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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. The STATE OF IDAHO; the IDAHO DEPARTMENT OF WATER RESOURCES, *an agency of the State of Idaho;* GARY SPACKMAN, *in his official capacity as the Director of the Idaho Department of Water Resources*, Defendants, v. IDAHO HOUSE OF REPRESENTATIVES; IDAHO SENATE; MIKE MOYLE, *in his official capacity as Majority Leader of the*	Case No. 1:22-cv-00236-DCN **STATE DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT (Dkt. 43)**

House; CHUCK WINDER, *in his official capacity as President Pro Tempore of the Senate*,

Intervenor-Defendants,

v.

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

Intervenor-Defendants.

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The State Defendants,[1] pursuant to this Court's scheduling orders (Dkts. 32-33), and by and through their counsel of record, hereby submit this reply memorandum in support of their cross-motion for summary judgment (Dkt. 43).

ARGUMENT

The United States insists this case only challenges certain "recently enacted" statutes, but the record belies that assertion. The United States challenges the constitutionality of Idaho Code § 42-222(2), which is more than a century old and provides that a water right shall be lost and forfeited if it is not applied to the beneficial use for which it was appropriated for a period of five (5) years. The United States also requests an order permanently enjoining any application of Section 42-222(2) to the United States and its agencies. Granting this relief would subvert SRBA decrees and nullify Idaho water law by permanently immunizing all of the United States' existing and future state law-based water rights from forfeiture pursuant to Section 42-222(2). This is the most important and consequential issue in this case.

The "recently enacted" statute that supposedly triggered the filing of this case, Idaho Code § 42-224, provides statutory procedures for addressing allegations that a stockwater right has been forfeited pursuant to Section 42-222(2). The procedures apply to *all* state law-based stockwater rights, not just the United States'. Further, the SRBA District Court—not IDWR, and not the Idaho Legislature—decides whether a stockwater right has been forfeited pursuant to Section 42-222(2). Section

[1] The State of Idaho, the Idaho Department of Water Resources ("IDWR"), and Gary Spackman, in his official capacity as Director of the Idaho Department of Water Resources. Dkt. 43 at 2. ("Dkt." page citations refer to the ECF page numbers.)

42-224 does not discriminate against the United States, and even if it did, that would not justify permanently barring application of Section 42-222(2) to the United States.

The United States has also put interpretation of SRBA decrees squarely at the center of this case, by asserting its SRBA decrees bar forfeiture proceedings from reaching the question of whether livestock watering by non-agents constitutes a "use" of the United States' decreed stockwater rights. The SRBA District Court has exclusive jurisdiction over this question.

The United States' waiver of sovereign immunity in the SRBA extends to the pending forfeiture proceedings through the retained jurisdiction provision of the SRBA's *Final Unified Decree*, and for the same reasons the forfeiture proceedings fall within the McCarran Amendment's waiver of sovereign immunity in suits for "administration" of decreed water rights. The United States' "facial" constitutional challenges to the "recently enacted" statutes should be dismissed because the United States has not shown that the statutes cannot be validly applied.

In the end, this case is a bid to prevent important questions of Idaho water rights and water law from reaching an Idaho court. Granting the relief the United States seeks would mean beneficial use is no longer the basis, measure, and limit of the United States' state law-based water rights. For the reasons discussed herein and in the State Defendants' opening brief, Dkt. 43-1, this case should be dismissed.

I. *Res Judicata* Bars the United States' Request to Permanently Immunize its Water Rights From Forfeiture Pursuant to Section 42-222(2).

The United States asserts it only challenges certain "recently" or "newly" enacted statutes, and *not* Section 42-222(2). Dkt. 60 at 15, 17, 26, 27 n. 6, 32, 33, 46,

50, 56, 72, 73, 74, 79, 80, 83, 89, 92. But the United States *expressly* asserts Section 42-222(2) is "contrary to" and "violates" the United States Constitution and the Idaho Constitution, Dkt. 11 at 25, 28, 29; Dkt. 34-1 at 46, and seeks an order *permanently* enjoining *any* application of Section 42-222(2) to the United States. Dkt. 11 at 30; Dkt. 34-1 at 46; Dkt. 60 at 89. Section 42-222(2) was enacted more than a century ago and was not changed by the "recently enacted" statutes. Dkt. 43-14 at 4; Dkt. 43-1 at 39 n.28.

Section 42-222(2) provides that water rights "shall be lost and forfeited" if not used for a period of five years.[2] An order permanently enjoining application of Section 42-222(2) to the United States, therefore, would mean that *all* its state law-based water rights would be entirely immunized from forfeiture pursuant to Section 42-222(2).[3] Not just *stockwater* rights, and not just *existing* rights, but *any and all water rights for any purpose of use that the United States has or acquires in the future under*

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

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

[3] The United States has sued "the State of Idaho," Dkt. 11 at 1, 5, and Idaho courts are the State of Idaho's "judicial department." Idaho Const. art. V. A permanent injunction would thus bar Idaho courts from applying Section 42-222(2) to the United States.

Idaho law would be immune from forfeiture.

This would fundamentally alter the nature of the United States' state law-based water rights. "Beneficial use is enmeshed in the nature of a water right," *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (2007), and statutory forfeiture "makes possible allocation of water consistent with beneficial use concepts." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997). Granting the United States' request for permanent immunity from forfeiture would mean that beneficial use is no longer "the basis, the measure, and the limit" of the United States' state law-based water rights. *Pioneer Irr. Dist.*, 144 Idaho at 110-12, 157 P.3d at 604-06. It would erase the "sharp" distinction between state and federal water rights, *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, 1248 (D. Nev. 2004), *aff'd sub nom. United States v. Truckee-Carson Irrigation Dist.*, 429 F.3d 902 (9th Cir. 2005), and transform the United States' state law-based water rights into impermissible "hybrid" water rights. *New Mexico ex rel. Reynolds v. Aamodt*, 1986 WL 1362103, at *2 (D.N.M. Jan. 24, 1986).

Under Idaho law, the United States' request for blanket immunity from Section 42-222(2) is a classic collateral attack on SRBA decrees. Dkt. 43 at 36-43. SRBA partial decrees are strictly construed. Any claim that a decreed water right includes an entitlement, interest, or immunity not expressly stated on the face of the partial decree is a "collateral attack," and so is any assertion that a partial decree must be "interpreted" as including unstated entitlements, interests, or immunities. *City of Blackfoot v. Spackman*, 162 Idaho 302, 307, 396 P.3d 1184, 1189 (2017); *Idaho*

Ground Water Appropriators, Inc. v. IDWR, 160 Idaho 119, 128, 369 P.3d 897, 906 (2016); *Rangen, Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016), *abrogated in part on other grounds by 3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022)). These principles give substance and effect to the rule that SRBA decrees are "*conclusive* as to the *nature* and *extent* of all water rights." 45-2 at 8, 10 (italics added); Idaho Code § 42-1420(1) (same); *In Re SRBA Case No. 39576 Subcase No. 37-00864*, 164 Idaho 241, 245, 429 P.3d 129, 133 (2018) (same); *see also id.* at 253, 429 P.3d at 141 ("'[f]inality in water rights is essential'") (citation omitted).

