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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, *Plaintiff* v. STATE OF IDAHO; STATE OF IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources *Defendants*, IDAHO HOUSE OF REPRESENTATIVES; MIKE MOYLE, in his official capacity as Majority Leader of the House; IDAHO SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate, *Defendant-Intervenors*, JOYCE LIVESTOCK CO.; LU RANCHING CO.; PICKETT RANCH & SHEEP CO.; and IDAHO FARM BUREAU FEDERATION, *Defendant-Intervenors*.	Case No. 1:22-cv-00236-DCN **RANCHER DEFENDANT-INTERVENORS' REPLY BRIEF**

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Not for the first time, "[t]he argument of the United States reflects a misunderstanding of water law." *Joyce Livestock Co. v. United States*, 156 P.3d 502, 520 (Idaho 2007). As reflected in its pleadings and briefing in this case, the United States also misunderstands the principles of sovereignty and supremacy upon which it bases its claims.

In 1952, Congress gave consent to join the United States in any suit "for the administration of" "State law" appropriated water rights. 43 U.S.C. § 666(a)(2). Following the landmark Idaho Supreme Court decision in *Joyce Livestock Co.*, in which that court explained certain aspects of longstanding Idaho water law—including that a putative appropriator must actually apply State water to beneficial use, and that ranchers could obtain the right to use Idaho stockwater on federal land—the Idaho Legislature codified aspects of Idaho water law explained by the Idaho Supreme Court and established a procedure for orderly administration of forfeited stockwater rights.

The United States—through the plaintiffs[1]—challenge those statutes, but it is too late to seek certiorari review of *Joyce Livestock Co.*, and they miss the point of the statutes they challenge. The administrative procedure itself does not function as a defeasance; the plaintiffs *automatically lose* their rights to use Idaho stockwater when they do not apply the water to a beneficial use. Instead, the procedure creates a way "for the administration of" stockwater rights, *see* 43 U.S.C. § 666(a)(2), and lets the State formally recognize the forfeitures in an organized manner.

The plaintiffs do not think they should have to play by the same rules as every other Idaho water user, including by taking part in the process to clearly and officially recognize the instances in which a party has forfeited its right to use Idaho stockwater by failing to apply the water to a beneficial use. But the plaintiffs are wrong, and they have been wrong on this score for years.

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[1] The United States is suing on its own behalf and on behalf of two federal agencies: the Bureau of Land Management and the Forest Service. *See* First Am. Compl. ¶¶ 8–10, ECF No. 11.

Intervenor-Defendant Joyce Livestock Co. has resisted the United States' efforts to evade Idaho law governing stockwater rights for more than a decade, *see Joyce Livestock Co.*, 156 P.3d 502; Intervenor-Defendant LU Ranching Co. has too, *see LU Ranching Co. v. United States*, 156 P.3d 590 (Idaho 2007).

Now, Joyce Livestock, LU Ranching, and the other Intervenor-Defendants—Pickett Ranch & Sheep Co. and Idaho Farm Bureau Federation (all four together, the "Ranchers")—ask the Court to deny the plaintiffs' continued, misguided efforts to be above the law, and instead award the Ranchers judgment on the plaintiffs' claims in this case.

I. ARGUMENT

As the Ranchers see it, there are no disputed facts that would prevent the Court from ruling on the parties' cross-motions for judgment. It cannot now be disputed that "the scope of this case goes well beyond the sixty-eight water rights" that brought this matter to a head, or that "the outcome of this case could ultimately affect the thousands of water rights possessed by the United States" including the Ranchers' "interests." *See* Mem. Decision and Order 8, ECF No. 42.

And the Court should rule *against* the plaintiffs and *for* the Ranchers and the other defendants as a matter of law. The legal question is ***whether*** the plaintiffs must follow the Idaho statutes that "establish a procedure" explaining how the State will figure out and record the instances where an entity has forfeited its right to use Idaho stockwater. *See* Mem. Decision and Order 2–3, ECF No. 42.[2] The answer is "***yes***," Congress mandated that the plaintiffs must follow this procedure.

