwater rights through the exhaustive and decades-long proceedings in the SRBA.

Nor do Private Intervenors find support in *United States v. Black Canyon Irrigation Dist. (In re SRBA Case No. 39576)*, 408 P.3d 52 (Idaho 2017), in which the Idaho Supreme Court stated: "Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures." *Id*. at 62, *quoted by* Priv. Br. 16. Finality instead supports the United States' position, as it did not dedicate decades of effort and litigation resources to having its stockwater rights confirmed in the SRBA, only to have to litigate again in a collateral proceeding whether the rights should have been decreed in the first instance.

Finally, the State's and Private Intervenors' change in position from the time of they withdrew their objections to the United States' claims also violates the equitable doctrine of judicial estoppel. As summarized by the Ninth Circuit:

> As a general principle, the doctrine of judicial estoppel bars a party from taking inconsistent positions in the same litigation. *See Milgard Tempering, Inc. v. Selas Corp. of Am.,* 902 F.2d 703, 716 (9th Cir. 1990); *Russell v. Rolfs,* 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied,* 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991); *In re Corey,* 892 F.2d 829, 836 (9th Cir. 1989), *cert. denied,* 498 U.S. 815, 111 S.Ct. 56, 112 L.Ed.2d 31 (1990); *Stevens Tech. Servs. v. SS Brooklyn,* 885 F.2d 584, 588 (9th Cir. 1989). . . . The majority of circuits recognizing the doctrine hold that it is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation; only in that situation, according to those circuits, is there a risk of inconsistent results and a threat to the integrity of the judicial process. The minority view, in contrast, holds that the doctrine applies even if the litigant was unsuccessful in asserting the inconsistent position, if by his change of position he is playing "fast and loose" with the court. *See Milgard Tempering, Inc.,* 902 F.2d at 716 (citing *Patriot Cinemas, Inc. v. General Cinema Corp.,* 834 F.2d 208, 212 (1st Cir. 1987)). In either case, the purpose of the doctrine is to protect the integrity of the judicial process. Accordingly, the doctrine of judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *Russell,* 893 F.2d at 1037 (quoting *Religious*

Tech. Center v. Scott, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)). *Morris v. State of Cal.*, 966 F.2d 448, 452–53 (9th Cir. 1991) (some citations omitted). Here, allowing the State and Private Intervenors to change their prior positions, as adopted by the SRBA court, would violate the integrity of the judicial process. The time to assert the invalidity of these rights was in the SRBA, not many years later when the United States' water rights continue to be used in the same manner as at the time of their decree. Though Defendants may regret failing to litigate this issue or settling their objections to the United States' claims, they may not now reopen the SRBA to relitigate this issue. The finality of decrees mandates more.

B. This Case does not Concern Whether the United States is Generally Subject to Idaho Water Law

In a variation on their res judicata and collateral estoppel arguments, Defendants contend that the United States seeks to evade the application of state law to its state-law based stockwater rights. Defendants' arguments mischaracterize both the United States' position and the effects of the Final Unified Decree. This case does not concern whether the BLM and Forest Service must generally follow state water law, but only whether the particular statutes in question are unlawful because they violate federal law, as well as the Retroactivity Clause of the Idaho Constitution. Each of Defendants' arguments to the contrary are unavailing. Their arguments are varied and numerous, but as shown below, are all rebutted – as concisely as possible given the shotgun style of the Defendants' contentions.

1. The United States Only Challenges the Particular Stockwater Statutes at Issue as Violating Federal and State Law

The State Defendants argue "[t]he question of whether the United States' state law-based stockwater rights are subject to forfeiture under state law is the central issue in this case." State Br. 48; *see also id*. at 48-49 ("[t]he ultimate issue the United States has put before this Court is

the question of whether state law-based stockwater rights decreed to the United States in the SRBA are subject to forfeiture under Idaho law."). The Legislature Intervenors also contend that "Courts have consistently affirmed State primacy over State water," Leg. Br. 17, and that the "United States holds only a usufructuary interest in Idaho Stockwater that may be forfeited for non-use." *Id*. at 30. These contentions highlight the fundamental fallacy of the Defendants' position. This case does not concern whether the United States' stockwater rights are immune from any forfeiture under state law, but whether these particular forfeiture proceedings violate federal and state law.

The State's position that the only limits on the exclusive control of states over water law are reserved rights and the navigation servitude, State Br. 31-32, *see also* Priv. Br. 8 n.2, wholly overlooks that state water law that is inconsistent with federal law is unlawful, or at the very least cannot be applied to the United States. 438 U.S. at 688 n.21. Though the Legislature Intervenors cite *California v. United States*, 438 U.S. 645 (1978), for its statement that "the history of western water revealed a 'consistent thread of purposeful and continued deference to state water law by Congress,'" Leg. Br. 34 (citing *California*, 438 U.S. at 653), they disregard its holding that Congress's deference to state water law is not absolute. Specifically, the Court held that Congress's direction to the U.S. Bureau of Reclamation to operate "in conformity" with state water laws with respect to the "the control, appropriation, use, or distribution of water used in irrigation" applied only to the extent "not inconsistent" with additional requirements of federal law. *California*, 438 U.S. at 668-73, nn.21 & 25. The Legislature's assertion of plenary state control over water law ignores this fundamental limit on the State's authority.

The Legislature also ignores the doctrine of intergovernmental immunity, which (as discussed above) does not allow states to discriminate against the United States or regulate in

areas to which Congress has not consented. This case therefore does not concern whether the United States' state-law stockwater rights are categorically immune from forfeiture, but whether the *particular manner* in which the State seeks to forfeit these thousands of rights unlawfully discriminates against the United States under the Supremacy Clause, exceeds the waiver of sovereign immunity under the McCarran Amendment, and violates the Contract and Property Clauses of the U.S. Constitution and the Retroactivity Clause of the Idaho Constitution.

The State Defendants contend: "The *Final Unified Decree* confirms that all state law-based water rights decreed in the SRBA, including those held by the United States, are subject to this forfeiture statute." State Br. 36; *see also id*. at 42 ("The United States' assertions that its decreed water rights must be understood as being immune from forfeiture . . . is an impermissible collateral attack on SRBA water right decrees."). However, this again seeks to redefine the operative question, which is whether the State may undertake a new program of mass forfeiture of federal rights decreed in the SRBA in a manner that violates the McCarran Amendment, discriminates against the United States, and seeks to divest it of its property rights without any intervening change in their use since the time of their decree.

The Private Intervenors argue, "In this case, . . . the federal agencies argue that they do not have to comply with state water law, and they have sought for decades to own and retain water rights to which they are not entitled." Priv. Br. 11. This contention again misstates the United States' position and refuses to acknowledge that the SRBA court has already determined the United States holds thousands of stockwater rights in accordance with state law. The United States does not dispute in this case the State's general authority over state-law based water rights, but only whether the State may exercise this authority in contravention of federal or state law.

The State Defendants contend that "[a] water right decree confirms the water right exists

at the time the decree is issued. It does not foreclose questions of how the water right is actually used after the decree." State Br. 68. This argument only takes the State so far. Given that the SRBA court confirmed the United States' rights in the Final Unified Decree, the continued use of those rights in the same manner as at time of the decree provides no basis for forfeiture.

The State Defendants argue: "An order permanently immunizing the United States' state law-based water rights from forfeiture pursuant to state law would endow the United States' state law-based water rights with special protections that the Final Unified Decree and the partial decrees explicitly deny to them." *Id.* at 37. The United States seeks no such order here, but only seeks a narrower determination that its rights may not be terminated under the forfeiture statute at issue in this case in a proceeding for which the United States has not waived its sovereign immunity and where the rights are used in the same manner as at the time of the entry of the Final Unified Decree. The Legislature Intervenors themselves appear to concede this point when they state "[i]f the purpose for which the water is appropriated changes, the right is lost." Leg. Br. 30. Here, there has been no such change, and no basis for forfeiture to apply.

The State Defendants point out that "[t]he forfeiture provisions of Idaho Code § 42-222(2) had been part of Idaho's water code for at least eighty years when the SRBA commenced in 1987." State Br. 38. But the United States does not challenge I.C. § 42-222(2), only Idaho's recently enacted stockwater legislation, which violates both federal law and the Retroactivity Clause of the Idaho Constitution. State Defendants also conveniently ignore that, until its recent repeal in 2017, another longstanding provision of state law – former Idaho statute section 42-501 – had long recognized since 1939 the authority of the BLM to "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain," without any agency requirement. Former I.C. § 42-501 (repealed 2017). The Legislature willingly departed

from this nearly 80-year-old Idaho law when it no longer suited its policy choices, but without a legal basis for doing so. The Legislature's recent changes to its statutory scheme may not lawfully divest the United States of its existing stockwater rights that long pre-dated this scheme.

The Legislature Intervenors assert: "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)." Leg. Br. 18. Alternately, the Private Intervenors assert that "[w]hen it comes to state law water rights in Idaho, then, federal lawmakers and courts agree: Idaho law *is* federal law." Priv. Br. 8. These arguments mix and match two separate concepts. Though the United States recognizes that it is generally subject to state water law relative to the appropriation and use of state-law based water rights, state law still may not discriminate against the federal government or otherwise violate federal law. This does not mean that the Government attempts to federalize state water law or, alternately, that state water law is federal law; it merely reflects that state water law is subject to the requirements of the U.S. Constitution and other applicable federal laws in accordance with the Supremacy Clause. *See*, *e.g.*, *California*, 438 U.S. at 688 n.21. Simply put, the United States does not dispute states' general regulatory authority over water rights, but rather Idaho's violation of federal law through its recently enacted legislation.

The State Defendants contend: "Federal land management agencies are subject to Idaho water law with respect to all other uses of water on federal lands in Idaho. This is what Congress has mandated. All the United States' claims and arguments in this case are simply an attempt avoid this congressional mandate." State Br. 32; *see also* Leg. Br. 34 ("Perfected water rights are subject to State water laws."). These arguments are again misdirected. Far from seeking to

avoid application of state law, this lawsuit instead seeks to prevent the State from enacting legislation that threatens to divest the United States of thousands of water rights decreed – under state law – in the SRBA. The United States' only challenges the particular state statutes in question as violating federal law and the Retroactivity Clause of the Idaho Constitution.

The Legislature Intervenors argue that the BLM and 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." Leg. Br. 10; *see also* Priv. Br. 14 ("For more than a century, constitutionally appropriated Idaho state law water rights have been subject to forfeiture for lack of beneficial use."). But again, the United States only challenges the Idaho Legislature's recent statutory enactments that unlawfully discriminate against the United States, retroactively diminish its decreed state-law water rights, and create a statutory forfeiture proceeding that exceeds the scope of the waiver of sovereign immunity in the McCarran Amendment.

2. The United States Does Not Assert that Federal Land Management Alone Constitutes Beneficial Use

The State Defendants assert that the United States argued in the SRBA that "it was entitled to state law-based stockwater rights 'based solely' on its administration of federal lands." State Br. 39 (citation omitted); *see also* Priv. Br. 14-15 ("In the SRBA and *Joyce* litigation, federal agencies argued that their administration of federal lands constituted beneficial use that fulfilled Idaho's requirement with regard to its stockwater rights on grazing lands."). This argument characterizes the United States' position as to the rights at issue in the *Joyce* litigation, but not what the United States argues here. Again, the United States asserts that the State's forfeiture statutes, which seek to divest the United States of thousands of stockwater rights that continue to be applied to beneficial use in the same manner as at the time of the SRBA decree, violate federal law (and the Retroactivity Clause of the Idaho Constitution). Contrary to the

State's contentions, the United States does not assert that its management alone is sufficient to constitute beneficial use of its stockwater rights, but instead relies upon continued stockwatering on federal grazing lands in the same manner as at the time of the Final Unified Decree.

The State Defendants likewise contend that Idaho water rights are based upon beneficial use of water, and that "Federal land management activities are not a 'beneficial use' of water." *Id*. at 34; *see also* Priv. Br. 15 (the federal agencies "seek to evade the SRBA's Final Unified Decree, which explicitly and specifically confirms that those rights are subject to Idaho's longstanding beneficial use requirement."). These contentions again try to pin on the United States an argument it does not make. The United States acknowledges that beneficial use is the measure of state-law based water rights in Idaho, including those held for federal agencies. However, the same was true when the SRBA court decreed the United States thousands of stockwater rights under state law, where the United States' permittees, not the federal agencies, owned the livestock consuming water on the federal lands. The State Defendants themselves recognize that "'[b]eneficial use' stockwater claims assert that valid stockwater rights were established by diverting the water for use by livestock, or by allowing livestock to simply drink from the water source—'instream' stockwatering." State Br. 19. In fact, the State settled its objections to the United States' claim in full awareness that the United States did not own the cattle that consumptively used the claimed water, and the SRBA court decreed the rights consistent with that use. The State's present change in position provides no basis for forfeiture.