It is undisputed that the United States' partial decrees for its state law-based stockwater rights are indistinguishable from those held by private parties for their own use, Dkt. 43-1 at 37; Dkt. 46 at 8-9, and unlike the United States' federal reserved water rights, lack provisions exempting them from forfeiture pursuant to Idaho law. Dkt. 43-1 at 36-37 & n.25; Dkt. 44 at 15-16; Dkt. 45-3; Dkt. 45-4.[4] Further, the *Final Unified Decree*'s forfeiture provision confirms that *all* state law-based water rights decreed in the SRBA are subject to forfeiture pursuant to Section 42-222(2). Dkt. 45-2 at 13. Thus, under Idaho law, the United States' request for an order permanently immunizing its decreed water rights from forfeiture is a collateral attack on the decrees. So is the United States' assertion that its partial decrees must be *interpreted* as precluding forfeiture when grazing permittees who are not acting as the United

[4] The United States' stockwater right decrees also stand in stark contrast to its storage water right decrees, which *do* include provisions stating that the water is used by persons and entities other than the United States. *Pioneer Irr. Dist.*, 144 Idaho at 115, 157 P.3d at 609.

States' agents water their livestock on federal lands. Dkt. 60 at 15, 49-50, 52, 54; 63-64, 66-68, 76-78; *see Rangen*, 159 Idaho at 806, 367 P.3d at 201 ("requests for such interpretations needed to be made in the SRBA itself.").[5]

The United States' assertion it is challenging statutes rather than SRBA decrees, Dkt. 60 at 78-80, elevates form over substance. Section 42-222(2) applies to water rights. *Supra* note 2. A request for an order providing the United States with blanket immunity from Section 42-222(2) necessarily seeks to endow the United States' decreed stockwater rights with an immunity that was not claimed or decreed in the SRBA. *See United States v. Hennen*, 300 F. Supp. 256, 264 (D. Nev. 1968) ("The complaint by the Government in this action constitutes a collateral attack on the State Court proceedings.").

The United States' request for an order permanently enjoining application of Section 42-222(2) to the United States' decreed water rights is thus barred by *res judicata*. Dkt. 43 at 36-43; *see, e.g., United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 59-62, 408 P.3d 52, 57-60 (2017) (holding that SRBA decrees have preclusive effect); *First Sec. Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 743-44, 451 P.3d 446, 456-57 (2019) (same). Because such an order would also apply to Idaho water rights the United States obtains in the future, it is also barred by the Taylor Grazing Act's mandate that the United States is subject to state water law, 43 U.S.C.

[5] Except for the forfeiture provision in the *Final Unified Decree*, Dkt. 45-2 at 13, the SRBA did not address or decide questions of whether any particular water rights would be subject to forfeiture in the future. *See* Dkt. 60-1 at 15 ("despite the issuance of a partial decree, the right is not immune from being reevaluated for forfeiture in a future proceeding").

§ 315b, and FLPMA's prohibition against "expanding or diminishing Federal or State jurisdiction … in water resources development or control." Dkt. 43-13 at 4.[6] The United States' prayer for a permanent injunction should be denied as a matter of law.

II. The United States' Request for Relief From Section 42-222(2) Is Barred by the *Rooker-Feldman* and Prior Exclusive Jurisdiction Doctrines.

The United States argues the *Rooker-Feldman* and prior exclusive jurisdiction doctrines do not apply, because this is an *in personam* action that challenges statutes rather than SRBA decrees. Dkt. 60 at 86. Both doctrines, however, require courts to focus on an action's substance and request for relief rather than "artful pleading."

The *Rooker-Feldman* doctrine applies when a federal claim challenges a state court decision "in substance," *Doe v. Mann*, 415 F.3d 1038, 1041 (9th Cir. 2005), or is so "'inextricably intertwined'" with the state court decision that adjudicating federal claims "would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules[.]" *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003) (citation omitted). These rules apply to the United States' request for permanent immunity from Section 42-222(2) because it is a collateral attack on SRBA decrees. *Supra* & Dkt. 43-1 at 44-45.

Courts also "look behind the form of the action to the gravamen of a complaint and the nature of the right sued on" when considering the prior exclusive jurisdiction doctrine. *State Engineer of State of Nevada v. South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada*, 339 F.3d 804, 810 (9th Cir. 2003) (cleaned up).

[6] "FLPMA" refers to the Federal Land Policy and Management Act of 1976. Pub. Law 54-579, 90 Stat. 2743; Dkt. 43-1 at 30; Dkt. 43-13;

The United States asserts it filed this action "to defend … water rights previously decreed in the SRBA from the State's unconstitutional, collateral attack," Dkt. 60 at 79, and "to protect its stockwater rights decreed under state law." *Id.* at 97. The "gravamen" of this case is the United States' contention that its decreed stockwater rights are immune from forfeiture, regardless of whether federal grazing permittees are acting as its agents. Dkt. 60 at 64, 67-68, 76-78, 87, 94, 96. The United States' decreed water rights are "the right[s] sued on," and the "nature" of these decreed rights is precisely what the United States puts at issue in this case. *State Engineer*, 339 F.3d at 810. These are questions of the interpretation of SRBA decrees, and the United States is asking this Court to step into the SRBA District Court's shoes.[7]

The record contradicts the United States' assertion that it "is not asking this Court to take any water rights from the SRBA court's control." Dkt. 60 at 88. This is *exactly* what the United States has done by requesting an order permanently immunizing its decreed water rights from forfeiture. This request intrudes into the SRBA District Court's retained jurisdiction under the *Final Unified Decree*,[8] and "seek[s] necessarily [to] interfere with the jurisdiction or control by the state court

[7] The United States' reliance on its SRBA decrees belies its contentions that the State Defendants are "reframing" the United States' "position," and that this case is merely "water-related" and does not implicate decreed water rights. Dkt. 60 at 86, 88-89

[8] "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." Dkt. 45-2 at 14. This provision's reference to "this proceeding" contradicts the United States' assertion that "*this* proceeding"—i.e., the SRBA—is confined to the initial adjudication of the water rights and the pending forfeiture proceedings are "a wholly different proceeding." Dkt. 60 at 34 (italics in original); *id.* at 36. The SRBA specifically includes "the administration" of decreed water rights. Dkt. 45-2 at 2, 7.

over the res." *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 592-93 (9th Cir. 2022) (cleaned up). The allegedly "pure" federal claims that sovereign immunity has not been waived and that Section 42-224 discriminates against the United States, Dkt. 60 at 45, 83, also fall within the SRBA District Court' retained jurisdiction because they also hinge upon interpretation of SRBA decrees.[9] *See S. Delta Water Agency v. U.S., Dep't of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985) ("'To administer a decree is…to construe and to interpret its language.'") (citation omitted).