[2] On this issue, the Ranchers and the State Defendants seem to agree. *See* State Defs.' Mem. in Supp. of Cross-Mot. for Summ. J. and Resp. to United States' Mot. for Summ. J. 48, ECF No. 43-1 ("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." (emphasis in original)).

To distract from that simple conclusion and the obvious result for this case, the plaintiffs have thrown five "constitutional" claims against the wall. But none stick.

First, the Idaho statutes do not discriminate against the plaintiffs by creating an administrative procedure for recognizing instances where an entity has forfeited its right to use Idaho stockwater. And *second*, Congress waived the plaintiffs' alleged immunity from such proceedings.

Third, the Property Clause of the U.S. Constitution does not save the plaintiffs, because they have already lost their rights to use Idaho stockwater; the administrative procedure does not dispose of any property rights that the plaintiffs have. *Fourth* and similarly, the Contracts Clause does not save the plaintiffs from their own failures. And *fifth*, the Idaho Legislature's[3] codification of *Joyce Livestock Co.* and creation of the administrative procedure for recognizing where an entity has forfeited its rights to use Idaho stockwater does not "retroactively" change those rights.

These alleged "constitutional" defects should not distract the Court from the main point: the plaintiffs are not above the law, and the Court should deny their requests for relief and grant judgment for the Ranchers and the other defendants.

A. The Stockwater Statutes Do Not Discriminate against the Plaintiffs.

The thrust of the plaintiffs' argument—that is, the basis for their contention that they do not have to follow the Idaho statutes that "establish a procedure" explaining how the State will figure out and record the instances where an entity has forfeited its right to use Idaho stockwater—is that portions of Idaho Code §§ 42-113, 42-222, 42-224, 42-501, 42-502, and 42-504 unlawfully discriminate against the plaintiffs. *See* First Am. Compl. ¶¶ 82–110(c). But they do not.

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[3] In this brief, Defendant-Intervenors Idaho House of Representatives; Mike Moyle, in his official capacity as Majority Leader of the House; Idaho Senate; and Chuck Winder, in his official capacity as President Pro Tempore of the Senate are the "Idaho Legislature."

Idaho Code § 42-113(2)(b) says,

> For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation . . . . The water right shall be an appurtenance to the base property. When a federal grazing permit is transferred or otherwise conveyed to a new owner, the associated stockwater rights may also be conveyed and, upon approval of an application for transfer, shall become appurtenant to the new owner's base property.

The plaintiffs contend that this unlawfully targets them as a matter of law because it means that someone other than the United States can own the right to use stockwater on federally owned surface lands. *See* United States' Mem. in Supp. of Mot. for Summ. J. 21–22, ECF No. 34-1 ("Plaintiffs' Brief").

But the statute does not target the plaintiffs. It just codifies the Idaho Supreme Court's recognition that under Idaho law, a rancher who puts unappropriated stockwater to beneficial use gains the right to use the water even when the stockwater is not on the rancher's surface estate. *See Joyce Livestock Co.*, 156 P.3d at 513–14. And those rights pass with *the rancher's* land when the rancher conveys that land. *See id.* at 515.

True, the statute clarifies that this aspect of Idaho law has always applied to the plaintiffs too. But the fact that a statute mentions the United States does not mean that it *targets* the United States. And the statute does not target the plaintiffs here.

Idaho Code § 42-222(2) says,

> 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.

"Idaho law has contained a similar provision since 1903." *Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 70 P.3d 669, 674 (Idaho 2003). The plaintiffs contend that this unlawfully targets them because even though it has long been the law in Idaho, the State Legislature had not previously codified an administrative procedure for implementing the law. *See* Plaintiffs' Brief 11–12. The plaintiffs' logic is flawed: they rely on the premise that the United States' right to use Idaho water is nevertheless immune from forfeiture as a matter of Idaho law, and they claim that they are immune from an administrative procedure that yields to the Idaho courts' role in deciding "the validity and continued existence of these rights." *See id.* at 35.