Nor does the United States contend that management activities alone constitute beneficial use. The United States offered its separate arguments in its opening brief concerning the adverse effects that loss of thousands of federally owned stockwater rights would have on the federal grazing program to support its requests for injunctive relief, not to establish beneficial use of

water. The State Defendants conflate two separate concepts in contending that the ruling in *Joyce* had already rejected the United States arguments that "state law-based stockwater rights are needed to 'support' or 'enable' federal grazing programs and are crucially important' to them." State Br. 39. The United States did not make and the *Joyce* court did not consider any requests for injunctive relief in those proceedings.

3. The United States Reasonably Entered into Its Agency Agreements. but Those Agreements are Not Required to Avoid Forfeiture of Vested Rights

The Legislature Intervenors characterize the United States' agency agreements with certain of its grazing permittees as "topsy-turvy," citing to language in one agreement stating, "the United States obtained the water rights *for the benefit of the permittee's livestock*." Leg. Br. 25. According to the Legislature, such agreements "flip on its head the *Joyce* holding that a rancher/agent may acquire a water right for the agency/principal." *Id*. This argument seeks to obscure the fact that the United States successfully claimed thousands upon thousands of stockwater claims in the SRBA for the use and benefit of its grazing permittees. Though the Legislature may view this result as "topsy-turvy" because it disagrees with it, the United States plainly obtained these rights for ultimate use by cattle owned by its permittees through the SRBA. The language in the cited agreement merely tracks this reality, as well as the State's own settlement agreements with the United States. *See*, *e.g*., ECF No. 36-3 at 5 ("the Parties agree that the United States, acting on behalf of the BLM or other such agency, may appropriate a stock water right in its own name, pursuant to State law.").

The Legislature Intervenors contend that the federal agencies pursuit of these "principal/agent agreements 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." Leg. Br. 25. The agencies have made no such admission but entered into the agreements as a

reasonably diligent step to take multiple measures to protect against the Legislature's zealous, multi-year initiative to divest the federal government of the thousands of stockwater rights that it succeeded in confirming through years of concerted efforts in the SRBA.

The Legislature Intervenors argue that "the Idaho Supreme Court emphasized the need for express principal/agent relationships in" *McInturff v. Shippy*, 447 P.3d 937, 945 (Idaho 2019). Leg. Br. 25. But *McInturff* concerned the construction of a license agreement, which identified one of the litigants as the owner of the disputed water right. It also concerned who should be deemed to have initially appropriated the right. That is not what is at issue here, where the rights have already been decreed by the SRBA court, and there is no license agreement that identified one of the parties as the owner of any of the stockwater rights at issue.

At the end of the day, it is Defendants who seek to turn Idaho water law upon itself to support mass forfeiture and defeat the United States' state law-based stockwater rights confirmed by the SRBA court after decades of hard-fought effort to secure their recognition. In fact, both the State Defendants and the Legislature Intervenors purport to recognize that "[w]ater right forfeiture has long been 'disfavored' in Idaho, *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001)." State Br. 67; Leg. Br. 32 ("Generally, water right forfeitures are not favored under Idaho law."). And yet they now vigorously defend the Legislature's adoption of a forfeiture scheme that seeks to facilitate the mass forfeiture of federal stockwater rights. These efforts violate this basic principle of Idaho water law. They also violate the principle of Idaho law that forfeiture cannot occur due to factors beyond the control of the water rights owner – in this case, the United States. *See* I.C. § 42-223(6) ("No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control."). To the extent the United States' vested stockwater rights recognized in the

SRBA are at now risk of forfeiture due to the lack of agency agreements, notwithstanding that the rights continue to be used in the same manner as at the time of their decree, that is a factor beyond the United States' control.

The United States has complied with state water law in appropriating and having adjudicated its thousands of stockwater rights and only opposes in these proceedings the State's efforts to undermine and terminate these settled rights in violation of federal and state law.

C. The State Defendants' Remaining Arguments Lack Merit

In their final set of arguments, the State Defendants again mischaracterize the United States' claims in an effort to manufacture a jurisdictional or other defect. But none exists. Each of the State Defendants' remaining efforts to evade the United States' challenges lacks merit.

1. The *Rooker-Feldman* Doctrine Does Not Apply

State Defendants' reliance on the *Rooker-Feldman* Doctrine is misplaced. The *Rooker-Feldman* Doctrine "prohibits federal courts from adjudicating cases brought by state-court losing parties challenging state-court judgments." *Reed v. Goertz*, 143 S. Ct. 955, 960 (2023). "If a federal plaintiff presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court. *Skinner v. Switzer*, 562 U.S. 521, 532 (2011) (cleaned up) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291-92 (2005)). Here, the United States did not lose in state court and does not challenge the SRBA's Final Unified Decree or the Idaho Supreme Court's decisions. To the contrary, and as State Defendants concede, the United States succeeded in being decreed thousands of stockwater rights in the SRBA. *See*, *e.g*., State Br. 16 (noting "the SRBA District Court decreed thousands of water rights in the name of the United States."). It is the State that now seeks to collaterally attack the United States' decreed water rights through its

unlawful forfeiture statutes.

State Defendants ground their argument on the assertion that the federal claims are "inextricably intertwined" with a state court decision and would "undercut the state ruling or require the district court to interpret the application of state laws or procedural rules[.]" State Br. 44-45. This argument is baseless. The United States is not a losing party seeking to re-adjudicate its water rights. Rather, the United States seeks to defend the thousands of water rights previously decreed in the SRBA from the State's unconstitutional, collateral attack. Additionally, there have been no rulings by the SRBA court applying the new Idaho laws at issue here. Indeed, the Idaho Legislature enacted these laws long after the SRBA court decreed the United States its water rights to allow IDWR and other parties dissatisfied with the Final Unified Decree to again challenge the United States' rights. Therefore, a finding in the United States' favor would not undercut any state court ruling. Because the United States is not a losing party, and it does not allege error of a specific state court judgment, the United States' claims are not barred by the *Rooker-Feldman* Doctrine.

State Defendants rely on two cases in support of their argument: *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) and *Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005). State Br. 44-45. But these cases are inapposite. In *Bianchi* and *Doe*, the plaintiffs sought to vacate state court decisions they alleged caused an injury. *Bianchi*, 334 F.3d at 896; *Doe*, 415 F.3d at 1042. Here, the United States does not seek to vacate a decision by the SRBA court. To the contrary, the United States seeks declaratory and injunctive relief to shield the thousands of decreed water rights it was adjudicated in the SRBA from a collateral attack from the Idaho Legislature through its recently enacted statutes. Additionally, the United States does not complain of any injury caused by a state court judgment. *Exxon Mobil Corp.*, 544 U.S. at 284 (noting that the Rooker-

Feldman Doctrine is confined to "cases brought by state-court losers complaining of injuries *caused by* state-court judgments[.]" (emphasis added)). The concern here is injury caused by the Idaho Legislature's recently enacted statutes, not any specific judgment issued by the SRBA court or the Idaho Supreme Court.

State Defendants also contend that similar arguments were raised and rejected in the SRBA and in the *Joyce* appeal. But this is of no relevance under the *Rooker-Feldman* Doctrine. First, the Legislature did not first begin enacting the statutes at issue until 2017, roughly ten years after the 2007 opinion in *Joyce*. Second, *Joyce* only concerned the specific stockwater rights at issue in that case, not the thousands of stockwater rights decreed to the federal government by the SRBA court that the United States seeks to protect through the current litigation. Third, the Supreme Court has concluded that "it is not an impediment to the exercise of federal jurisdiction that the 'same or a related question' was earlier aired between the parties in state court" "if a federal plaintiff 'presents an independent claim.'" *Skinner*, 562 U.S. at 532 (quoted source omitted) (citing *In re Smith*, 349 F. App'x. 12, 18 (6th Cir. 2009) (Sutton, J., concurring in part and dissenting in part) (a defendant's federal challenge to the adequacy of state-law procedures for postconviction DNA testing is not within the "limited grasp" of *Rooker-Feldman*)). Here, the United States' challenges to Idaho's recently enacted legislation constitute wholly independent claims from the matters at issue in *Joyce*.

Finally, while the *Rooker-Feldman* Doctrine prohibits federal courts from adjudicating cases brought by state-court losing parties challenging state-court judgments, it does not preclude subsequent federal court challenges to a "statute or rule governing the [prior] decision[.]" *Reed*, 143 S. Ct. at 960-61 (citing *Skinner*, 562 U.S. at 532). Therefore, even if the United States were a losing party in a state court action (and it was not) and these statutes were in place at the time

of the adjudication (they were not), the Supreme Court has made it clear that the statutes governing the decisions may be challenged in a federal action. For example, in *Skinner v. Switzer* and *Reed v. Goertz*, the Supreme Court concluded that the *Rooker-Feldman* Doctrine did not apply because the plaintiffs in each case did not challenge their respective adverse Texas Court of Criminal Appeals decisions. *Skinner*, 562 U.S. at 532; *Reed*, 143 S. Ct. at 961. Instead, the plaintiffs targeted specific Texas statutes related to DNA testing on constitutional grounds. *Id.* Here, as in *Skinner* and *Goertz*, the United States does not challenge any specific adverse state-court decision but targets the unconstitutional statutes Idaho created to retroactively challenge the United States' water rights.

State Defendants' invocation of the *Rooker-Feldman* Doctrine should be rejected.

2. The *Burford* Abstention Doctrine Does Not Apply

State Defendants also err in relying on the *Burford* abstention doctrine. State Br. 49-53. This doctrine does not apply because: (1) this case largely turns on questions of federal, not state law; (2) the SRBA court has no "special competence" to determine whether the statutory forfeiture scheme enacted by the state legislature comports with federal law; and (3) Idaho is not entitled to implement statutes that are inconsistent with federal or state law.

The *Burford* abstention doctrine "is concerned with protecting complex state administrative processes from undue federal interference[.]" *Tucker v. First Md. Sav. & Loan, Inc.*, 942 F.2d 1401, 1404 (9th Cir. 1991) (cleaned up). "Abstention from the exercise of federal jurisdiction is the exception, not the rule[.]" *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 19-CV-04405-WHO, 2023 WL 1785278, at *9 (N.D. Cal. Feb. 6, 2023), *appeal docketed*, *Yurok Tribe v. Klamath Water Users*, No. 23-15499 (9th Cir. Apr. 5, 2023) and *Yurok Tribe v. Klamath Irrigation*, No. 23-15521 (9th Cir. Apr. 7, 2023). *Burford* abstention in particular represents an

"extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it." *City of Tucson v. U.S. W. Commc'ns, Inc.*, 284 F.3d 1128, 1133 (9th 2002) (citation omitted). The doctrine originated with a case in which an oil company filed a diversity suit in federal court attacking the validity of a state-issued drilling permit. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Supreme Court ultimately concluded that the case belonged in state court, because "the Texas legislature has established a system of thorough judicial review by its own state courts" of disputes arising from the state's complex regulatory scheme for oil and gas development. *Id.* at 325.

As subsequently construed by the courts, there is only a "narrow range of circumstances in which *Burford* can justify the dismissal of a federal action." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726 (1996). "[T]o limit the application of abstention under the *Burford* principle," the Ninth Circuit has determined it applies only where:

> (1) . . . the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) . . . federal review might disrupt state efforts to establish a coherent policy.

Tucker, 942 F.2d at 1405; *see also* State Br. 50. In essence, *Burford* abstention allows courts to "decline to rule on an essentially local issue arising out of a complicated state regulatory scheme." *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 376 (9th Cir. 1982). Here, none of the three exceptional *Burford* factors are present.

In an effort to meet the narrow criteria under the *Burford* abstention doctrine, State Defendants twist the United States' suit into one that purportedly challenges specific IDWR determinations in a water adjudication. State Br. 50 (citing I.C. § 42-224(10)). For example, State Defendants contend that the first *Burford* factor is met because "the SRBA District Court is the *only* Idaho court authorized to hear challenges to IDWR's determinations that stock-water

rights have been forfeited." *Id*. But the United States' suit does not challenge a specific SRBA court determination; rather, it targets Idaho's unconstitutional forfeiture and other stockwatering statutes that the Legislature recently enacted years after the SRBA court had decreed thousands of stockwater rights to the United States in the SRBA. Indeed, this case largely turns on questions of federal, not state, law. *See Martin v. Stewart*, 499 F.3d 360, 368 (4th Cir. 2007) (holding that federal courts generally may not abstain from deciding purely federal issues). The State has not concentrated challenges to unconstitutional statutes in the SRBA. State Defendants fail to meet the first *Burford* factor.