The United States does not dispute that the pending forfeiture proceedings fall within the language of the *Final Unified Decree*'s retained jurisdiction provision, but argues that provision exceeds the scope of the McCarran Amendment, 43 U.S.C. § 666(a). Dkt. 60 at 35-36. This argument is foreclosed by *res judicata*. It is undisputed that the United States was joined to the SRBA pursuant to the McCarran Amendment, that the *Final Unified Decree* was issued in 2014, and that the United States did not appeal from the *Final Unified Decree* on grounds that the retained jurisdiction provision (or any other provision) exceeded the scope of the McCarran Amendment. The United States is bound by the retained jurisdiction provision of the

[9] The United States' claim that it has not waived sovereign immunity in the forfeiture proceedings raises a question of interpretation of the retained jurisdiction provision of the *Final Unified Decree*. The claim that Section 42-224 discriminates against the United States rests largely on assertions that its partial decrees must be interpreted as barring any requirement of showing "'proof of agency agreements' between the United States and its grazing permittees to avoid their forfeiture." Dkt. 60 at 15; *see also id.* at 49-50 (similar). These interpretation questions should be resolved by the SRBA District Court. *See Nehmer v. U.S. Dep't of Veterans Affs.*, 494 F.3d 846, 860 n.6 (9th Cir. 2007) (referring to "the inherent authority of a court to construe its own decree—to interpret a decree that it had entered many years earlier, about which it had extensive knowledge from years of oversight").

Final Unified Decree.[10]

The McCarran Amendment's plain language confirms this conclusion. It provides that the United States is bound by "State laws" and the "judgments, orders, and decrees" of the adjudication court "in the same manner and to the same extent as a private individual," with the sole exception of a "judgment for costs." 43 U.S.C. § 666(a).[11] "Private individuals" who are parties to the SRBA cannot cherry-pick which provisions of the *Final Unified Decree* are binding on them, and neither can the United States, even "by reason of its sovereignty." *Id.*

The United States' reliance on the general rule that waivers of sovereign immunity must be strictly construed is also misplaced. Dkt. 60 at 36-38. "[T]he McCarran Amendment is a virtually unique federal statute, and we cannot in this context be guided by general propositions." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983). The general proposition the United States invokes here does not authorize courts "to narrow the waiver that Congress intended" in the

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[10] The *Final Unified Decree*'s retained jurisdiction provision is not unusual. Courts that adjudicate water rights generally have continuing jurisdiction to interpret and enforce their decrees, and their decrees often include specific provisions to that effect. *United States v. Fallbrook Pub. Util. Dist.* 2019 WL 2184819, at *1-2 (S.D. Cal., May 21, 2019); *United States v. Walker River Irr. Dist.*, 890 F.3d 1161, 1166, 1169-73 (9th Cir. 2018); *United States v. Gila Valley Irr. Dist.* 859 F.3d 789, 794 (9th Cir. 2017); *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1011-15 (9th Cir. 1999); *Wackerman Dairy, Inc. v. Wilson*, 7 F.3d 891, 892 (9th Cir. 1993); *Salmon River Canal Co. v. Bell Brand Ranches*, 564 F.2d 1244, 1246, 1249 (9th Cir. 1977); *Orderville Irr. Co. v. Glendale Irr. Co.*, 409 P.2d 616, 619 (Ut. 1965); *Gillespie Land & Irr. Co. v. Narramore*, 378 P.2d 745, 749 (Ariz. 1963); *In Re Rts. to Use of Waters of Owyhee River and its Tributaries*, 1 P.2d 1097, 1099 (Or. 1931).

[11] The Senate Report on 43 U.S.C. § 666 also states "there is no valid reason why the United States should not … be required to abide by the decisions of the Court *in the same manner as if it were a private individual*." Dkt. 43-9 at 7 (italics added).

McCarran Amendment. *United States v. Idaho*, 508 U.S. 1, 7 (1993).

Finally, there is no merit in the assertion that the SRBA District Court only decrees water rights and therefore lacks the jurisdiction and legal acumen to resolve the United States' federal claims. Dkt. 60 at 87. The SRBA District Court is an Idaho district court of general jurisdiction, Idaho Code §§ 1-701, 1-705,[12] and the SRBA is a proceeding in that court for the adjudication and administration of water rights arising under state *and federal* law. Dkt. 45-2 at 2, 5, 7, 8, 11, 14. The SRBA District Court has the jurisdiction, competence, and experience to decide any questions or claims that bear on the adjudication or administration of the water rights at issue, regardless of whether they arise under state or federal law. Dkt. 43-1 at 48-49 & n.33; *see also McKesson v. Doe*, ___ U.S. ___, ___, 141 S.Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law.") (citation omitted).

III. The United States Has Waived Sovereign Immunity in the Pending Forfeiture Proceedings.

The United States' waiver of sovereign immunity in the SRBA applies to the pending forfeiture proceedings because they fall within the *Final Unified Decree*'s retained jurisdiction provision, as discussed above. The McCarran Amendment's waiver of sovereign immunity in suits for the "administration" of decreed water rights, 43 U.S.C. § 666(a), also applies in this case. Dkt. 43-1 at 54-59.

The United States provides no support for its argument that McCarran

[12] "SRBA District Court" is a term of convenience that refers to the Twin Falls County District Court, Idaho Fifth Judicial District. Idaho Code § 42-224(10); Dkt. 46 at 3.

Amendment "administration" suits must be as comprehensive and all-inclusive as "adjudication" suits. Dkt. 60 at 34, 41-42. The McCarran Amendment does not impose such a requirement, 43 U.S.C. § 666(a), and the only authority the United States has cited, *Federal Youth Center v. District Court*, 575 P.2d 395 (Colo. 1978), expressly recognizes that "[n]early any proceeding to administer water rights will by necessity consider only a fragment of a particular river system." *Id.* at 401 n.5.