But Congress never immunized the United States from Idaho water law. *See* 43 U.S.C. § 666. It specifically requires the plaintiffs to submit themselves to state-law administrative processes that implement state water law. *Id.* And Idaho law has always held that a failure to put water to beneficial use results in forfeiture and reversion to the State of the right to use the water. *See Jenkins v. State, Dep't of Water Res.*, 647 P.2d 1256, 1259–60 (Idaho 1982). Further, "clear and convincing proof" has always been "required to support a forfeiture." *Id.* at 1261. The plaintiffs cannot complain they are targeted just because the Idaho Legislature created an administrative process for the clear, orderly determination and recording of instances where an entity has forfeited its right to use Idaho water.

Idaho Code § 42-224, which implements the administrative procedure along with § 42-222, says,

> If the [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. However, the director shall not issue an order to show cause where the director has or receives written

> evidence signed by the principal and the agent, prior to issuance of said order, that a principal/agent relationship existed during the five (5) year term mentioned in subsection (1) of this section or currently exists between the owner of the water right as principal and a permittee or lessee as agent for the purpose of obtaining or maintaining the water right.

Again, the plaintiffs contend that this aspect of the administrative process unfairly targets them. *See* Plaintiffs' Brief 11–12, 22–23.

The statute *helps* the plaintiffs, however, by negating the State's administrative process when the plaintiffs already have direct proof that a rancher is using Idaho stockwater *as* the plaintiffs' agent. The Idaho Legislature gave the plaintiffs a way to deal with the longstanding Idaho law that a rancher who uses stockwater located on the federal surface estate does not *impliedly* and *necessarily* do so as the plaintiffs' agent. *See Joyce Livestock Co.*, 156 P.3d at 518–19. And the plaintiffs certainly know how to strongarm ranchers into signing principal/agent agreements by threatening not to support structures that supply Idaho stockwater. *See* Price Decl. ¶¶ 28–29, ECF No. 36.

Faced with this, the plaintiffs complain that now they will have to "monitor" the State administrative proceedings when facing an allegation that the United States has forfeited a right to use Idaho stockwater. *See* Plaintiffs' Brief 40. But Congress has already instructed them to do so, 43 U.S.C. § 666, so this further argument is unavailing.

Next, among other things, Idaho Code § 42-501 says,

> It is the intent of the Legislature to codify and enhance these important points of law from the *Joyce* case to protect Idaho stockwater right holders from encroachment by the federal government in navigable and nonnavigable waters.
>
> Further, in order to comply with the *Joyce* decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture pursuant to sections 42-222(2) and 42-224, Idaho Code.

The plaintiffs' arguments on this statute show the flaws in all of their claims: the statute does not *target* the United States; rather, the Idaho Legislature took the time to clarify the Idaho Supreme Court's explanation of what the law *is* in Idaho. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

In *Joyce Livestock Co.*, the Idaho Supreme Court explained the historical underpinnings and development of Idaho water law that have *always* applied to the plaintiffs, the Ranchers, and everyone else who wants to use Idaho water. *See id.*, 156 P.3d at 506–08. And to be clear, "Idaho has long recognized that an appropriator can obtain a water right in waters located on federal land. The appropriator simply must follow Idaho law in obtaining that water right." *Id.* at 508. And Idaho law has "long recognized that an appropriator may not waste water, but it must permit others to use the water when the appropriator is not applying it to a beneficial use." *Id.* at 516. These longstanding legal principles do not target the plaintiffs, and neither does Idaho Code § 501.

Idaho Code § 42-502 says,

> No agency of the federal government shall acquire a stockwater right unless the agency owns livestock and puts the water to beneficial use. For purposes of this chapter, "stockwater rights" means water rights for the beneficial use for livestock.