State Defendants also fail to meet the second *Burford* factor because this Court does not require any special competence in water law to determine whether the statutes are unconstitutional. State Defendants contend that water rights are an issue of vital concern and that IDWR and the SRBA court have special competence to which the United States' claims cannot be easily separated. State Br. 51. While Idaho does have a regulatory scheme in place with respect to the adjudication of water rights, the questions presented in this case are "pure constitutional challenge[s]" "that would not require the Court to intrude into proceedings involving that scheme." *Adibi v. Cal. State Bd. of Pharmacy*, 393 F. Supp. 2d 999, 1007 (N.D. Cal. 2005) (citing *Matson Navigation Co., Inc. v. Haw. Pub. Utils. Comm'n*, 742 F. Supp. 1468, 1476 (D. Haw. 1990) (holding *Burford* abstention inapplicable because "the question presented is a pure constitutional challenge to" an "order issued pursuant to a state statute")).

In *Adibi*, the court acknowledged that the State had "a relatively complex regulatory scheme in place with respect to pharmaceutical licensing and permitting," but the question presented was a "'a pure constitutional challenge' that would not require the Court to intrude into proceedings involving that scheme." 393 F. Supp. 2d at 1007 (citation omitted). The court

concluded that the federal constitutional issues were "easily separable from complicated state law issues" and presented an issue over which the state courts do not have "special competence." *Id.* (citing *Tucker*, 942 F.2d at 1405). This reasoning applies with equal force here.

State Defendants pluck quotes out of context to argue that this case turns on complex state law issues. State Br. 51 (citing *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001)). However, in *Morros* the Ninth Circuit explicitly held that:

> [e]ven if there were such a symbiotic relationship between the state courts and the State Engineer, it would hardly be relevant because this case does not revolve around "complex state law issues," such as who is entitled to how much water. *Rather, it revolves around whether state law conflicts with federal law, which is plainly not an issue "with respect to which state courts might have special competence.*

Morros, 268 F.3d at 705 (emphasis added). The SRBA court does not have any unique competence to hear constitutional challenges to relevant statutes.

Lastly, State Defendants fail to meet the third *Burford* factor because it "has no right to an unconstitutional policy, coherent or otherwise." *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 297 (9th Cir. 1996), as amended (Aug. 14, 1996) (citations omitted). State Defendants contend that the third *Burford* requirement is met because federal review may disrupt its efforts to establish a coherent policy "regarding the use and forfeiture of state law-based stockwater rights." State Br. 52. More specifically, the State argues that "[t]he administrative and judicial components of Idaho Code § 42-224 constitute an integrated procedure to resolve allegations of stockwater right forfeiture." *Id.* But "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *McGee v. Cole*, 66 F. Supp. 3d 747, 755 (S.D.W. Va. 2014) (citing *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978)). The Ninth Circuit has reiterated that "abstention is not required whenever there exists such a process, or even in all cases where there is a potential for conflict with state

regulatory law or policy." *City of Tucson*, 284 F.3d at 1133 (citing *New Orleans Pub. Serv. Inc., v. Council for New Orleans*, 491 U.S. 350, 362 (1989)) (internal quotation marks omitted).

Resolution of the United States' constitutional claims will not disrupt state resolution of distinctly local policies. State Defendants concede that these are the first forfeiture proceedings to take place under Section 42-224, and the statute itself is the product of years of legislative development. State Br. 52. The SRBA operated up until this point without applying these statutes. Overturning these statutes does not threaten the state's ability to adjudicate or administer water rights or implement a coherent policy.

In short, the State Defendants' "attempt[] to establish a coherent policy are of little consequence, as it is the constitutionality of the state's efforts to do precisely this which is currently in question." *Fireman's Fund*, 87 F.3d at 297. The important constitutional matters at issue outweigh the State's interest in developing its discriminatory forfeiture policy without scrutiny from the federal courts. Because no exceptional circumstances are present here, *Burford* does not apply, and jurisdiction is proper before this Court.

3. The SRBA Court Does Not Have Prior Exclusive Jurisdiction Over the United States' Claims

The State Defendants' argument that the SRBA court has prior exclusive jurisdiction over the United States' challenges is equally without merit. State Br. 45-49. The doctrine of prior exclusive jurisdiction generally holds "'that when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court.'" *State Eng'r of State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 809 (9th Cir. 2003) (quoting 14 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3631, at 8 (3d ed. 1998)). Although an *adjudication* of water rights may be analogous to an *in rem* proceeding because all

claimants are joined and their relative rights to use the water are at issue, this proceeding, which challenges the State's unlawful statutes and forfeiture proceedings, is a proceeding *in personam*.[12] Accordingly, the doctrine of prior exclusive jurisdiction does not apply.

Still, the State Defendants seek to reframe the United States' position to argue that this action is *in rem*. State Defendants assert that "the question of whether the United States' state law-based stockwater rights are subject to forfeiture under state law is *the* central issue in this case." State Br. 48; *see also id*. at 48-49. State Defendants also argue that "the requested relief "seek[s] 'necessarily [to] interfere with the jurisdiction or control by the state court over the *res*[,]"' *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 593 (9th Cir. 2022) (citation omitted), "because the question of whether the United States' stockwater rights are subject to forfeiture under Idaho law falls within the retained jurisdiction of the SRBA District Court." State Br. 49. These contentions, however, highlight the fallacy of the State Defendants' framing of the issue.

As discussed above, this case does not turn on whether the United States' stockwater rights are categorically immune from forfeiture. Rather, the central issue is whether the several statutes at issue are consistent with federal and state law, including whether the particular manner in which the State is seeking to forfeit thousands of rights unlawfully discriminates against the United States under the Supremacy Clause, exceeds the waiver of sovereign immunity under the McCarran Amendment, and violates the Contract and Property Clauses of

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[12] "An action is *in rem* when it determines interests in specific property as against the whole world." *Goncalves By & Through Goncalves v. Rady Child.'s Hosp. San Diego*, 865 F.3d 1237, 1254 (9th Cir. 2017) (internal quotation marks and alteration omitted). If the action seeks "merely to determine the personal rights and obligations of the parties," on the other hand, it is *in personam*[.] *Id*. (cleaned up); *see also In Personam*, Black's Law Dictionary (11th ed. 2019) (defining in action as "[i]nvolving or determining the personal rights and obligations of the parties." In assessing whether an action is *in rem* or *in personam*, courts "look behind the form of the action to the gravamen of a complaint and the nature of the right sued on." *State Eng'r*, 339 F.3d at 810–11 (internal quotation marks omitted).

the U.S. Constitution and the Retroactivity Clause of the Idaho Constitution. Additionally, the State Defendants' framing fails to acknowledge that statutes are unlawful and that the State has no authority to implement an unconstitutional scheme under the auspices of an *in rem* action.

The SRBA court has jurisdiction to adjudicate the validity and elements of water rights, not to determine the validity of legislation that is alleged to have violated federal and state law. In particular, the SRBA court did not retain jurisdiction to review the lawfulness of subsequently enacted legislation, even if that legislation pertains to restrictions on water rights or seeks to divest the United States of thousands of previously decreed stockwater rights. The forfeiture proceedings authorized by I.C. § 42-224 are not even a part of the SRBA, nor is the SRBA a declaratory judgment action concerning the lawfulness of the State's legislation creating new appurtenancy, change application, and appropriation restrictions.

Simply put, this suit is not an action to adjudicate water rights, or to determine the relative rights of various claimants in a *res*. Indeed, the water rights placed at issue by the challenged legislation have been adjudicated by the SRBA and the United States now seeks to shield those rights from the State's collateral attack. Importantly, the United States does not seek to have this Court "seize and control" any assets whatsoever. This action will neither redefine nor modify the adjudicated water rights of any of the parties interested in the SRBA. This suit is therefore distinct from the *in rem* adjudication of the water rights of all the claimants and the prior exclusive jurisdiction doctrine simply does not apply. *See Goncalves*, 865 F.3d at 1254 (doctrine does not apply when plaintiffs were "not asking the district court to take any of the settlement funds from the state court's control"); *Hanover Ins. Co. v. Fremont Bank*, 68 F. Supp. 3d 1085, 1110 (N.D. Cal. 2014) (same, where plaintiff "does not ask the [district] court to seize" assets under the state court's control).

State Defendants argue that even if this suit is *in personam* (which it is), the "gravamen" of the complaint is still the underlying water rights, and the prior exclusive jurisdiction doctrine should apply. State Br. 48 (first citing *Applied Underwriters*, 37 F.4th at 592 and then quoting *State Eng'r*, 339 F.3d at 810). But the United States is not asking this Court to take any water rights from the SRBA court's control. Nor would this Court's determination disturb the SRBA court's control over any water rights. Rather, the United States seeks only a determination of the lawfulness of the State's recent legislation. As such, this suit is an *in personam* action, not an action *in rem* or *quasi in rem*, and the doctrine of prior exclusive jurisdiction does not apply. *Goncalves*, 865 F.3d at 1254 ("where a judgment is "strictly in *personam* . . . both a state court and a federal court having concurrent jurisdiction may proceed with the litigation." (citing *Penn Gen. Cas. Co. v. Penn. ex rel. Schnader*, 294 U.S. 189, 195 (1935)).

State Defendants' position also conflicts with case law holding that not all water-related litigation falls within the scope of the waiver of sovereign immunity under the McCarran Amendment. *See*, *e.g.*, *Klamath Irrigation Dist.*, 48 F.4th at 946 ("not every suit that comes later in time than a related adjudication amounts to an administration under the Amendment." (citing *San Luis Obispo Coastkeeper*, 394 F. Supp. 3d at 995 ("In sum, the purpose of the McCarran Amendment is not to waive sovereign immunity whenever litigation may incidentally relate to water rights administered by the United States. It is for determining substantive water rights by giving courts the ability to enforce those determinations . . . .")). State Defendants' position likewise conflicts with 28 U.S.C. § 1345, which states: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." As the Ninth Circuit explained in *United States v. State*

of Cal., 655 F.2d 914 (9th Cir. 1980), "[t]he federal government, of course may sue a state in federal court under any valid cause of action, state or federal, even if the state attempts to limit the cause of action to suits in state courts only." *Id*. at 918; *see also United States v. Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987) (finding federal jurisdiction over contribution claim by United States against Hawaii under 28 U.S.C. § 1345, "even though Hawaii law provides that the suit must be heard in a Hawaii state court"). Though water related, the United States' challenges to the lawfulness of the State's newly enacted legislation simply do not fall within the exclusive jurisdiction of the SRBA court.

In sum, this is an action brought by the United States challenging unconstitutional statutes and forfeiture proceedings that are *independent* from the *in rem* water rights adjudication. It is not an *in rem* action relating to the water rights themselves, but an *in personam* action against Idaho representatives and entities who enacted and are implementing the statutes in violation of federal and state law.

III. The United States Is Entitled to a Permanent Injunction

An injunction is warranted if, in addition to prevailing on the merits, the plaintiff demonstrates: (1) a likelihood of suffering irreparable harm absent an injunction; (2) that the balance of equities tips in the plaintiff's favor; and (3) that injunctive relief is in the public interest. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The United States satisfies each of these prongs for permanent injunctive relief, and this Court should permanently enjoin application of the Idaho legislation described above, codified in Idaho Code sections 42-113(2)(b), 42-222(2), 42-224, 42-501, 42- 502, and 42-504, as to the United States or its agencies.

A. The Challenged Statutes Irreparably Harm the United States

The United States has demonstrated that it has been – and will continue to be –

irreparably harmed by the Idaho statutes at issue because they violate the Supremacy, Property, and Contract Clauses of the United States Constitution, as well as the Retroactivity Clause of the Idaho Constitution, to the detriment of the United States. Idaho's actions also irreparably harm the United States' property rights and the federal grazing program and obstruct the federal agencies from accomplishing their missions. Yet Defendants argue that this factor has not yet been met because the United States has not shown "that 'it has *already* suffered irreparable injury.'" State Br. 75 (citing *TCR, LLC v. Teton Cnty*., No. 4:22-cv-00268-CRK, 2023 WL 356169, at *6 (D. Idaho Jan. 23, 2023)); *see also* Priv. Br. 31-33. Defendants err.

As an initial matter, the Ninth Circuit has long recognized that constitutional violations in general constitute irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that denial of a preliminary injunction was an abuse of discretion because, *inter alia*, the deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury"); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" (citation omitted)); *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (an alleged constitutional infringement by deprivation of equal protection "will often alone constitute irreparable harm."); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) ("Injunctive relief is appropriate in cases involving challenges to government policies that result in a pattern of constitutional violations."). As discussed above, Idaho's statutes satisfy this measure of irreparable harm by violating the U.S. and Idaho Constitutions to the injury of the United States.