The United States' argument also ignores the fact that the *purpose* of requiring all water rights on a system to be defined in a comprehensive adjudication is to *allow* subsequent private suits against the United States. *See Dugan v. Rank*, 372 U.S. 609, 618 (1963) (disallowing a "private suit" because there had not yet been "a general adjudication of 'all rights of various owners on a given stream'") (quoting the Senate Report); *S. Delta Water Agency*, 767 F.2d at 541 (similar). Requiring every private suit against the United States for "administration" of water rights to *also* join all water right holders in the original adjudication would be duplicative and nonsensical.

The United States' assertion that "administration" is limited to enforcement of water right priorities "relative to other SRBA rights," Dkt. 60 at 40, lacks merit. The McCarran Amendment contains no such limitation, and the Ninth Circuit has interpreted "administration" broadly: "'To administer a decree is to execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language.'" *S. Delta Water Agency*, 767 F.2d at 541 (quoting *Hennen*, 300 F.Supp. at 263). As the Colorado Supreme Court stated, "It would be difficult to draft a provision more all-inclusive than s 666(a)(2). … a suit for the 'administration' of

water rights could be virtually any action concerning the status of those rights as they had been previously adjudicated." *Fed. Youth Ctr.*, 575 P.2d at 398.

The pending forfeiture proceedings fall within these definitions of "administration" because they require "construing" and "interpreting" the United States' partial decrees and the *Final Unified Decree*'s forfeiture and retained jurisdiction provisions, Dkt. 45-3; Dkt. 45-2 at 13-14, Dkt. 47-10 at 9; Dkt. 47-12 at 5, 10; Dkt. 47-13 at 5, 10; Dkt. 47-14 at 4, 8, and determining the current "status" of decreed water rights. *S. Delta Water Agency*, 767 F.2d at 541; *Fed. Youth Ctr.*, 575 P.2d at 398. The United States' view that its partial decrees preclude forfeiture even if its grazing permittees are *not* acting as its agents, Dkt. 60 at 15, 49-50, means the pending forfeiture proceedings also involve "conflicts as to [the partial decrees'] meaning." *S. Delta Water Agency*, 767 F.2d at 541.[13]

The United States' contention that forfeiture impermissibly relitigates the validity of previously decreed water rights, Dkt. 60 at 18, 49, 54, 61-63, fails as a matter of Idaho law. Decreed water rights are subject to forfeiture,[14] and SRBA partial decrees do not address questions of whether particular water rights are

[13] In asserting the forfeiture proceedings "resemble a private suit" and "are in effect private suits," Dkt. 60 at 34, 39, the United States has effectively conceded that the forfeiture proceedings are "suits" within the meaning of the McCarran Amendment. 43 U.S.C. § 666(a); Dkt. 43-1 at 57-59.

[14] *Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982); *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976); *Graham v. Leek*, 65 Idaho 279, 287, 144 P.2d 475, 479 (1943); *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924); Dkt. 43-1 at 38 & n.27. The United States misses the point in asserting its decreed stockwater rights are "perfected." Dkt. 60 at 60. "Perfected" water rights are subject to forfeiture.

subject to forfeiture in the future. *See* Dkt. 60-1 at 15 ("despite the issuance of a partial decree, the right is not immune from being reevaluated for forfeiture in a future proceeding.").[15]

Forfeiture promotes allocation of water "consistent with beneficial use concepts." *Hagerman Water Right Owners, Inc.*, 130 Idaho at 735, 947 P.2d at 408. As one federal district court recently explained, statutory forfeiture exists "*[b]ecause* beneficial use is the basis, measure and limit to the use of water." *Gila River Community v. Bowman*, ___ F. Supp.3d ___, 2023 WL 2633614, at *3 (D. Ariz. Mar. 24, 2023) (italics added). That court recently declared several previously-decreed water rights forfeited, in exercising its "continuing jurisdiction to enforce and interpret the Decree." *Id.* at *1, *7-*8. This confirms that "administration" includes questions of whether a decreed water right has been forfeited. *See also Gila River Indian Cmty. v. Freeport Mins. Corp.*, 2020 WL 13178025, at *5-6 (D. Ariz. Mar. 5, 2020) (analyzing "forfeiture" as a question of "the Court's administration of the Decree"); *Gila River Indian Cmty. v. Freeport Mins. Corp.*, 2018 WL 9880063, at *2 (D. Ariz. July 20, 2018) ("Though forfeiture is not a separately enshrined right in the Decree, the water right forming the basis for Plaintiff's forfeiture claim is"). The

[15] The SRBA settlements upon which the United State relies, Dkt. 60 at 14, 16, 49, 55-57, also did not address forfeiture. They resolved Idaho's objections to decreeing the United States' claimed stockwater rights, Dkt. 36-3 at 5-7, 13, 59-60, and specifically did *not* address "any other disputes or objections in the Snake River Basin Adjudication or any other case or controversy." *Id.* at 9, 13-14, 62. Further, they "shall not be used in any manner, by, for or against the United States, State of Idaho, or any other person or entity in the Snake River Basin Adjudication or any other case or controversy other than those subcases and controversies addressed in this agreement." *Id.*

Colorado Supreme Court also concluded that the McCarran Amendment's waiver for "administration" applies when "the substance of the plaintiff's adverse possession claim is that one or more of the claimants to water … have lost their respective rights by failure to exercise them." *Fed. Youth Cntr.,* 575 P.2d at 401.

While the *Gila River* and *Federal Youth Center* courts squarely held that "administration" includes terminating previously decreed rights for non-use, the United States has cited *no* authority that limits "administration" to enforcing water right priorities. The pending forfeiture proceedings fall well within the McCarran Amendment's waiver of sovereign immunity in suits for "administration" of decreed water rights. 43 U.S.C. § 666(a).

IV. Section 42-224 Does Not Discriminate Against the United States.

The plain language of Section 42-224 demonstrates it does not "'treat someone else better than it treats [the Federal Government].'" *North Dakota v. United States*, 495 U.S. 423, 438 (1990) (citation omitted). The statute defines a procedure for addressing allegations that a stockwater right has been forfeited pursuant to Section 42-222(2), and applies to *all* stockwater rights other than those based on federal law. Idaho Code § 42-224(1)-(14); Dkt. 43-1 at 25-26, 64-67.