Again, the plaintiffs contend that the statute "discriminates" against them because it requires a putative appropriator to put stockwater to beneficial use for its livestock. Plaintiffs' Brief 20–21. But it is again just a codification of longstanding Idaho law as recognized by the Idaho Supreme Court, which also clarified that the plaintiffs are not above the Idaho law. *See Joyce Livestock Co.*, 506 P.3d at 518–19. The plaintiffs do not explain how the Idaho Legislature's recognition that Idaho water law applies to them *too*, as it *always* has, somehow unfairly targets them; they go further, admitting that Idaho water law, as explained in *Joyce Livestock Co.*, "applies equally to the United States" as it does to other potential appropriators. *Id.* at 20.

Last, Idaho Code § 42-504 says,

> If an agency of the federal government, or the holder or holders of any livestock grazing permit or lease on a federal grazing allotment, acquires a stockwater right, that stockwater right shall never be utilized for any purpose other than the watering of livestock on the federal grazing allotment that is the place of use for that stockwater right.

Again, the plaintiffs contend that this limitation on the use of a right to use Idaho stockwater unfairly targets them. Plaintiffs' Brief 24. But it doesn't. Idaho law has always authorized and limited the right to use of Idaho stockwater to actually watering livestock where the stockwater is.

And again, this is merely a codification of longstanding Idaho law and a clarification by the Idaho Legislature that the plaintiffs are not above the law. For example, and at least for illustrative purposes here, the Idaho Supreme Court explained that the plaintiffs could always "appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain by using the permit procedure for obtaining a water right." *Joyce Livestock Co.*, 156 P.3d at 519 (internal quotation omitted).

But for more than a century, Idaho law has "require[d] that the appropriator actually apply the water to a beneficial use," and "If that use is stock watering, then the appropriator must actually water stock." *Id.* at 520. That is, Idaho stockwater rights are and have always been non-diversionary rights that only convey a right to use stockwater in place to water livestock, *see id.* at 519 n.3, and the Idaho Legislature codified that explanation in the statute. By clarifying that the plaintiffs must follow this longstanding Idaho law too, the Idaho Legislature did not unfairly target them; Congress requires them to submit the Idaho law. *See* 43 U.S. § 666.

The Idaho Legislature created an administrative process for clearly and formally dealing with forfeitures of stockwater rights, and it does not discriminate against the plaintiffs.

B. Congress Waived the Plaintiffs' Immunity from Forfeiture Proceedings.

In the "McCarran Amendment," among other laws, Congress said,

> *Consent is given to join the United States as a defendant in any suit* (1) *for the adjudication of rights to the use of water of a river system or other source*, ***or*** (2) ***for the administration of such rights***, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. *The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable* ***or that the United States is not amenable thereto by reason of its sovereignty***, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

43 U.S.C. § 666(a) (emphasis added). The plaintiffs' main "supremacy" and "sovereignty" argument boils down to a contention that the McCarran Amendment does not apply to Idaho's administrative procedure explaining how the State will figure out and record the instances where an entity has forfeited its right to use Idaho stockwater. *See* Plaintiffs' Brief 25–30. But the plaintiffs' arguments fall flat.

The plaintiffs focus their argument on § 666(a)(1)—a strawman—and contend that Congress only waived sovereign immunity for basin-wide, "comprehensive general stream adjudications" including "all persons who have rights." *See* Plaintiffs' Brief 26–27. But that reading obviously ignores § 666(a)(2), in which Congress waived sovereign immunity and gave "Consent . . . to join the United States as a defendant in any suit . . . (2) for the administration of" state-law water rights, including Idaho stockwater rights.