Idaho's statutes also inflict additional harm on the United States because they will divest the United States of its property interests in its decreed stockwater rights. Divesting the United States of a property interest it spent decades adjudicating is a harm in of itself. *Park Vill.*

Apartment Tenants Ass'n v. Mortimer Howard Tr., 636 F.3d 1150, 1159 (9th Cir. 2011) ("It is well-established that the loss of an interest in real property constitutes an irreparable injury."); *see also Milton S. Kronheim & Co., Inc. v. Dist. of Columbia*, 877 F. Supp. 21, 28 (D.D.C. 1995), *rev'd on other grounds*, 91 F.3d 193 (D.C. Cir. 1996) ("[F]rom the earliest times, courts in equity have considered an injury to real property to be irremediable at law. The uniqueness of land typically makes damages an inadequate remedy." (alteration and citation omitted)); *accord 7-Eleven, Inc. v. Khan*, 977 F. Supp. 2d 214, 234 (E.D.N.Y. 2013) ("As for the adequacy of potential remedies, it is well-settled that unauthorized interference with a real property interest constitutes irreparable harm as a matter of law, given that a piece of property is considered to be a unique commodity for which a monetary remedy for injury is an inherently inadequate substitute." (citation omitted)). It will also negatively impact the federal agencies' ability to execute the federal grazing programs. These injuries further support injunctive relief.

Defendants brush past these harms and argue, without citation to any precedent, that these harms are not sufficient because the stockwater rights have not *yet* been scrutinized or found to have been forfeited. Priv. Br. 31-32; State Br. 75. In short, Defendants contend that the United States has only shown a possibility of harm but has not demonstrated actual harm. *Id.* These arguments miss the mark.

First, the United States suffers an irreparable injury because these statutes are unconstitutional. Second, even if the constitutional violations were not an injury in of itself (and they are), the United States (or any plaintiff) need not wait for the inevitable injury to occur, as one of the requirements for injunctive relief is the likelihood of future, irreparable harm. *Winter*, 555 U.S. at 20. This requirement conforms to common sense, which dictates that courts issue injunctions to *prevent* irreparable harm, not just to remedy past violations. Here, the United

States has already been injured because the statutes at issue violate the Constitution and have been applied against the United States. And Defendants cannot genuinely deny that the forfeiture of decreed property rights held by the United States is the inevitable – and intended – result of these newly enacted statutes if this Court does not enjoin their enforcement.

Rather than confront the significant and irreparable harms that will result from these statutes, State Defendants simply recategorize these harms as "natural and entirely lawful consequences of the fact that federal agencies are subject to Idaho water law." State Br. 77. Without any citation or explanation, State Defendants conclude that these "impacts" are not legally cognizable injuries because they are a product of Idaho law. *Id.* The United States does not dispute that the stockwater rights were decreed under Idaho law. But critically, State Defendants omit that the Legislature created these new laws to retroactively redefine stockwater rights and impose additional conditions on their continued existence with the intent to specifically target the United States' rights for forfeiture. The State Defendants' concession that these "impacts" result from the Idaho statutes illustrate that the harm the United States has highlighted is not only imminent, but inevitable and expected if an injunction is not issued.

The United States has further shown how the new statutes have already disrupted the day-to-day administrative actions related to water right applications. ECF No. 35 at ¶ 18. For instance, the United States has explained how IDWR issued the Forest Service a Permit to Appropriate Water in 2014, which the Forest Service relied on when it invested time and money to develop the improvement in compliance with Idaho state law. *Id.* But, in 2021, after this development in reliance on the permit, IDWR sent a letter to the Forest Service explaining that recent changes to Idaho water law codified at I.C. § 42-502 now require the Forest Service to show the agency's ownership of the livestock when submitting the Proof Statement. *Id.* Though

State Defendants dismiss the United States' concerns by noting IDWR will issue final approval if the United States submits evidence that it owns the livestock utilizing the water, State Br. 75, the imposition of this retroactive requirement, which was not a condition to the issuance of the permit, precludes the United States from now perfecting the right.

Similarly, the State Defendants argue that the IDWR has not *officially* denied approval of the BLM stockwater developments but has simply started asking the federal agencies to demonstrate compliance with the *Joyce* decision when filing permit applications or proof of beneficial use. State Br. 76. But this is a legal argument, not a refutation of the United States' showing of harm. Further, the State's position is legally incorrect, as *Joyce* applied to instream stockwater consumed by livestock without a physical diversion structure, not developed livestock watering sources for which the BLM may seek a permit. *See* ECF No. 36 at ¶ 25.

State Defendants contend that any uncertainty for federal grazing permittees that may result from the potential forfeiture of United States' state law-based stockwater right is speculative and unquantifiable. State Br. 76. Yet State Defendants do not and cannot explain the basis for these unfounded assertions. The simple fact is that absent an injunction the State will systematically divest the United States of thousands of water rights that it has been decreed.

The Legislature Intervenors dismiss the United States' concerns by arguing that the agencies may continue to administer grazing allotments and that the permittees will be subject to the same forfeiture scheme. Leg. Br. 48. These arguments ignore that the forfeiture statutes would both divest the United States of a property right – a harm in of itself – and frustrate the federal grazing program by allowing the potential dewatering and/or monopolization of water on federal grazing lands. U.S. Br. 47-48. Without water or with water solely in the control of a single rancher on allotments serving multiple permittees, the lands would be rendered useless for

grazing by those permittees without access to water. And is it not a simple matter of the permittees without water applying for new water rights on those allotments, as the applications may face objections by existing water rights holders, including because many sub-basins are closed to new appropriations. ECF No. 36 at ¶ 30. None of the Defendants confront this reality.

Lastly, State Defendants argue that the United States fundamentally misunderstands Idaho water law and denies that it is subject to Idaho's forfeiture statutes. State Br. 77. But as discussed at length, the United States does not dispute that it is subject to valid state water laws, only those water laws, particularly the challenged statutes, that violate federal and state law. The SRBA court decreed the United States, under Idaho law, thousands of water rights that it now seeks to protect here against this collateral attack. Divesting the United States of a decreed property interest under the guise of the State's invalid forfeiture laws, or implementing new restrictions on decreed water rights, is no doubt an irreparable harm.

In fact, when constitutional violations occur, courts have consistently recognized there is no adequate remedy at law to rectify any resulting injury. *Allee v. Medrano*, 416 U.S. 802, 814–15 (1974); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 798 (9th Cir. 2019); *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm"), *rev'd and remanded on other grounds*, 562 U.S. 134 (2011); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009). Additionally, as discussed above, injuries to real property interests are deemed irreparable. Because the United States has no adequate remedy at law to prevent this irreparable harm, it satisfies this requirement for the grant of a permanent injunction.

B. The Balance of Equities and Public Interest Strongly Favor Injunctive Relief

The United States also satisfies the other two requirements for the grant of permanent

injunctive relief – balance of hardships and the public interest, *Winter*, 555 U.S. at 20 – which two factors merge when the United States is a party. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

"Without a doubt, constitutional injuries can inflict serious damage and the public interest is served through the enjoinment of an unconstitutional application of law." *Menges v. Knudsen*, 538 F. Supp. 3d 1082, 1120–21 (D. Mont. 2021), *appeal dismissed as moot*, No. 21-35370, 2023 WL 2301431 (9th Cir. Mar. 1, 2023) (citing *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) ("When weighing public interests, courts have consistently recognized the significant public interest in upholding First Amendment principles" (internal quotations omitted)). By establishing a likelihood that Idaho's statutes violate the U.S. and Idaho Constitutions, the United States has also established that the public interest and balance of the equities favor an injunction. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). "[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). On the contrary, the public interest and the balance of the equities favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

Enforcement of the challenged statutes will also inevitably strip the United States of its property interests in its stockwater rights to the impairment of the federal grazing programs and its permittees who rely on the rights held by the United States. Without a guaranteed source of water for all its permittees, not just those who hold their own rights, the federal grazing program, upon which these permittees and local communities depend, will have an uncertain future.

In contrast, the hardships imposed on Defendants are non-existent. Enjoining Defendants

from enforcing the unlawful statutes will not impose any burdens. In fact, it is in the public interest to do so. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) ("'it is always in the public interest to prevent the violation of a party's constitutional rights.'" (internal citation omitted)). And the State has no judicially-enforceable interest in unlawfully divesting the United States of its stockwater rights decreed in conformance with state law, where the rights continue to be used in the same manner as at the time of their decree.

Still, the State Defendants recycle arguments to contend that the balance of the equities does not warrant an injunction. State Defendants argue that use of stockwater on federal lands is defined by state, not federal law, and that the Taylor Grazing Act and Federal Land Policy and Management Act incorporate this deference to state law. State Br. 80. But as repeatedly explained, deference to state law does not allow the enforcement of state statutes that violate federal and state constitutional law and that would subject the United States to a forfeiture scheme that exceeds the waiver of sovereign immunity under the McCarran Amendment.

Similarly, State Defendants argue that if the requested relief is granted, it will redefine the nature and extent of the United States' state law-based water rights and will undermine the finality of the SRBA and other water rights adjudications in Idaho. Again, the opposite is true. An injunction is necessary to *prevent* Idaho from redefining the nature and extent of thousands of the United States' water rights. Indeed, striking these statutes down would *preserve* the Final Unified Decree from Idaho's collateral attack and prevent the Legislature from retroactively implementing new restrictions on decreed rights or redefining existing rights for the sole purpose of causing a forfeiture. An injunction against the enforcement of these unlawful statutes provides the *finality* that Idaho seeks to preserve. Idaho has effectively operated for over a century under laws that did not present these legal violations. To the extent there is a burden, it

is of Idaho's own making. The public interest is best served by disallowing new legislation that violates federal and state law.

Lastly, Legislature Intervenors misconstrue the United States' Complaint as seeking to "federalize" Idaho water. Leg. Br. 46. Though Legislator Intervenors argue that Idaho has exclusive control over its water and that the United States is somehow imposing its policies on Idaho in violation of the Tenth Amendment, *id*., the United States is not imposing any policy measures on Idaho. Nor is the United States seeking to diminish the rights of any third parties in this case. Rather, the United States only seeks to protect its stockwater rights decreed under state law and prevent the unlawful divestment and diminishment of these rights.

The balance of harms and public interest favor enjoining these statutes, enacted in violation of federal and state law, regardless of any alleged harm to Idaho. The equities favor an injunction to protect the public interest from serious and irreparable impacts caused by Idaho's unconstitutional statutes.

C. There is No Need for Bifurcated Proceedings on Remedy

Courts have not hesitated to issue permanent injunctions barring future unlawful conduct when constitutional violations and real property interests are at stake. *See Allen v. Campbell*, No. 4:20-CV-00218-DCN, 2021 WL 737123, at *9 (D. Idaho Feb. 25, 2021) (issuing an injunction where "[t]he loss of the real property alone, which Plaintiffs have improved and developed in a unique manner to their business interests, is an irreparable injury."); *Menges*, 538 F. Supp. 3d at 1120 (collecting cases where constitutional violations constitute an irreparable injury where there is no adequate remedy at law to rectify any resulting injury). While the Ninth Circuit has stated that "[t]he district court has considerable discretion to fashion appropriate injunctive relief, particularly where the public interest is involved[,]," *United States v. Akers*, 785

F.2d 814, 823 (9th Cir. 1986), the severity of the harms and the interest in rectifying a constitutional violation counsel in favor of issuing an injunction. This case is no different.

The Legislature Intervenors contend that if this Court concludes that Idaho has violated the Constitution, then the Court should bifurcate the proceedings and invite briefing on a tailored remedy. But there is no other remedy but to strike down these unconstitutional laws. And it against the public interest to allow Idaho to operate under an unlawful forfeiture scheme.

Legislature Intervenors invoke principles of federalism to justify bifurcating the remedy from this proceeding. Leg. Br. 46. But as the Legislature notes, comity requires consideration of "federal rights and interests in a manner that does not 'unduly interfere with the *legitimate* activities of the States.'" *Id*. at 47 (citing *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 860 (9th Cir. 1992) (emphasis added)). Unconstitutional statutes are not legitimate on their face, and the Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any in the Constitution or Laws of any state to the Contrary notwithstanding." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing U.S. Const., art. VI, cl. 2). A separate proceeding to decide that is unnecessary.

The United States has demonstrated that it is entitled to succeed on the merits, that it will be irreparably harmed absent permanent injunctive relief, and that the balance of the equities and the public interest strongly weigh in favor of such relief.

CONCLUSION

For all the foregoing reasons and those in the United States' opening memorandum, the Court should grant the United States summary judgment and enjoin the enforcement of the challenged statutes against it.

Respectfully submitted this 21st day of June, 2023.

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EXHIBIT A TO

UNITED STATES' COMBINED RESPONSE AND REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

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Counsel for Plaintiff United States of America

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,	)	Case No. 1:22-cv-00236-DCN **DECLARATION OF COUNSEL IN SUPPORT OF UNITED STATES' COMBINED RESPONSE AND REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

v.	)
	)
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,	)
	)
and	)
	)
JOYCE LIVESTOCK CO.; LU RANCHING CO.; PICKETT RANCH & SHEEP CO.; IDAHO FARM BUREAU FEDERATION, INC.,	)
	)
Intervenor Defendants.	)

I, Thomas K. Snodgrass, declare and state as follows:

1. My name is Thomas K. Snodgrass. I am over eighteen years of age and hold the position of Senior Attorney, U.S. Department of Justice, Environment and Natural Resources Division, Natural Resources Section. I am co-counsel of record for Plaintiff United States of America in this case.