Section 42-224's language belies the United States' contentions that it creates "a process expressly designed to terminate the United States' decreed rights" or "a new program of mass forfeiture of federal [stockwater] rights" that will "inevitably" result in forfeiture. Dkt. 60 at 27, 71, 92. Forfeiture proceedings are not initiated by the State but rather by third parties who file petitions with IDWR alleging that

certain individual stockwater rights have been forfeited. Idaho Code § 42-224(1). The petitions must identify the specific water rights at issue and the basis for the alleged forfeiture of each water right. *Id.* IDWR evaluates the petitions and determines whether a show-cause order is warranted, *id.* § 42-224(1)-(2), and if a show-cause order issues, the stockwater right holder is entitled to a hearing before IDWR. *Id.* § 42-224(6)-(8).[16] The stockwater right holder can submit evidence and argument to show the right has not been forfeited, *id.*, and rely upon any statutory or common law defense to forfeiture available under Idaho law. *Id.* § 42-223; *see* Dkt. 47 at 2-6 (discussing Section 42-224); Dkt. 48 at 9 (same).

Even if IDWR ultimately determines that a stockwater right has been forfeited, that determination has "no legal effect" on the water right. Idaho Code § 42-224(9). The SRBA District Court makes the legally effective forfeiture determination in a civil action governed by the standards of Section 42-222(2) and the Idaho Rules of Civil Procedure, Idaho Code § 42-224(10)-(12), not by a legislative "program" or directive. Dkt. 60 at 71. The claim that Section 42-224 implements a state-sponsored campaign for mass forfeiture of the United States' decreed stockwater rights is hyperbole that bears no resemblance to the statutory language.[17]

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[16] The Show-Cause Orders in this case determined that approximately half of the stockwater rights at issue had *not* been forfeited. Dkt. 43-1 at 27. So much for forfeiture being "inevitable." Dkt. 60 at 92.

[17] The assertion that Section 42-224 is presumed invalid, Dkt. 60 at 17, 26, is incorrect because such a presumption applies only to intergovernmental immunity "direct regulation" claims. *See North Dakota*, 495 U.S. at 434 ("State law may run afoul of the Supremacy Clause in two distinct ways: The law may regulate the Government directly or discriminate against it"); *GEO Group v. Newsom*, 50 F.4th 745, 758, 762 (9th Cir. 2022) (similar). Further, *United States v. City of Arcata*, 629 F.3d 986 (9th

Section 42-224's language also disposes of the United States' reliance on Section 42-501 to prove discriminatory *intent*. Dkt. 60 at 18-19, 28-29. Section 42-501 is not cited, referenced, incorporated, or applied in Section 42-224, Section 42-222(2), or the Show-Cause Orders. Dkts. 47-6—47-14. Section 42-501 is an inoperative statement of "Legislative intent" that has no application in determining whether a stockwater right has been forfeited, and was not applied in this case.[18]

Further, any "supposed nefarious motive" is "wholly irrelevant" because an intergovernmental immunity analysis "'must proceed from the text of the [statute], not the alleged motives behind it.'" *United States Postal Serv. v. City of Berkeley*, 228 F.Supp.3d 963, 969 (N.D. Cal. 2017) (citation omitted); *see also First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017) ("'[t]he Supreme Court has held

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Cir. 2010), does *not* stand for the rule that "[s]tate laws can *discriminate* against the federal government even if they do 'not target the federal government alone.'" Dkt. 60 at 17 (quoting *City of Arcata*) (italics added). The *City of Arcata* passage quoted by the United States, Dkt. 60 at 17, does not refer to "discrimination" but rather cites the "direct regulation" holding in *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996). Even if the United States had alleged a "direct regulation" claim, it would fail because Congress has provided "clear and unambiguous authorization" for Idaho to directly regulate the federal government's state law-based water rights, *GEO Group*, 50 F.4th at 762, via the McCarran Amendment and numerous other federal laws. *See United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.").

[18] While Section 42-501 states "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 § 42-501, this statement does not create or impose any forfeiture standards, requirements, or procedures but rather acknowledges and defers to those in Sections 42-222(2) and 42-224. This statement also goes no further than recognizing what the SRBA District Court had already decreed: that *all* state law-based water rights, *including* those decreed to the United States, are subject to forfeiture pursuant to Idaho law. Dkt. 45-2 at 13.

unequivocally that it 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'") (citations omitted). The intergovernmental immunity doctrine is not concerned with legislative motives and is not a vehicle for federal courts to police the intent of state legislatures.

The fact that Section 42-224 includes "a special notice provision that applies only to federal or state grazing lands," Dkt. 60 at 20, does not make it discriminatory. Intergovernmental immunity "is not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment," *United States v. California*, 921 F.3d 865, 881 (9th Cir. 2019), and the notice provision does not impose any burden or disadvantage on the *United States*. It requires the *Director* to notify *grazing permittees* of show-cause orders issued for stockwater rights located on federal or state lands. Idaho Code § 42-224(4). If anything, the notice provision *benefits* the United States by alerting its grazing permittees of pending forfeiture proceedings that might (according to the United States) threaten the permittees' interests. Dkt. 34-1 at 50. A provision that benefits the United States "cannot be considered to discriminate against it." *North Dakota*, 495 U.S. at 439.[19]

The fact that Section 42-224 applies only to stockwater rights also does not make it discriminatory. Dkt. 60 at 19-21.[20] Many Idaho stockwater rights are held

[19] The notice provision also applies to state lands, Idaho Code § 42-224(4), which Idaho, like the United States, makes available for grazing by private livestock owners pursuant to its sovereign authority to manage its own lands. The notice provision thus treats the United States the same as "other similarly situated actors." *United States v. Kernen Constr.*, 349 F.Supp.3d 988, 993 (E.D. Cal. 2018).

[20] Stockwater-specific legislation is not a recent development. The Idaho Code has had provisions addressing stockwater rights on federal lands since 1939, Dkt. 43-2,

by private parties, and private parties continue to file stockwater claims in the SRBA, pursuant to its procedures for deferred adjudication of *de minimis* domestic and stockwater claims. Dkt. 45-2 at 10, 12, 14, Dkt. 46 at 6.[21] The State also holds many stockwater rights potentially subject to forfeiture under Section 42-224's procedure for applying Section 42-222(2). Dkt. 36 at 12-13; Dkt. 47 at 6; Dkt. 48 at 9.

V. Section 42-224 Does Not Retroactively Impair Decreed Water Rights.

The United States asserts Section 42-224 collaterally attacks or retroactively diminishes the United States' decreed stockwater rights because it changes forfeiture law from what it was when the rights vested or were decreed. Dkt. 60 at 16, 47-50, 59, 60, 64, 68, 78-79, 87, 94, 96-97. These arguments lack merit.