The plaintiffs try to minimize this error by suggesting that the waiver in § 666(a)(2) is "narrow" and has "no applicability to the State forfeiture proceedings." Plaintiffs' Brief 27–30. But here, there is no doubt that the Idaho Legislature set up a "procedure" for the "administration"

of Idaho stockwater rights. *See* Mem. Decision and Order 2–3, ECF No. 42. By its terms, the statute authorizes, directs, explains, and limits the Idaho executive branch's role in figuring out and recording the instances where an entity—any entity, not just the plaintiffs—has forfeited its right to use Idaho stockwater; as the Idaho Legislature says:

> (1) Within thirty (30) days of receipt ***by the director of the department of water resources*** of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, ***the director*** must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If ***the director*** determines the petition or other information, or both, is insufficient, he shall notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.
>
> (2) ***If the director*** determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, ***the director*** must within thirty (30) days issue an order to the stockwater right owner to show cause ***before the director*** why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause must contain ***the director's*** findings of fact and a reasoned statement in support of the determination.
>
> (3) ***The director*** must serve a copy of any order to show cause on the stockwater right owner by personal service or by certified mail with return receipt. Personal service may be completed ***by department personnel*** or a person authorized to serve process under the Idaho rules of civil procedure. Service by certified mail shall be complete upon receipt of the certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, ***the director*** may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by publication shall be complete upon the date of the last publication.
>
> (4) If the order affects a stockwater right where all or a part of the place of use is 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. However, ***the director*** shall not issue an order to show cause where ***the director*** has or receives written evidence signed by the principal and the agent, prior to issuance of said order, that a principal/agent relationship existed during the five (5) year term mentioned in subsection (1) of this section or currently exists between the owner of the water right as principal and a permittee or lessee as agent for the purpose of obtaining or maintaining the water right.

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

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

(7) If the stockwater right owner fails to timely respond to the order to show cause, ***the director*** must issue an order within fourteen (14) days regarding forfeiture stating the stockwater right has been forfeited pursuant to section 42-222(2), Idaho Code.

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

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

(10) Within sixty (60) days after issuance of an order ***by the director*** determining that a stockwater right has been forfeited, the state of Idaho, by and through the office of the attorney general, must initiate a civil action by electronically filing in the district court for the fifth judicial district, Twin Falls county, the following: a complaint requesting a declaration that the stockwater right is forfeited; certified copies of the order regarding forfeiture; and ***the record of***

> ***the administrative proceeding***. A copy of the complaint and accompanying documents shall be served on the stockwater right holder who shall be named as the defendant in the action, all parties to ***the administrative proceeding***, and any holder or holders of livestock grazing permits or leases for the place of use of the stockwater right for which the director possesses an address. Any person may move to intervene in the action pursuant to the Idaho rules of civil procedure, but only if such a motion is filed at least twenty-one (21) days before the date set for the hearing under the scheduling order.
>
> (11) After the initiation of the civil action required by this section, the proceedings in the district court shall be like those in a civil action triable without right to a jury, provided that ***the department of water resources shall not be a party*** to the civil action but may appear as a witness to explain the basis for ***the director's*** forfeiture determination. In any such proceeding, *the director's* order determining forfeiture shall constitute prima facie evidence that the right has been forfeited but shall not change the standard of proof for forfeiture of the water right established by section 42-222(2), Idaho Code.
>
> (12) At the conclusion of the action, the district court shall issue an order determining whether the stockwater right has been forfeited pursuant to section 42-222, Idaho Code. If the district court determines that the stockwater right has been forfeited, the court shall also enter a judgment that the stockwater right has been forfeited.
>
> (13) For purposes of this section, the following terms have the following meanings:
>
> (a) "Stockwater right" means water rights for the watering of livestock meeting the requirements of section 42-1401A(11), Idaho Code.
>
> (b) "Stockwater right owner" as used in this section means the owner of the stockwater right shown in the records of the department of water resources at the time of service of the order to show cause.
>
> (14) ***This section applies to all stockwater rights*** except those stockwater rights decreed to the United States based on federal law.