2. The following statements are based upon my personal knowledge.

3. Attached hereto is a true and correct copy of the "Memorandum Decision and Order on Challenge in the Matter of the Final Unified Decree," issued June 28, 2012, by Eric J. Wildman, Presiding Judge, Snake River Basin Adjudication, in the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Twin Falls, Basin-Wide Issue 16, Subcase No: 00-92099 (In Re: Form and Content of Final Unified Decree), as downloaded from http://www.srba.state.id.us/srba7.htm.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated June 21, 2023

/s/ Thomas K. Snodgrass_
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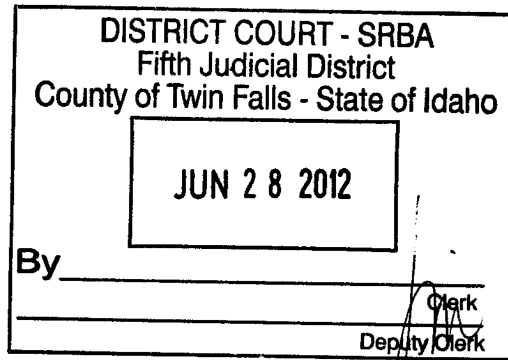

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Basin-Wide Issue 16**
	)	**Subcase No: 00-92099**
Case No. 39576	)	**(In Re: Form and Content of Final Unified Decree)**
	)	
	)	**MEMORANDUM DECISION AND ORDER ON CHALLENGE IN THE MATTER OF THE FINAL UNIFIED DECREE**
	)	

Appearances:

Paul L. Arrington and Sarah W. Higer of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company and Clear Springs Foods, Inc.

Robyn M. Brody of Brody Law Office, Rupert, Idaho, attorney for Rangen, Inc.

Jerry R. Rigby of Rigby, Andrus and Rigby, Chartered, Rexburg, Idaho, attorneys for Fremont Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, North Fremont Canal System, Peoples Canal & Irrigation, The United Canal Company and Snake River Valley Irrigation District.

Daniel V. Steenson of Ringert Law, Chartered, Boise, Idaho, attorneys for Nampa & Meridian Irrigation District.

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I.

PROCEDURAL BACKGROUND

1. On July 12, 2011, the Court entered an *Order* in the above-captioned matter designating the following issue as "Basin-Wide Issue 16": "The issue pertaining to the form and content of the final unified decree to be entered upon completion of the SRBA."

2. On July 15, 2011, the Court entered an *Order* establishing a Steering Committee to address the form and content of the final unified decree.[1] Among other things, the Steering Committee was charged with identifying issues pertaining to the form and content of the final unified decree, recommending a logical order and time frame in which to address those issues, and submitting a written report to the Court setting forth the Committee's recommendations.

3. On November 30, 2011, the Steering Committee submitted its *Report of Steering Committee Re: Proposed Final Unified Decree*. Attached to the *Report* was a copy of the Steering Committee's *Proposed Final Unified Decree*. Various issues pertaining to the form and content of the final unified decree were identified by the Steering Committee by way of written comments contained in the body of the *Proposed Final Unified Decree*. The issues identified were those issues the members of the Steering Committee were unable to resolve via a consensus resolution.

4. Additionally, the Steering Committee submitted its *Report of Steering Committee Re: Proposed Process for Final Unified Decree*. Among other things, the Committee proposed that the Court review the *Proposed Final Unified Decree*, make any suggested changes, and serve a copy of the *Proposed Decree* on the parties. The Steering Committee further recommended that the parties would then have the opportunity to challenge the *Proposed Final Unified Decree* – specifically issues pertaining to the form and content of the *Decree* – before this Court pursuant to the procedures and deadlines set forth by the Committee.

5. On January 30, 2012, the Court issued an ***Order Re: Proposed Final Unified Decree and Adopting Proposed Procedures and Deadlines*** adopting the *Proposed Final Unified*

[1] By *Order* of the Court dated May 18, 2011, those parties to the SRBA that wished to participate in Basin-Wide Issue 16 were required to file a *Notice of Intent to Participate* in the above-captioned subcase. Those parties that wished to volunteer to be part of a Steering Committee regarding the form and content of the final unified decree were required further to so indicate in their *Notice of Intent to Participate*. All parties that indicated a willingness to be a part of the Steering Committee were appointed as members of the Steering Committee via this Court's July 15, 2011 *Order Establishing Steering Committee*.

Decree subject to certain modifications set forth in the *Revised Proposed Final Unified Decree* attached as an exhibit to the ***Order***.

6. Timely *Notices of Challenge* to the *Revised Proposed Final Unified Decree* were filed by Sinclair Oil Corporation, et al.[2], A & B Irrigation District, et al.[3], the State of Idaho, City of Pocatello, and the Ground Water Districts.[4] Rangen, Inc., Fremont-Madison Irrigation District, et al.[5], Nampa & Meridian Irrigation District, and the Municipal Providers[6] participated in the Challenge through the filing of rebuttal briefing.

7. Oral argument on the *Notices of Challenge* was heard May 14, 2012.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on Challenge was heard before this Court on May 14, 2012. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or May 15, 2012.

III.
ISSUES RAISED ON CHALLENGE

The following issues were raised on Challenge:

Issue 1. Whether the term "persons" rather than the term "parties" should be used in reference to those who are bound by the Final Unified Decree?

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[2] "Sinclair Oil Corporation, et al.," refers collectively to Sinclair Oil Corporation d/b/a Sun Valley Company, Pioneer Irrigation District, Emmett Irrigation District, Seward Prosser Mellon and Thousand Springs Ranch, Thompson Creek Mining Company, Snake River Dairies, LLC, Wallach IX, LLC, Seneca Foods Corporation, Diller Miller Land Company, LLC and Miller Land Company, Inc., Newfoundland Partners, and Tree Top Ranches, L.P.

[3] "A&B Irrigation District, et al.," refers collectively to A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, and Clear Springs Foods, Inc.

[4] "Ground Water Districts" refers collectively to Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

[5] "Fremont-Madison Irrigation District, et al.," refers collectively to Fremont-Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, North Fremont Canal System, Peoples Canal & Irrigation, The United Canal Company and Snake River Valley Irrigation District.

[6] "Municipal Providers" refers collectively to the City of Nampa, City of Meridian, and United Water Idaho.

Issue 2. Whether duplicates of partial decrees entered pursuant to federal reserved water right settlements should be included in Attachment 2 to the Final Unified Decree with a remark cross-referencing the applicable settlement documents included in Attachment 4?

Issue 3. Whether the Court should issue a new order clarifying the definitions of *de minimis* "domestic" and "stock water" claims and the procedures for adjudicating deferred claims?

Issue 4. Whether the Final Unified Decree should include language clarifying that the results of water right transfers initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree are not superseded by the Final Unified Decree?

Issue 5. Whether the Final Unified Decree should include a finding that "Each partial decree was the result of a specific factual investigation related to the underlying water right," and that "Because the evidence adduced for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding?"

Issue 6. Whether the Final Unified Decree should include a finding that the elements of each water right reflect the extent of beneficial use as of November 19, 1987?

Issue 7. Whether the Final Unified Decree should state that the quantity element of each water right defines the maximum amount of water that may be diverted?

Issue 8. Whether the tolling of the forfeiture period during the SRBA precludes the Director from considering beneficial use in water distribution proceedings?

IV.

APPLICABLE LAW

Idaho Code § 42-1412(8) provides that "[u]pon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and general

provisions into a final decree." Idaho Code § 42-1420 provides, subject to certain enumerated exceptions, that "[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system . . . ."

V.
DISCUSSION

A. Discussion and Rulings on Unopposed Issues.

Issues 1 through 4 as identified above were unopposed on Challenge. For each of the unopposed issues the Court set forth on the record at oral argument that it concurred with the reasoning in support of the Challenge and would adopt the proposal advanced by the party who raised the issue. The Court will therefore proceed as follows with respect to each of the unopposed issues.

1. Issue 1: The Binding Scope of the Final Unified Decree.

In regards to Issue 1, the Court will substitute the term "person" for the term "parties" in reference to those who are bound by the Final Unified Decree.

2. Issue 2: Partial Decrees Subject to Federal Settlements.

In regards to Issue 2, consistent with the State of Idaho's proposal, the Court will include duplicates of partial decrees entered pursuant to federal reserved water right settlements in Attachment 2 to the Final Unified Decree. Each of the duplicate decrees will be marked as a duplicate and will include a remark cross-referencing the applicable settlement documents included in Attachment 4 to the Final Unified Decree.

3. Issue 3: Issuance of a Superseding Order Clarifying Definitions and Procedures for Deferrable Domestic and Stock Water Claims.

In regards to Issue 3, the Court will issue an order clarifying the definitions of *de minimis* domestic and stock water rights as well as the procedures for adjudicating deferred claims in accordance with the State of Idaho's proposed *Order Governing Procedures in the SRBA for Adjudication of Deferred De minimis Domestic and Stock Water Claims.* The Final Unified Decree will cite to such order.

4. Issue 4: Clarification Regarding Administrative "Changes" following Issuance of a Partial Decree.

In regards to Issue 4, the Court informed the parties that it would draft proposed language to be included in the Final Unified Decree clarifying that the Final Unified Decree does not supersede the results of water right transfers initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree. The Court proposes the following paragraph to be inserted in the Order of the Final Unified Decree as Paragraph 13 and that subsequent paragraphs be renumbered in sequence accordingly.

> 13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) Any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree, or; 2) Elements of a water right defined by a license, where in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

Parties will have the opportunity to review and comment on the above-proposed paragraph.

B. Discussion and Rulings on Contested Issues 5, 6, 7 and 8.

Issues 5, 6, 7, and 8 involve provisions sought by both the City of Pocatello and the Ground Water Districts to be included in the Final Unified Decree. The City of Pocatello supports the inclusion of the following provisions in the Final Unified Decree:

> Each partial decree was the result of a specific factual investigation related to the underlying water right.
>
> Because the evidence considered for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding.[7]

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[7] The *Proposed Final Unified Decree* filed by the Steering Committee included paragraph 11 in the Findings of Fact which provides "Each partial decree was the result of a specific factual investigation related to the underlying water right." Paragraph 16 of the Order, which relates to paragraph 11, provides "Because the evidence considered for

The Court has identified these proposed provisions as Issue 5. The Ground Water Districts proposed the following alternative provisions:

> The water rights elements contained in the Final Unified Decree are based on the extent of beneficial use as of the commencement of the Snake River Basin Adjudication (SRBA) on November 19, 1987.
>
> The "diversion rate" element of each water right is the maximum permissible rate of diversion under the water right, and not a judicial determination that the maximum rate is needed at all times during the "period of use" to accomplish the designated "purpose of use."
>
> The tolling of the forfeiture statute during the SRBA does not preclude the Director from considering post-November 19, 1987, evidence of beneficial use in water right administrative proceedings.

The Court has identified these three proposed provisions as Issues 6, 7, and 8 respectively.

The intended purpose of the provisions proposed by both the City of Pocatello and the Ground Water Districts is to attempt to define the scope of the preclusive effect of the partial decrees included in the Final Unified Decree so as to avoid issues in future administrative proceedings regarding the admissibility pre-partial decree evidence to show historical beneficial use. The arguments in support of the provisions are twofold. First, that the water right recommendations made by the Department were primarily based on the conditions surrounding the use of water rights as of the date of commencement of the SRBA on November 19, 1987, and did not consider the conditions existing at the time the Department investigated the right. In many cases the investigation was not conducted until many years after the commencement date. Second, in 1999, the SRBA Court adopted the "tolling rule" which tolled the running of the statutory forfeiture period upon the filing of the claim until the partial decree was issued. Following the issuance of the partial decree, the five year period would begin to run again. *See* ***Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence Issue"*** Subcase No. 36-02708 *et. al.* (Dec. 29, 1999). As a result, unless the statutory

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each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding." This Court previously rejected the inclusion of both provisions in the Final Unified Decree.

five year period had completely run prior to filing of the claim, parties were precluded from asserting forfeiture.

The proposed provisions attempt to prevent foreclosing the use of pre-partial decree evidence concerning the use of a water right in a post-partial decree proceeding. The concern alleged is that in any subsequent judicial or administrative proceeding, principles of *res judicata* would preclude the ability of a litigant to introduce evidence pertaining to the use of a water right during the period between the commencement date and the issuance of the partial decree. Other parties to the proceeding who agreed in principle with the intended purpose of the provisions proposed alternative language in the rebuttal briefing.