Contrary to the United States' assertion that Section 42-224 "retroactively changes" Idaho forfeiture law, Dkt. 60 at 47, the statute expressly confirms the century-old forfeiture standards of Section 42-222(2). Idaho Code § 42-224(1), (2), (7), (8), (11), (12); Dkt. 43-14 at 4.[22] While the United States objects to the "particular

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and addressing "instream stockwatering" since 1984. 1984 Idaho Sess. Laws 299-300. It is well within the Idaho Legislature's prerogatives to enact legislation addressing a particular use of water. *See* Idaho Code § 42-101 ("Water being essential … its control shall be in the state, which, in providing for its use, shall equally safeguard all the various interests involved. All the waters of the state, when flowing in their natural channels … are declared to be the property of the state"); *Nate v. Denney*, 166 Idaho 801, 808, 464 P.3d 287, 294 (2017) ("'It is a well-established rule that a state legislature has plenary power over all subjects of legislation not prohibited by the federal or state constitution'") (citation omitted).

[21] There are potentially tens of thousands of deferred stockwater claims that remain to be filed. Dkt. 46 at 6.

[22] The United States mischaracterizes *United States v. Orr Water Ditch Co.*, 256 F.3d 935 (9th Cir. 2001), and *United States v. Gila Valley Irr. Dist.*, 859 F.3d 789 (9th Cir. 2017), as establishing a *federal* rule barring retroactive application of forfeiture statutes. Dkt. 60 at 47-48. These decisions recognize that *state* law controls in

manner" in which Section 42-224 deals with stockwater right forfeiture, Dkt. 60 at 71, 86, under Idaho law the United States' decreed stockwater rights do not include a vested right to any particular "manner" or "mode of procedure" for addressing allegations that the rights have been forfeited. *See State v. Griffith*, 97 Idaho 52, 58, 539 P.2d 604, 610 (1975) ("'No one has a vested right in any given mode of procedure, and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change.'") (citation and footnote omitted).[23]

There is also no merit in the contention that Section 42-224 "effectively chang[es] the burden of proof" by providing that IDWR's forfeiture determinations have "prima facie" effect in a civil action in the SRBA District Court. Dkt. 60 at 28. The statute provides that IDWR's determination "shall *not* change" the standard of proof under Section 42-222(2). Idaho Code § 42-224(11) (italics added). Further, forfeiture is a statutory doctrine, and giving IDWR's forfeiture determination "prima facie" weight in subsequent court proceedings is a "'permissible exercise of the [Legislature's] authority, recognized in I.R.E. 301, to create an evidentiary presumption.'" *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996) (citation omitted).

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determining whether a change in forfeiture law impermissibly impairs vested water rights. *See, e.g., Gila Valley Irr. Dist.*, 859 F.3d at 807 ("The Arizona Supreme Court is the final arbiter of Arizona law, and it had already found that statutory forfeiture applies to pre-1919 water rights."). Any claim that Section 42-224 retroactively impairs the United States' decreed water rights is a question of Idaho water rights and Idaho water law over which the SRBA District Court has exclusive jurisdiction.

[23] Section 42-224's procedures provide due process and do not deny "a substantial and efficient remedy." *Id.*; *see supra* Part IV (discussing Section 42-224).

The contention that Section 42-224 is a collateral attack because the United States' decreed stockwater rights bar consideration of *Joyce Livestock*'s[24] holdings and "agency agreements" in a forfeiture proceeding, Dkt. 60 at 15, 49-58, 61-63, also lacks merit. As discussed above, SRBA partial decrees are strictly construed and do not include entitlements, interests, or immunities beyond those stated on the face of the decree, and nothing in the United States' partial decrees precludes consideration of *Joyce Livestock*'s holdings or "agency agreements" in a forfeiture proceeding. But in any event, nothing in Section 42-224 prevents the United States from arguing in the SRBA District Court that its decreed stockwater rights must be so interpreted, or prevents the SRBA District Court from accepting that argument.[25]

The United States' oft-repeated assertion that there has been "no change" in the "use" of these rights since they were decreed, Dkt. 60 at 14, 15, 40, 48, 62, 63, 66, incorrectly equates "livestock watering" on federal lands with "use" of the United States' decreed stockwater rights. When federal grazing permittees water their livestock on federal lands they are not necessarily "using" the United States' stockwater rights. Dkt. 48 at 10. They may be exercising their own statutory rights to water livestock directly from public water sources ("instream stockwatering") or "domestic" wells rather than "using" the United States' stockwater rights. Idaho Code §§ 42-113(1), 42-227, 42-111(1); Dkt. 46 at 7; Dkt. 48 at 9-10; Dkt. 49 at 4.[26]

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

[25] The State Defendants do not waive their position that such an argument fails as a matter of law.

[26] This is just one reason this Court should not credit the United States' dire predictions about the consequences of forfeiting the United States' state law-based

Federal permittees can perfect their own beneficial use-based instream stockwater rights in this way and file "deferred" SRBA claims for them, even if those claims entirely overlap a decreed stockwater right held by the United States. *Id.*; *see Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007) ("The prior appropriation doctrine recognizes that two or more parties can obtain a right to use water from the same source."). It cannot be assumed that private livestock watering on federal lands constitutes a "use" of the United States' stockwater rights, because the federal permittees may be exercising or perfecting their own rights.

The United States' reliance on the Property Clause as precluding forfeiture of its state law-based water rights, Dkt. 60 at 46-48, is also misplaced. Congress exercised its Property Clause power in the McCarran Amendment, the Taylor Grazing Act, and earlier enactments, "sever[ing] the water from the land" of the public domain and making it "subject to the plenary control" of the individual States. Dkt. 43-9 at 4, 5; *see also id.* at 5 ("The Federal Government, *as owner of the public domain*, had the power to dispose of the land and water composing it separately or together") (quoting *Ickes v. Foxe*, 300 U.S. 82, 95 (1937)) (italics added). Through this legislation, Congress gave "express permission," Dkt. 60 at 46, for the United States' state law-based water rights to be forfeited pursuant to state water law. And contrary to the United States' contention that the McCarran Amendment should not subject it to "varying" state laws, Dkt. 60 at 47, Congress expressly intended the United States'

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stockwater rights. Another is the undisputed fact that the United States holds approximately 6,500 stockwater rights based on federal law, Dkt. 36 at 11; Dkt. 46 at 6-7, and they are not subject to forfeiture. Dkt. 45-2 at 13.

water rights to be defined and administered according to the "law of appropriation … *as provided in each such State*." Dkt. 43-9 at 5 (italics added).[27]

VI. The United States Has Not Shown That the Other Stockwater Statutes Are Facially Unconstitutional.

The United States asserts Idaho Code §§ 42-113(2)(b), 42-502, and 42-504 are "facially" invalid but has *not* shown that "'no set of circumstances exists under which [the statutes] would be valid.'" *Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1217 (9th Cir. 2020) (citation omitted). At most, the United States has shown these statutes might be invalid in *some* circumstances.