Idaho Code § 42-224 (emphasis added). The Idaho Legislature could hardly have been clearer that it was setting up an administrative procedure, *id.* § 42-224(8)–(10), for "the administration of"

Idaho stockwater rights. Congress has waived sovereign immunity for such a procedure, 43 U.S.C. § 666(a)(2), and the plaintiffs are not immune from it.

C. The Property Clause Does Not Help the Plaintiffs Because They No Longer Own the Property.

The plaintiffs' Property Clause argument also misses the point. *See* Plaintiffs' Brief 31–32. Under the Property Clause, only Congress has the "Power to dispose of" federal property. U.S. Const. art. IV, § 3, cl. 2. But regardless of when the administrative proceeding under Idaho Code § 42-224 takes place, once the United States has forfeited its Idaho stockwater right, that "right" is no longer federal property—the plaintiffs have already lost it by not putting the Idaho stockwater to beneficial use. *See Joyce Livestock Co.*, 156 P.3d at 516, 518–19. When the plaintiffs are "not applying the water to a beneficial purpose," then they lose it. *See id.* at 520.

The administrative procedure that the plaintiffs challenge in this case does not itself serve as a defeasance; it is a procedure explaining how the State will figure out and record the instances where an entity, which can include the plaintiffs, has already forfeited its right to use Idaho stockwater. *See* Idaho Code § 42-224.

D. The Plaintiffs' Failure to Use Their Water Does Not Implicate the Contracts Clause.

The plaintiffs fair no better under the Contract Clause, which says that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. The thrust of the plaintiffs' argument is that because some of the United States' state-law stockwater rights were affirmed or otherwise recognized through settlement agreements in a basin-wide adjudication, therefore the plaintiffs are constructively "immune" from Idaho water law. *See* Plaintiffs' Brief 32–34. They supply no support for this novel argument, nor any reason to conclude that Congress meant anything other than what it said in the McCarran Amendment, 43 U.S.C. § 666(a)(2).

E. The Procedure Does Not Retroactively Create a "Beneficial Use" Requirement.

With respect to their last "constitutional" argument, the plaintiffs again get things backward. They contend that the Idaho Legislature has "retroactively" changed their state-law stockwater rights. *See* Plaintiffs' Brief 34–36. But contrary to their contention, longstanding Idaho law has made stockwater rights appurtenant to the beneficial user's property. *See Joyce Livestock Co.*, 156 P.3d at 513–15. The Idaho Legislature did not make it up out of whole cloth. Nor did the Idaho Legislature impose any other new conditions on the plaintiffs—as the Idaho Supreme Court has explained, those conditions have always applied to Idaho stockwater rights. *See Joyce Livestock Co.*, 156 P.3d at 518–19.

The Idaho Legislature merely wrote the longstanding common law of Idaho into a set of statutes, and those statutes create an administrative procedure explaining how the State will figure out and record the instances where an entity has forfeited its right to use Idaho stockwater. *See* Mem. Decision and Order 2–3, ECF No. 42. Congress has subjected the plaintiffs to that procedure, *see* 43 U.S.C. § 666(a)(2), and they cannot avoid it just because they do not like it.

II. CONCLUSION

From the Ranchers' perspective, "the scope of this case goes well beyond the sixty-eight water rights" that brought this matter to a head, and the case is really about whether—as a question of law—the plaintiffs can avoid Idaho water law and Congress's waiver of sovereign immunity. But ***Congress did waive*** the plaintiffs' immunity from the Idaho procedure explaining how the State will figure out and record the instances where an entity has forfeited its right to use Idaho stockwater. Accordingly, the Ranchers respectfully ask the Court to deny the plaintiffs' request for judgment, and instead award the Ranchers judgment on the plaintiffs' claims in this case.

Dated: September 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 22, 2023, I filed the foregoing document with the Clerk of the Court using this Court's CM/ECF system, which will send a notification to all counsel of record pursuant to Fed. R. Civ. P. 5 and D. Idaho L.R. 5.1(k).

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