For the reasons set forth below the Court rejects the inclusion of the proposed provisions. As a general matter, the Court declines to include provisions in the Final Unified Decree for the purpose of advising or influencing tribunals in future proceedings as to the legal effect of a partial decree issued in the SRBA. The issue of what pre-decree evidence may be discoverable, relevant and/or admissible in a given future post-decree proceeding is simply an issue not properly before this Court at this time and will not be considered. Furthermore, as explained below, the adopting of "blanket" provisions such as those proposed in an attempt to address hypothetical post-decree situations not presently before the Court would result in significant unintended consequences.

1. Issue 5.

The City of Pocatello argues for the inclusion of the following provisions:

> Each partial decree was the result of a specific factual investigation related to the underlying water right.
>
> Because the evidence considered for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding.

The City of Pocatello argues the provisions are "necessary to guide future courts in disputes over the controlling effect of partial decrees to make clear that despite the fact that all partial decrees are included in the Final Unified Decree, each partial decree was litigated separately, and the litigation considered separate facts and may have been limited in its scope of inquiry by operation of law." The City of Pocatello asserts further the proposed provisions are

necessary to establish that litigants are bound only as to those specific issues that were actually litigated in the SRBA.

This Court rejects the proposed provisions for several reasons. First, including the proposed provisions in the Final Unified Decree is inconsistent with the operation of Idaho Code § 42-1420, which provides that subject to certain exceptions "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system . . . ." The proposed provisions would therefore have the unintended consequence of calling into question the conclusive effect of every uncontested right, as well as every uncontested element for those rights that were contested. In the SRBA, the majority of the water rights claimed and recommended were not contested. For those water rights that were contested, not every element of the right was necessarily contested. The proposed language would therefore not only undermine Idaho Code § 42-1420 but would also undermine the very purpose of the SRBA by calling into question the binding effect of the partial decree as to all such uncontested rights and/or elements.

Second, the proposed language misstates the significance of decreeing uncontested rights in the SRBA. Issuing partial decrees for uncontested rights in the SRBA is not identical to the issuance of a default judgment in a non-SRBA case. The significance of decreeing uncontested rights was previously explained in ***Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman (A.L. Cattle)***, Subcase No. 65-07267 *et. al*, (Jan. 31, 2001). In that case, A.L. Cattle sought to set aside numerous state-law based partial decrees entered uncontested in favor the United States. In seeking to set aside the partial decrees, one of the arguments presented was the over-riding preference for having a case decided on its merits as opposed to the entry of default. The SRBA Court rejected this argument reasoning that in the SRBA even though a claim is uncontested the claim is nonetheless "decided on its merits." The Court reasoned:

> The SRBA presents its own unique set of circumstances. In a non-SRBA case, the entry of a default or default judgment typically occurs when a party fails to take some required action. Although ***AO1*** [***SRBA Administrative Order 1***] incorporates the standards for setting aside a default and default judgment and applies these standards by analogy, water right claims that proceed uncontested through the SRBA are not entirely analogous to a default situation. First, uncontested claims are prosecuted by claimants who are usually active in their subcase but face no objectors. Second, although uncontested, the claims are still in fact "decided on the merits." Idaho's statutory scheme for the SRBA, together

> with ***A01*** procedure, set forth a comprehensive process for adjudicating both uncontested and contested state based claims. This process affords additional procedures and safeguards not otherwise present in non-SRBA cases.
>
> To illustrate, a claim of a water right is filed in accordance with Idaho Code § 42-1409. IDWR then investigates the nature and extent of the claim. I.C. § 42-1410. The director then prepares and files a director's report for the claim. I.C. § 42-1411. The director's report constitutes prima facie evidence of the nature and extent of the water right. I.C. § 42-1411(4) [internal footnote omitted]. Either the claimant or any other party to the SRBA can file objections and/or responses to objections to the director's report. I.C. § 42-1412.
>
> . . .
>
> Director's reports that are uncontested are typically decreed as reported. I.C. § 42-1411(4). Although this is what normally occurs, the SRBA Court retains discretion to apply law to the facts and render its own conclusion regarding uncontested water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). The district court can also delay entry of a partial decree for the uncontested portions of the director's report if the court determines that an unobjected claim may be affected by the outcome of a pending contested matter. I.C. § 42-1412(7). Ultimately the claim is subject to a final review by the court prior to the entry of a partial decree.
>
> . . .
>
> In sum, in the SRBA "deciding a case on the merits" must be placed in proper context.

Id. at 8–9.

Accordingly, the language proposed by the City of Pocatello ignores the significance of SRBA procedure for processing uncontested rights and would have the unintended consequence of putting every uncontested right or element at issue in the future. The SRBA would have accomplished nothing as concerns those rights. Next, even if the Department's examination may have relied on conditions as they existed as of the commencement of the SRBA, with the exception of the tolling rule, nothing precluded parties from contesting the Department's recommendation based on post-commencement date conditions surrounding a particular water right.

Further, the tolling rule only stopped the running of the forfeiture statute from the time the claim was filed until the partial decree was entered. After entry of the partial decree, the tolling of the forfeiture rule is lifted and the right could be subject to forfeiture in whole or part in a subsequent proceeding. Consequently, despite the issuance of a partial decree, the right is not immune from being reevaluated for forfeiture in a future proceeding. The SRBA Court

explained this in ***Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Troutt),*** Subcase No. 65-5663B (May 9, 2002), wherein the Court stated:

> Because of the magnitude of the case and the way the SRBA is procedurally structured a "point in time" approach must be taken with respect to investigating, reporting and adjudicating the rights. For example, absent subsequent administrative changes, IDWR reports the status of a water right as of the date of inception of the SRBA.
>
> This does not mean the decreed right is insulated from forfeiture. Once the partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew. Thus after the partial decree is issued five years of non-use must accrue before the water right is again subject to forfeiture. In Graham v. Leek, 65 Idaho 279, 283, 144 P.2d 475, 479, the Idaho Supreme Court made this point clear in holding: [A] decreed right is not immune from a showing that it has been abandoned [forfeited], and such showing does not impeach the decree upon which the right was based, **where evidence received with reference to the abandonment [forfeiture] relates to a time subsequent to the decree.** *Id.* (citing *Albrethesen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418, 422 (1924).

Id. at 21–22 (emphasis in original). Therefore, in the context of an administrative transfer proceeding even without the proposed language, a litigant is not prevented from asserting forfeiture after the running of the five year period. In the context of a delivery call, even if the five year period had yet to run, as a result of any non-use, a litigant defending against the call is not precluded from asserting that the senior making the call is not using the full decreed quantity at that time to accomplish the purpose of use of the right.

For these reasons, the Court finds the language proposed by the City of Pocatello to be unnecessary and would result in significant unintended consequences.

2. Issue 6.

The Ground Water Districts proposed the inclusion of the following provision in the Final Unified Decree:

> The water rights elements contained in the Final Unified Decree are based on the extent of beneficial use as of the commencement of the Snake River Basin Adjudication (SRBA) on November 19, 1987.

At oral argument, the Ground Water Districts proposed the following modifications (underlined and in bold) to address concerns raised by other parties to the proceeding:

> The water right elements contained **in the partial decrees attached to the Final Unified Decree** are based on the extent of beneficial use **of the water right on or before** the commencement of the SRBA, November 19, 1987, **except that partial decrees for water rights with a priority date subsequent to November 19, 1987, are based on the extent of beneficial use on or before the priority date of the water right**.

The Court rejects the inclusion of the proposed language for the following reasons. First, the proposed language consists of another "blanket" provision which does not apply to all rights. While the Department may have based its recommendations on the conditions as they existed as of the commencement date for the SRBA, the partial decree issued for the right does not necessarily reflect those same conditions. As explained previously, parties were not precluded from contesting a recommendation based on post-commencement circumstances. To the extent an objector prevailed, the partial decree may not reflect the right as it existed as of the date of the commencement. For example, to the extent a forfeiture period ran prior to the filing of the claim, then forfeiture could be successfully litigated.

The proposed language also does not account for administrative transfers occurring after the commencement of the SRBA. Any such administrative transfers would be memorialized in the partial decree. A quick review of Court records reveals that administrative transfers occurring after the commencement of the SRBA affected approximately 13,000 water rights during the pendency of the SRBA. Because the proposed provision would not apply to all partial decrees, the Court finds the provision to be somewhat misleading.

Finally, the inclusion of the proposed language would again result in creating an ambiguity regarding the binding effect of a partial decree. The language could be interpreted in a manner so as to conclude the decree is binding only as to the date of commencement of the SRBA. A water right holder is then left with the burden of establishing the use of the right for the period between the commencement of the SRBA and the issuance of the partial decree.

3. Issue 7.

The Ground Water Districts also propose the following finding of fact and/or conclusion of law to be included in the Final Unified Decree:

> The "diversion rate" element of each water right is the maximum permissible rate of diversion under the water right, and not a judicial determination that the maximum rate is needed at all times during the "period of use" to accomplish the designated "purpose of use."

This issue was previously addressed in the SRBA when a request was made to insert a similar remark in the face of each individual partial decree which provided that "in the event of a water call, the quantity associated with actual beneficial use will apply." The SRBA Court denied the request on the basis that beneficial use is an implicit limitation in every water right decree and therefore the language was unnecessary. The SRBA Court held as follows:

> Implicit in the quantity element, as contained in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: "Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed.'" However, the quantity element in a water right necessarily sets the "peak" limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted). The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the state of the crop at any point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short results in a loss or reduction to the water right.
>
> Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to "call,") more water than can be beneficially applied. . . .

Memorandum Decision and Order on Challenge, Subcase Nos. 36-00003A et al. (Nov. 23, 1999) at 41. No appeal was taken from that decision.

The Ground Water Districts argue that despite the SRBA Court's ruling, efforts have been made in non-SRBA proceedings to preclude the Director from considering evidence showing that a water user can accomplish his or her beneficial use with less than the full rate of diversion shown on their SRBA decree based on the argument that consideration of such evidence is a collateral attack on the SRBA decree. The Ground Water Districts argue that to date such efforts have failed but not without great expense.

The Court rejects the inclusion of the provision for the reasons previously relied on by the SRBA Court. Although attempts may have been made to preclude the Director from considering such evidence, it appears the case law is being developed on that topic as the issues arise. For example, in *American Falls Reservoir District #2 v. IDWR*, 143 Idaho 862, 868, 154 P.3d 433, 439 (2007), the Idaho Supreme Court reviewed the Director's conclusion that "[b]ecause the amount of water necessary for beneficial use can be less than the decreed or licensed amount, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury." The senior water right holders making the call argued that in responding to a delivery call the Director is required to deliver the full decreed quantity according to priority. The Supreme Court rejected the argument holding that "[i]f this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id.* at 876, 154 P.3d at 447. The Court acknowledged the difference between water rights administration and water adjudications: "water rights adjudications neither address, nor answer, the questions presented in delivery calls." *Id.* Further that water adjudications do not determine whether waste is taking place or how each water right on a source actually is diverted and used and how it affects rights on that source. *Id.* at 877, 154 P.3d at 448.

In its *Memorandum Decision and Order on Petition for Judicial Review*, *A&B Irr. Dist. v. IDWR*, et al., Minidoka County Case No. 2009-647 (May 4, 2010), this Court in its capacity to hear administrative appeals from the Department, held that conditions surrounding the use of a water right are not static and circumstances can exist where a senior making a call may not require the full decreed quantity. This Court cited examples such as the failure to irrigate the full number of decreed acres, efficiencies and improvements in the delivery system, cropping decisions, and climatic conditions. *Id.* at 30–31. Ultimately this Court acknowledged that the quantity decreed is not conclusive as to whether or not all the water being diverted is being put to beneficial use in any given irrigation season. *Id.* at 31. This decision is currently on appeal. Idaho Supreme Court Docket No. 38403. Accordingly, once the case law on this issue is more fully established, the need to repeatedly litigate similar issues in subsequent administrative proceedings should be alleviated. However, in the context of an administrative proceeding, the issue also implicates related issues regarding any presumptive weight given to a partial decree, as

well as applicable burdens and standards of proof. These related issues also need to be addressed in conjunction with an allegation that less than the decreed quantity is necessary to accomplish the designated purpose of use. The proposed provision is silent as to these issues and could result in the unintended consequence of rendering such issues moot. Accordingly, this issue is more appropriately addressed through case law on a more developed record.

4. Issue 8.

The Ground Water Districts also propose the following provision be included in the Final Unified Decree.

> The tolling of the forfeiture statute during the SRBA does not preclude the Director from considering post-November 19, 1987, evidence of beneficial use in water right administrative proceedings.