The United States' argument that Section 42-113(2)(b) retroactively alters "appurtenance" of the United States' decreed water rights, Dkt. 60 at 21-22, fails because the United States does not dispute that the statute is presumed to operate prospectively only, and contains no language giving it retroactive effect. Dkt. 43-1 at 70-71. The argument that Section 42-113(2)(b) is unconstitutional even if applied prospectively, Dkt. 60 at 22-23, is precluded by *Joyce Livestock*'s holding that beneficial use-based stockwater rights, perfected by federal grazing permittees, are appurtenant to their "base" properties. *Joyce Livestock Co.*, 144 Idaho at 12-13, 156 P.3d at 513-14. Section 42-113(2)(b) can thus be applied constitutionally to claims in pending and future Idaho adjudications for beneficial use-based stockwater rights used on federal lands. The United States also has not disputed that it *benefits* from

[27] The United States relies heavily on *United States v. Lewis County*, 175 F.3d 671 (9th Cir.), Dkt. 60 at 37-39, 47, but *Lewis County* is not a water rights case, and does not interpret the McCarran Amendment, the Taylor Grazing Act, or FLPMA.

Section 42-113(2)(b)'s authorization for federal permittees to convey such stockwater rights to "successive" permittees on the same allotments. Dkt. 43-1 at 41, 72.

Joyce Livestock also forecloses the United States' facial challenge to Section 42-502. Dkt. 60 at 23-24. The United States does not dispute that Section 42-502 is consistent with *Joyce Livestock*, Dkt. 43-1 at 73, but instead argues *Joyce Livestock* "does not require [Section 42-502's] explicit discrimination against the United States." Dkt. 60 at 24. This assertion is not only wrong about what *Joyce Livestock* "requires," but also incorrectly implies that *Joyce Livestock* authorizes "discrimination" against the United States.

The United States' sovereign status had no role in *Joyce Livestock*, outside the United States' argument that it was entitled to Idaho stockwater rights "based upon its ownership and control of the public lands coupled with the Bureau of Land Management's comprehensive management of public lands under the Taylor Grazing Act." *Joyce Livestock Co.*, 144 Idaho at 17, 156 P.3d at 518. The Idaho Supreme Court rejected this argument, based on longstanding and generally-applicable principles of Idaho water law, not based on the United States' sovereign status. *Id.* at 17-20, 156 P.3d at 518-21.[28] *Joyce Livestock*'s holding therefore means that Idaho water law prohibits any landowner, including the United States, from being decreed a beneficial use-based stockwater right in an Idaho adjudication unless they own the livestock in question, or the livestock owner acts as their agent. Section 42-502

[28] The United States did not seek review of the *Joyce Livestock* decision in the United States Supreme Court, and long ago waived any argument that the decision discriminates against the federal government.

partially codifies this holding and thus can be constitutionally applied in pending and future Idaho adjudications.

While Section 42-504's prohibition against transferring stockwater rights used on federal lands to other lands or uses has been part of the Idaho Code since 1939, Dkt. 43-1 at 73-74, the United States argues that the former statute applied only to permitted and licensed stockwater rights, and not to beneficial-use based stockwater rights. Dkt. 60 at 25. This assertion is irrelevant, because in 1939 it was already clear the United States could not acquire beneficial use stockwater rights based on livestock watering by ranchers, unless they were acting as agents of the United States. *See Joyce Livestock Co.*, 144 Idaho at 18, 156 P.3d at 519 (quoting *First Sec. Bank of Blackfoot v. State*, 49 Idaho 740, 746, 291 P. 1064, 1065 (1930)).[29]

Further, the United States does not dispute that Section 42-504's prohibition against transferring stockwater rights on federal lands to other lands or uses *supports* the United States' interest in preventing what it calls "dewatering" of federal grazing lands. Dkt. 43-1 at 74; *see North Dakota,* 495 U.S. at 439 ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it."). Finally, Section 42-504 *also* applies to "the holder or holders of any livestock grazing permit or lease on a federal grazing allotment." Idaho Code § 42-504.

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[29] Prior to this action, the United States never claimed ownership of beneficial use stockwater rights based on livestock watering by ranchers. The United States did not even make such claims in the SRBA—it relied, rather, on its authority to manage federal lands and administer federal grazing programs. Dkt. 43-1 at 21; *Joyce Livestock Co.*, 144 Idaho at 17, 156 P.3d at 518.

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

The United States is not entitled to a permanent injunction because its claims should be dismissed on both jurisdictional and substantive grounds. Further, a permanent injunction "is a drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), and it is "axiomatic" an injunction should not issue when there is an adequate remedy in the ordinary course of law. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992). Idaho law provides an adequate remedy for the United States' claims. It can raise all of its federal and state claims and defenses in the "civil action" authorized by Section 42-224(10)-(12). The SRBA District Court's final decision can be appealed to the Idaho Supreme Court, and further review is available in the United States Supreme Court.

Moreover, the United States has not been "harmed," because none of its water rights have been or can be forfeited in the pending administrative proceedings, *see* Idaho Code § 42-224(9) ("shall have no legal effect"), and the possibility that some or all may be forfeited in a subsequent civil action in the SRBA District Court is too speculative to support a permanent injunction. Dkt. 43-1 at 75; *see TCR, LLC v. Teton Cnty.*, 2023 WL 356169, at *6 (D. Idaho Jan. 23, 2023) ("For a permanent injunction, a plaintiff must show it has already suffered irreparable injury.").[30]

[30] The United States mischaracterizes *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), by implying it authorizes permanent injunctive relief based on "the likelihood" of future harm. Dkt. 60 at 89, 91. The cited statements in *Winter* address the standard for a *preliminary* injunction, not a *permanent* injunction. 555 U.S. at 20.