The Ground Water Districts argue the provision is necessary so as not to construe the tolling of the forfeiture period from prohibiting the Director from considering actual beneficial use of a water right in response to water delivery calls. More specifically, the Ground Water Districts argue that when responding to delivery calls, the Director is tasked with determining how much water is reasonably needed to meet the senior's current water demands. The Ground Water Districts argue that in making this determination the Director considers the senior right holders current water needs as well as his or her water needs during prior years of similar climatic conditions and water availability. Since filing a claim in the SRBA does not prevent a water user from making use of his or her water right, the Ground Water District's argue the Director must be permitted to consider actual beneficial use of the water, irrespective of whether the statutory forfeiture period is tolled.

The Court rejects the inclusion of the provision for the following reasons. First, the tolling rule was limited solely to preventing forfeiture actions that relied on any period of non-use following the filing of the claim through the entry of partial decree. The tolling rule did not address water rights administration and what evidence of pre-decree use, if any, may or may not be relevant in any subsequent administrative proceeding. Given this limited purpose, the Court rejects the argument that an inference can be drawn that the tolling rule somehow has implications regarding the ability of the Director to consider pre-decree evidence in responding to a delivery call or other administrative proceeding. Second, and most importantly, the issue of

what pre-decree evidence may be discoverable, relevant and/or admissible in a given future post-decree proceeding is not properly before this Court. Trying to address the issue in the hypothetical on an undeveloped record through the inclusion of a "blanket" provision not only invades the province of a future tribunal but also results in unintended consequences.

In summary, the provisions proposed by the City of Pocatello and the Ground Water Districts extend beyond what is necessary for the Final Unified Decree. Attempting to address issues of administration in the hypothetical with "blanket" provisions is not only unnecessary but runs the risk of undermining the effect of the Final Unified Decree. This is particularly true when such issues can be addressed in an appropriate forum if and when they arise.

VI.
ORDER

BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. With respect to issue 1, it is hereby ordered that the term "persons" rather than the term "parties" should be used in reference to those who are bound by the Final Unified Decree.

2. With respect to issue 2, it is hereby ordered that duplicates of partial decrees entered pursuant to federal reserved water right settlements should be included in Attachment 2 to the Final Unified Decree with a remark cross-referencing the applicable settlement documents included in Attachment 4 to the Final Unified Decree.

3. With respect to issue 3, the Court holds that a new order clarifying the definitions of *de minimis* "domestic" and "stock water" claims and the procedures for adjudicating deferred claims shall be issued by this Court.

4. With respect to issue 4, this Court holds that the Final Unified Decree should clarify that the results of administrative changes initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree are not superseded by the Final Unified Decree. Accordingly, the Court proposes the following paragraph to be inserted in the Order of the Final Unified Decree as Paragraph 13 and that subsequent paragraphs be renumbered in sequence accordingly.

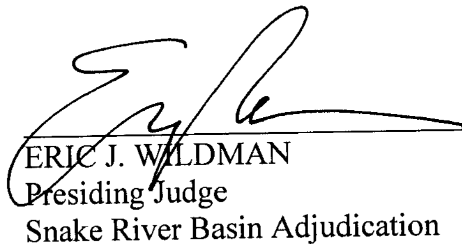
13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) Any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree, or; 2) Elements of a water right defined by a license, where in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

If any party wishes to suggest modifications to the above language, they may do so in conjunction with a timely *Motion to Reconsider*.

5. With respect to issues 5, 6, 7, and 8, the requests by the City of Pocatello and the Ground Water Districts that this Court adopt into the Final Unified Decree the respective remarks sought by those parties in their *Notices of Challenge* are hereby denied.

6. The modifications addressed by this *Memorandum Decision and Order* are set forth in the *Second Revised Proposed Final Unified Decree*, attached hereto as Exhibit A, via the use of strikethrough formatting. The deletions are evidence by way of strikethrough, while the additions are underlined.

Dated 6/28/2012

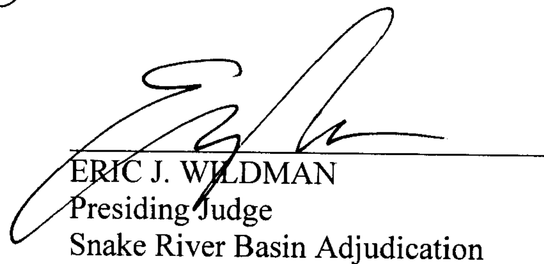


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: June 28, 2012



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

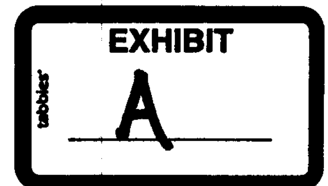
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	SECOND REVISED PROPOSED FINAL UNIFIED DECREE
	)	
	)	
Case No. 39576	)	
	)	
	)	

I. PROCEDURE

On June 17, 1987, the State of Idaho, ex rel. A. Kenneth Dunn in his official capacity as Director of the Idaho Department of Water Resources, filed a petition in the above-entitled Court seeking commencement of a "general adjudication inter se of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights." *Petition* at 2. On November 19, 1987, this Court issued its *Commencement Order* thereby initiating the above-entitled general stream adjudication of all rights to the use of the waters of the Snake River Basin within the State of Idaho pursuant to Idaho Code § 42-1406A (Supp. 1987).[1] The *Commencement Order* adopted by reference this Court's October 14, 1987, *Memorandum Opinion on Commencement of Adjudication* as "further findings of fact and further conclusions of law as permitted by I.R.C.P. 52(a)." *Commencement Order* at 4.

[1] Idaho Code § 42-1406A was added by section 1 of chapter 18, 1985 Idaho Sess. L. at 28. Section 42-1406A was subsequently amended by section 11 of chapter 454, 1994 Idaho Sess. L. at 1452-53, and now appears as an uncodified law in the 1994 Idaho Session Laws.



As set forth in the *Memorandum Opinion on Commencement of Adjudication*, Idaho Code § 42-1406A (Supp. 1987) required that the adjudication be commenced within the terms of the McCarran Amendment, 43 U.S.C. § 666. This Court determined that for the adjudication to come within the terms of the McCarran Amendment the entire Snake River Basin water system within the State of Idaho had to be adjudicated. This Court defined the entire Snake River Basin water system within Idaho as follows:

> Beginning at the point where the southern boundary line of the state of Idaho meets the western boundary line of the state of Idaho, then following the western boundary of the state north to the northern boundary of the Clearwater Basin, in Idaho, in section 36, T. 36 N., R. 6 W., B.M., then following the northern watershed divide of the Clearwater River Basin north and east to the eastern boundary of the state of Idaho in section 4, T. 42 N., R. 11 E., B.M., then following the eastern boundary of the state southeast to the northern boundary of the Bear River Basin in section 35, T. 10 S., R. 46 E., B.M., then following the northern watershed divide of the Bear River Basin, in Idaho, southwest to the southern boundary of the state of Idaho in section 26, T. 16 S., R. 28 E., B.M., then following the southern boundary line of the state of Idaho west to the point of beginning.

Commencement Order at 5. A map showing the boundaries of the Snake River Basin water system is attached for illustrative purposes as Attachment 1, as required by Idaho Code § 42-1413 (2003). The following counties are wholly located within the boundaries of the Snake River Basin water system:

Ada	Canyon	Idaho	Owyhee
Adams	Clark	Jefferson	Payette
Bingham	Clearwater	Jerome	Teton
Blaine	Custer	Lemhi	Twin Falls
Boise	Elmore	Lewis	Valley
Bonneville	Fremont	Lincoln	Washington
Butte	Gem	Madison	
Camas	Gooding	Minidoka	

Commencement Order at 5. The following counties are partly located within the boundaries of the Snake River Basin water system:

Bannock	Nez Perce
Caribou	Oneida
Cassia	Power
Latah	Shoshone

Id. at 6.

The *Commencement Order* also determined that "all classes of water uses . . . within the water system [must] be adjudicated as part of the Snake River Basin adjudication." *Id.* at 6. On January 17, 1989, however, this Court entered its *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses* that allowed claimants of *de minimis* domestic and stock water rights, as defined in Idaho Code § 42-1401A(5) and (12) (Supp. 1988), to elect to defer adjudication of their claims; provided, all such claimants "shall be joined as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree." *Findings of Fact* at 3.

The *Commencement Order* directed the Director of the Idaho Department of Water Resources ("Director"): 1) to investigate the water system as provided in Idaho Code § 42-1410 (Supp. 1987); 2) to prepare the notice of order commencing a general adjudication containing that information required by Idaho Code § 42-1408A(1) (Supp. 1987); 3) to serve notice of the order commencing a general adjudication in accordance with chapter 14, title 42, Idaho Code; and 4) to file with this Court affidavits and other documents stating the persons served with a notice of order commencing the adjudication. *Commencement Order* at 7-8.

Based upon the claims submitted, the files and records of the Idaho Department of Water Resources and the Court, the examination of the ditches, diversions, lands

irrigated, and other uses of water within the water system, the Director's Reports and evidence herein, this Court enters the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

1. All requirements for joinder of the United States as a party under state and federal law, including but not limited to 43 U.S.C. § 666, have been satisfied.

2. The Nez Perce Tribe participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Notice of Claim to a Water Right Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance* (March 18, 1993).

3. The Northwestern Band of the Shoshoni Nation participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Partial Protective Filing by the Northwestern Band of the Shoshoni Nation of Notices of Claim for Water Rights Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance on Behalf of the Northwestern Band of the Shoshoni Nation* (March 22, 1993).

4. The Shoshone-Bannock Tribes sought and were granted intervention in this proceeding. *Order Granting Permissive Intervention by the Shoshone-Bannock Tribes* (April 12, 1993).

5. The Shoshone-Paiute Tribes of the Duck Valley Indian Reservation sought and were granted intervention in this proceeding. *Motion to Intervene and Request for Expedited Hearing* (SRBA Consolidated Subcase No. 51-12756, Jan. 12, 1999); *Order Granting Tribes' Motion to Intervene, Order Requiring Written Status Reports and Order for Scheduling Conference Reports* (SRBA Subcases Nos. 51-12756 et al., Dec. 6, 1999).

6. The Director served notice of the commencement of the Snake River Basin Adjudication ("SRBA") in accordance with chapter 14, title 42, Idaho Code and the orders of this Court. This included service of the notice of commencement on the State of Idaho and the United States; service of the notice of commencement on all other persons by publication; service of the notice of commencement by posting in each county courthouse, county recorder's office and county assessor's office in which any part of the water system is located; service of the notice of commencement by mail on each person listed as owning real property on the real property assessment roll within the boundaries of the Snake River Basin water system; and filing of a copy of the notice of commencement in the office of the county recorder in each county in which any part of the water system is located.

7. In addition to the steps taken in paragraph 6, the Idaho Department of Water Resources also served notices of commencement on persons who may have used water within the water system, but were not listed as owners of real property. The sources of information the Idaho Department of Water Resources reviewed for this purpose were: 1) water right records of the Idaho Department of Water Resources for each basin wholly or partly within the water system; 2) cooperating farm/ranch operator records of the United States Department of Agriculture, Agricultural Stabilization and Conservation Service for each basin wholly or partly within the water system; and 3) mining claim records on federal land of the United States Department of Interior, Bureau of Land Management for each basin wholly or partly within the water system.

8. The Director has completed an examination of the Snake River Basin water system and submitted Director's Reports to this Court in conformance with the requirements of chapter 14, title 42, Idaho Code and the orders of this Court.

9. As required by title 42, chapter 14, Idaho Code and this Court's orders, claims to water rights arising under state or federal law to the use of the surface and ground waters from the Snake River Basin water system have been adjudicated resulting in the issuance of partial decrees that have been certified as final pursuant to I.R.C.P. 54(b).

10. Idaho Code § 42-1412(8) (2003) provides that: "Upon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and the general provisions into a final decree." The Court finds that the conditions of Idaho Code § 42-1412(8) (2003) have been met with respect to the water rights identified in Attachments 2, 4, 5 and 6 and the general provisions in Attachment 3, enabling the Court to issue this Final Unified Decree.

III. CONCLUSIONS OF LAW

1. The SRBA is a general stream adjudication *inter se* of all water rights arising under state or federal law to the use of surface and ground waters from the Snake River Basin water system and for the administration of such rights.

2. The State of Idaho is a party to this proceeding.

3. The Director was withdrawn as a party to this proceeding in 1994. Idaho Code § 42-1401B (2003); *State of Idaho, ex rel. Higginson v. United States*, 128 Idaho 246, 256-57, 912 P.2d 614, 624-25 (1995).

4. The United States is a party to this proceeding under 43 U.S.C. § 666.

5. This Final Unified Decree is conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, including, but not limited to, water rights held by the United States in trust for any Indian tribe, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

6. The Nez Perce Tribe, the Northwestern Band of the Shoshoni Nation, the Shoshone-Bannock Tribes, and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation are parties to this proceeding.

7. The *Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board* with its six attachments dated January 30, 2007 (*"Nez Perce Consent Decree"*), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Nez Perce Consent Decree* is conclusive as to the nature and extent of all rights of the Nez Perce Tribe to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

8. The *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* with its four attachments, dated August 2, 1995, and *Order Amending Partial Final Consent Decree*

Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin to Correct Clerical Error, I.R.C.P. 60(a) with its Appendix Containing Amendments to Consent Decree, dated August 24, 2005 (collectively "*Shoshone-Bannock Consent Decree*"), are included in Attachment 4 and are hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Bannock Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Bannock Tribes to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

9. The *Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho* with its three attachments, dated December 12, 2006 ("*Shoshone-Paiute Consent Decree*"), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Paiute Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

10. This Final Unified Decree is conclusive as to the nature and extent of all rights of the Northwestern Band of the Shoshoni Nation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19,

1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

11. Claimants in each of the SRBA basins received notice of the commencement of the SRBA in accordance with chapter 14, title 42, Idaho Code and orders of this Court. These notice procedures satisfy constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003).

IV. ORDER

NOW THEREFORE this Court ORDERS, ADJUDGES AND DECREES as follows:

1. This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987, except the following described water rights shall not be lost by failure to file a notice of claim, as provided in Idaho Code § 42-1420 (2003):

   a. Any domestic and stock water right, as defined in Idaho Code § 42-111 (1990), Idaho Code § 42-1401A(5) (1990), and Idaho Code § 42-1401A(12) (1990), the adjudication of which was deferred in accordance with this Court's ~~January 17, 1989 *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*, as well as this Court's March 22, 1995 *SRBA Administrative Order No. 10: Order Governing Procedures in the SRBA for Domestic and Stock Water Uses* ("*Administrative Order 10*")~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*;

b. A water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;

c. A water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the Director required the permit holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code;

d. A water right license issued under chapters 2 or 15, title 42, Idaho Code, if proof of beneficial use was not filed with the Department of Water Resources before November 19, 1987, unless the Director required the license holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code; and

e. A claim to a water right under federal law, if the priority of the right claimed is later than November 18, 1987.

All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed. Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water rights were claimed in the SRBA and a partial decree issued, the partial decree is conclusive as to the nature and extent of the right.

2. All partial decrees issued by this Court are set forth in Attachments 2 and 4 to this Final Unified Decree and are incorporated herein by reference.

3. Attachment 2 consists of a name index, a water right number index, and a copy of all partial decrees issued by this Court., ~~except for those water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement set forth in Attachment 4.~~

4. General provisions decreed by this Court are set forth in Attachment 3 to this Final Unified Decree and are incorporated herein by reference.

5. Attachment 4 consists of the federal and tribal reserved water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement, including all consent decrees and all attachments thereto, all partial decrees issued by this Court as part of the respective settlements, and all Federal, State and/or Tribal legislation necessary to enact and approve the water right settlements. In the case of any conflict between this Final Unified Decree and the partial consent decrees approving reserved water right settlements, the partial consent decrees approving the reserved water right settlements as set forth in Attachment 4 shall control. Duplicates of the partial decrees included under Attachment 4 are also included under Attachment 2.

6. All claims to water rights filed in this proceeding that were decreed disallowed by this Court are set forth in Attachment 5 to this Final Unified Decree and are incorporated herein by reference.

7. The water right numbers for those water rights of record with the Idaho Department of Water Resources that were required to be claimed but were not claimed in this proceeding and therefore were decreed disallowed by this Court are set forth in Attachment 6 and are incorporated herein by reference. The portion of any disallowed water right that was deferrable pursuant to this Court's ~~January 17, 1989, *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*, as amended by *Administrative Order No. 10* issued by this Court on March 22, 1995 in Case No. 39576~~ June 28, 2012, *Order Governing*

Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims is not affected by this paragraph.

8. This Final Unified Decree is binding against all ~~parties~~ persons including any ~~parties~~ persons that deferred filing of domestic and/or stock water claims pursuant to this Court's ~~January 17, 1989, *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, which is set forth in Attachment 7 to this Final Unified Decree, and is incorporated herein by reference.

9. The adjudication of deferred domestic and stock water claims and the administration of such rights prior to their adjudication shall be governed by this Court's ~~January 17, 1989, *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims* and applicable state law.

10. All water rights based on beneficial uses, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final Unified Decree. Provided, however, this Final Unified Decree does not supercede the third-party beneficiary contractual rights conferred on certain classes of water rights pursuant to the "Contract to Implement Chapter 259, Sess. Law 1983" as authorized by 1983 Idaho Sess. Laws 689 and codified as Idaho Code § 61-540 (2002). The scope of third-party beneficiaries and contract rights are defined in this Court's *Order on State of*

Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011) as included in Attachment 9.

11. All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provisions of this Court.

12. This Final Unified Decree shall not be construed to define, limit or otherwise affect the apportionment of benefits to lands within an irrigation district pursuant to chapter 7, title 43, Idaho Code.

13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) Any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree, or; 2) Elements of a water right defined by a license, where in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

14. The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree. State law regarding forfeiture does not apply to partial decrees based upon federal law.

15. The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state and tribal law, including the administrative provisions set forth in the federal reserved water right settlement agreements in Attachment 4.

16. Nothing in this Final Unified Decree shall be interpreted or construed as exempting the holder of a decreed water right based on state law from exercising or changing such right in compliance with applicable Idaho law.

17. This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources; and b) adjudicate any domestic or stock water rights deferred under this Court's ~~January 17, 1989, *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*. Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, and will be filed with the Idaho Department of Water Resources in lieu of issuing an Amended Final Unified Decree. Attachment 8 contains instructions on how to access any orders amending this Final Unified Decree.

18. The incorporation by reference of partial decrees and orders of this Court contained in the Attachments to this Final Unified Decree does not constitute a reissuance of such partial decrees and orders.

19. This Final Unified Decree, including the entirety of Attachments 1 through 10 listed below, shall be entered in the records of the clerk of the District Court for the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

Attachment 1	Snake River Basin Water System Map

Attachment 2 Partially Decreed Water Rights ~~Other Than Those Contained in Partial Federal Reserved Water Right Consent Decrees Set Forth in Attachment 4~~, including a name index and a water right number index, consisting of ___ pages.

Attachment 3 General Provisions, consisting of ___ pages

Attachment 4 Federal and Tribal Reserved Water Right Settlements, including all Consent Decrees and all Attachments thereto, all Partial Decrees issued by this Court as part of the Respective Settlements, and all Federal, State and/or Tribal Legislation Necessary to Enact and Approve the Water Right Settlements consisting of ____ pages.

Attachment 5 List of Water Right Numbers for Filed Water Right Claims Decreed as Disallowed consisting of ___ pages.

Attachment 6 List of Water Right Numbers for Unclaimed Water Rights Decreed as Disallowed, consisting of __ pages.

Attachment 7 ~~January 17, 1989, *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, consisting of ~~10~~ 6 pages.

Attachment 8 Instructions on Searching the Final Unified Decree.

Attachment 9 *Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2.* Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011).

Attachment 10 *Register of Actions*, Twin Falls Case No. 39576 (i.e., SRBA Main Case).

20. A certified paper and electronic copy of the entire Final Unified Decree shall be provided to the Director. The Director shall record the Final Unified Decree excluding all Attachments other than the name index in Attachment 2 and Attachments 7 and 8 in

the office of the county recorder of each county in which the place of use or point of diversion of any individual decreed water right in the Final Unified Decree is located. The Director shall maintain a copy of the Final Unified Decree for public inspection.

DATED this ___ day of _____, 2012.

____

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

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ATTACHMENT 1

SNAKE RIVER BASIN WATER SYSTEM MAP, consisting of 1 page.

DRAFT

ATTACHMENT 2

PARTIALLY DECREED WATER RIGHTS ~~OTHER THAN THOSE CONTAINED IN PARTIAL FEDERAL RESERVED WATER RIGHT CONSENT DECREES SET FORTH IN ATTACHMENT 4~~, INCLUDING A NAME INDEX, AND A WATER RIGHT NUMBER INDEX, consisting of ____ pages.

TABLE OF CONTENTS

1. NAME INDEX Pages __ to __.

2. WATER RIGHT NO. INDEX Pages __ to __.

3. PARTIAL DECREES Pages __ to __.

ATTACHMENT 3

GENERAL PROVISIONS,
consisting of ___ pages.

DRAFT

ATTACHMENT 4

FEDERAL AND TRIBAL RESERVED SETTLEMENTS, INCLUDING ALL CONSENT DECREES AND ALL ATTACHMENTS THERETO, ALL PARTIAL DECREES ISSUED BY THIS COURT AS PART OF THE RESPECTIVE SETTLEMENTS, AND ALL FEDERAL, STATE AND/OR TRIBAL LEGISLATION NECESSARY TO ENACT AND APPROVE THE WATER RIGHT SETTLEMENTS, CONSISTING OF ___ PAGES.

TABLE OF CONTENTS

Page

a. *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin*, dated August 2, 1995. ___

Order Amending Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin To Correct Clerical Error, I.R.C.P. 60(a), dated August 24, 2005. ___

The 1990 Fort Hall Indian Water Rights Agreement by and between the Shoshone Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Idaho Water Users, dated July 5, 1990. ___

Public Law 101-602, 104 Stat. 3059 (November 16, 1990). ___

Chapter 228, 1991 Idaho Sess. L. 547. ___

Shoshone Bannock Resolution (NEED CITE)

b. *Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho*, dated December 12, 2006. ___

c. *Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board*, dated January 30, 2007. ___

Snake River Water Rights Act of 2004, Pub. L. 108-447, Division J, Title X, (December 8, 2004). ___

Chapter 148, 2005 Idaho Sess. L. 461. ___

Chapter 149, 2005 Idaho Sess. L. 462-465. ___

Chapter 150, 2005 Idaho Sess. L. 465-466. ___

Nez Perce Tribal Resolution No. 05-210 (March 29, 2005). ___

d. *Water Rights Agreement Between the State of Idaho and the United States for the Craters of the Moon National Monument* (May 13, 1992); *Orders of Partial Decree* entered Dec. 1, 1998 (Subcase Nos. 34-12383, 34-12384, 34-12385,

34-12386, 34-12387, 34-12388, and 34-12389).

e. *Water Rights Agreement Between the State of Idaho and the United States for the United States Department of Energy* (July 20, 1990); *Order of Partial Decree* entered *nunc pro tunc* June 20, 2003 (Subcase No. 34-10901).

f. *Order Approving Stipulation and Entry of Basin 79 Partial Decrees* (Subcase No. 79-13597, Hells Canyon National Recreation Area Act Claims, Nov. 16, 2004).

Order Approving Entry of Basin 78 Partial Decrees, dated May 2, 2005 (Consolidated Subcase No. 79-13597 Hells Canyon National Recreation Area Act Claims (Encompassing Subcases 79-14054 through 79-14079 and Subcases 78-12200 through 78-12205).

g. *Amended Order Approving Stipulation and Entry of Partial Decrees* (Consolidated Subcase No. 75-13316 (Wild & Scenic Rivers Act Claims, Nov. 17, 2004).

h. *Yellowstone Park Agreement* (need to add if approved).

DRAFT

ATTACHMENT 5

LIST OF WATER RIGHT NUMBERS FOR FILED WATER RIGHT CLAIMS DECREED AS DISALLOWED, consisting of ___ pages.

The disallowed water right numbers listed in Attachment 5 fall into two categories: (1) water right numbers where the actual claimed use of water was adjudicated to be disallowed; and (2) water right numbers where the water right was split subsequent to the filing of the director's report, with the claimed use of water being decreed under the water right numbers for the "children" rights, and the number for the "parent" right having been decreed disallowed for purposes of closing the subcase number in the court's register of action. Please consult the Idaho Department of Water Resources for further inquiry regarding any of the disallowed water right numbers listed in Attachment 5.

ATTACHMENT 6

LIST OF WATER RIGHT NUMBERS FOR UNCLAIMED WATER RIGHTS DECREED AS DISALLOWED, consisting of __ pages.

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ATTACHMENT 7

~~JANUARY 17, 1989, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ESTABLISHING PROCEDURES FOR ADJUDICATON OF DOMESTIC AND STOCK WATER USES~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, consisting of ~~10~~ 6 pages.

ATTACHMENT 8

INSTRUCTIONS ON SEARCHING THE FINAL UNIFIED DECREE, consisting of ___ pages.

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ATTACHMENT 9

Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011)

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ATTACHMENT 10

Register of Actions, Twin Falls Case No. 39576 (i.e., SRBA Main Case)

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE IN THE MATTER OF THE FINAL UNIFIED DECREE was mailed on June 28, 2012, with sufficient first-class postage to the following:

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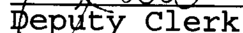

 Deputy Clerk