Further, the mere existence of the pending administrative proceedings does not "harm" the United States because it has waived sovereign immunity.[31]

The United States uses preemption terminology in asserting forfeiture of state law-based stockwater rights would "obstruct," "frustrate," or "impair" federal grazing programs. Dkt. 60 at 90, 93, 95; *see, e.g., Martinez v. Wells Fargo Home Mort., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010) ("obstruct, impair, or condition … frustrate"). The United States thus relies on preemption principles even if it professes otherwise, but preemption has no role in this case.[32] Pursuant to clear congressional directives, the United States' state law-based stockwater rights are subject to state water law, *regardless* of the effect it may have on federal grazing programs. Assertions that

[31] The anecdotal assertion that Section 42-502 disrupts "day-to-day" operations and imposes new conditions on an existing groundwater permit, Dkt. 60 at 92-93, does not support the United States' *facial* challenge to the statute. *See* Dkt. 60 at 24 n.4. ("the United States has not brought an as-applied challenge to [Section 42-502]"). Further, the United States does not have a protectable interest in having a license issued without new conditions being added. *Idaho Power Co. v. IDWR*, 151 Idaho 266, 273-75, 255 P.3d 1152, 1159-61 (2011). In any event, using the well in question for livestock watering is a "domestic" use for which no water right is required so long as the use does not exceed 13,000 gallons per day. Idaho Code §§ 42-111(1), 42-227; Dkt. 46 at 7-8; Dkt. 48 at 3, 6, 10; Dkt. 49 at 4. Federal grazing permittees can water their livestock from the well *regardless* of whether the United States has a water right for that use. *Id.*

[32] The United States also mischaracterizes *California v. United States*, 438 U.S. 645 (1978), as standing for the preemption-like rule that state water law is void when "inconsistent with federal law." Dkt. 60 at 70. The actual *California* standard is much narrower: state water law recedes when "inconsistent with *clear congressional directives respecting the project.*" 438 U.S. at 672 (italics added); *see also S. Delta Water Agency*, 767 F.2d at 538 ("clear congressional directives."). And in this case, as in *Joyce Livestock,* the United States has not identified any congressional directive in the Taylor Grazing Act or FLPMA that preempts or overrides state water law. *Joyce Livestock Co.*, 144 Idaho at 19-20, 156 P.3d at 520-21. To the contrary, these acts require *compliance* with state water law. 43 U.S.C. § 315b; Dkt. 43-13 at 4.

federal grazing programs would be obstructed, frustrated, or impaired by applying Section 42-222(2)'s forfeiture provisions to the United States' state law-based stockwater rights, are *not* actionable or a basis for injunctive relief.

The fact of the matter, though, is that federal grazing programs are *not* obstructed, frustrated, or impaired by applying Idaho water law to the United States' state law-based stockwater rights. The scenarios the United States invokes—"potential dewatering and/or monopolization of water on federal grazing lands" rendering them "useless for grazing," Dkt. 60 at 93-94—are based on the same "misunderstanding of water law" and conclusory assertions rejected in *Joyce Livestock*. 144 Idaho at 19-20, 156 P.3d at 520-21; Dkt. 48 at 6-12; Dkt. 49 at 4-6.

The United States also asserts injunctive relief is appropriate because water rights are similar to interests in land, Dkt. 60 at 91, but the analogy is inapposite. Idaho water rights are only rights to *use* a resource owned by the State of Idaho, and do not entitle *anyone*, not even the United States, to exclude others from using public water sources on federal lands. *Joyce Livestock*, 144 Idaho at 19-20, 156 P.3d at 520-21; Dkt. 48 at 6-12; Dkt. 49 at 4-6.[33] The State of Idaho's ownership of the water and ongoing interest in "equally guard[ing] all the various interests involved," Idaho Code § 42-101, are not diminished "in any way" by the United States' decreed stockwater rights. *Joyce Livestock,* 144 Idaho at 7, 156 P.3d at 508.

[33] While the "uniqueness" of a given tract of *land* may justify injunctive relief, Dkt. 60 at 91, *water* is generally considered fungible rather than "unique." *See, e.g., Bd. of Directors of Wilder Irr. Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461, 465 (1943) ("a decree and the appurtenancy of water to lands do not, in and of themselves, constitute a sufficient reason for denying a substitution or exchange of water.").

Further, state law-based water rights are *not* necessary to support grazing on federal lands, for at least two reasons: (1) federal permittees can water their livestock directly from surface sources or "domestic" wells on federal lands even without a water right, Idaho Code §§ 42-113(1), 42-227, 42-111(1); Dkt. 46 at 7-8; Dkt. 48 at 3, 6, 10; Dkt. 49 at 4; and (2) the United States holds approximately 6,500 federal reserved stockwater rights which are not subject to forfeiture under Idaho law.[34] Dkt. 36 at 11; Dkt. 46 at 6-7; Dkt. 45-2 at 13. The sky would not fall on federal grazing programs even if *all* of the United States' state law-based stockwater right were forfeited—a scenario so implausible that even the United States has not raised it.

The United States' request for permanent relief from Section 42-222(2) also goes far beyond addressing the alleged discrimination in the "recently enacted" stockwater statutes. *See Natural Res. Def. Council v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007) ("Injunctive relief must be tailored to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion."). Indeed, the request to immunize all of the United States' existing and future water rights from application of Section 42-222(2) shows that this case is not just a challenge to "recently enacted" statutes, but rather a bid to entirely escape Idaho's longstanding requirement that a water right holder must beneficially use the water right in order

[34] The United States misses the point in disputing that the 6,500 federal stockwater rights "'are the *only* stockwater rights that Congress deemed necessary to support grazing programs on public lands in Idaho.'" Dkt. 60 at 31 (quoting the State Defendants' brief) (italics in original). Even if Congress *intended* to reserve additional stockwater rights based on federal law, the United States did not claim them, and as a result they were "decreed as disallowed" upon entry of the *Final Unified Decree*. Dkt. 45-2 at 11.

to avoid forfeiting it.

The United States' request for an order permanently enjoining application of Section 42-222(2) also belies its argument that any hardships an injunction would impose on the State Defendants' are "non-existent." Dkt. 60 at 95. The request to permanently immunize all of the United States' existing and future Idaho water rights from forfeiture is a direct assault on the State of Idaho's sovereign authority over its water resources, Idaho Const. art. XV; Idaho Code Title 42, and sidesteps congressional directives requiring the United States to defer to state water law.

The United States' improbable argument that it is trying to protect the finality of SRBA decrees, Dkt. 60 at 96, simply confirms that the *res* adjudicated in the SRBA is at the center of the United States' claims. It also confirms that the United States' real objective in this case is to deny Idaho courts the opportunity to address important and unsettled questions of whether and how the beneficial use reasoning and holdings of *Joyce Livestock* apply to allegations that the United States has forfeited the decreed stockwater rights at issue in the Show-Cause Orders. The SRBA District Court has primary exclusive jurisdiction over these questions.

CONCLUSION

The State Defendants' cross-motion for summary judgment should be granted and this case should be dismissed for the reasons discussed herein and in the State Defendants' opening brief (Dkt. 43-1).

Respectfully submitted this 24th day of August, 2023.

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