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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
v. )  
STATE OF IDAHO; IDAHO )  
DEPARTMENT OF WATER )  
RESOURCES, an agency of the State of )  
Idaho; and MATHEW WEAVER, in his )  
official capacity as Director of the Idaho )  
Department of Water Resources, )  
Defendants, )  
 )  
IDAHO HOUSE OF )  
REPRESENTATIVES; MEGAN )  
BLANKSMA, in her official capacity as )  
Majority Leader of the House; IDAHO )  
SENATE; and CHUCK WINDER, in his )  
official capacity as President Pro Tempore )  
of the Senate, )  
Intervenor-Defendants, )  
 )  
JOYCE LIVESTOCK CO.; LU )  
RANCHING CO.; PICKETT RANCH & )  
SHEEP CO.; IDAHO FARM BUREAU )  
FEDERATION, )  
Intervenor-Defendants. )  
 )

Case No. 1:22-cv-00236-DCN  
**IDAHO LEGISLATURE'S  
SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Plaintiff United States maintains that it may bring an as-applied challenge to Idaho Code (“I.C.”) § 42-224 because the McCarran Amendment’s waiver of sovereign immunity is inapplicable. First Am. Compl. (Dkt. 11) ¶¶ 87-90. At oral argument, the Court asked the United States to cite any case in which it had raised sovereign immunity as a “sword,” not as a “shield.” Counsel for the government offered up *Yurok Tribe v. U.S. Bureau of Reclamation*.

*Yurok* does not support the United States’ (“U.S.”) argument. Nor are the U.S.’s other proffered cases helpful to it. Consequently, the U.S.’s First Claim for Relief may be dismissed sua sponte by the Court for failure to state a claim for which relief may be granted. The claim is also unripe and improperly seeks an advisory opinion on the merits of the U.S.’s as-applied challenge to Idaho’s forfeiture procedures before they have been fully applied.

## II. PROCEDURAL BACKGROUND

The legislative intervenor-defendants, collectively the “Idaho Legislature,” hereby brief the sovereign immunity cases cited by the United States at oral argument and in a subsequent email to defendants’ counsel. The Idaho Legislature adopts and incorporates by reference into this brief the State of Idaho Defendants’ supplemental brief filed today, Dkt. 72.

The United States cites *Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d 941 (N.D.CA. 2023) (“*Yurok*”), *United States v. Oregon, Water Resources Department*, 44 F.3d 758 (9th Cir. 1994) (“*Oregon*”), and *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 154 P.3d 433 (2007). Because the briefing is simultaneous, the Idaho Legislature addresses what it predicts the United States will argue from those cases.

### III. ARGUMENT

#### A. **The *Yurok* decision does not address sovereign immunity as a cause of action**

The Northern District of California's *Yurok* decision does not answer the Court's question whether the federal government has ever asserted sovereign immunity as a cause of action. The federal agency in the *Yurok* case was a defendant. The federal agency brought a cross-claim against a state agency but did not assert sovereign immunity as a cause of action. *See* U.S. Cross-cl. for Declaratory and Injunctive Relief, *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 3:19-cv-4405-WHO (N.D.Cal. Oct. 1, 2021) (Dkt. 963) 34-42 (ECF pagination). One of the cross-defendants filed a counterclaim against the U.S. *Id.* (Dkt. 988). The U.S. filed an answer in which it asserted sovereign immunity as a defense against the claims brought by the counterclaimant. *Id.* (Dkt. 1004) at 19-20. The state agency also brought counterclaims against the U.S. *Id.* (Dkt. 1021). The U.S. answered those counterclaims, again asserting sovereign immunity as a shield. *Id.* (Dkt. 1033) 10-11, 14 (denying that cited state and federal laws were a waiver of its sovereign immunity).

Not surprisingly, because the U.S. did not plead a sovereign immunity cause of action, neither the parties nor the district court addressed it as a claim. The court reiterated that the case was not about water rights or their adjudication and, further, that neither the Tribes nor the U.S. waived their immunity for purposes of adjudicating or quantifying water rights. *Yurok*, 654 F. Supp. 3d at 956, n.3. Tribal sovereign immunity is footnoted elsewhere in the decision. *Id.* at n.7. The McCarran Amendment is not mentioned. The only other discussion of governmental immunity is in the context of the court's forbearance from deciding the government's intergovernmental immunity doctrine claim under the Supremacy Clause. *Yurok*, 654 F. Supp.

3d at 969-72. Two local parties have appealed the *Yurok* decision to the Ninth Circuit. In its answering brief, the U.S. does not assert sovereign immunity as a cause of action.<sup>1</sup>

**B. The United States is a defendant in Idaho’s proceedings to administer its stockwater**

The U.S. cites *United States v. Oregon, Water Resources Department* to support its claim of sovereign immunity as a cause of action. As briefed by the Idaho State Defendants in this case, the Ninth Circuit held that a state’s combined administrative and judicial process for adjudicating a river system’s water rights constituted a suit for purposes of invoking the McCarran Amendment’s waiver of sovereign immunity. Dkt. 43-1 at 57-60. Idaho Code § 42-224 uses a similar hybrid administrative and judicial process that constitutes a state “suit” against the United States in the context of the McCarran Amendment.<sup>2</sup> The Idaho Legislature’s prior briefing, corrected here, misstated this standard when arguing that a state suit commences under I.C. § 42-224 only when filed in state court. Dkt. 53-1 at 41-42; Dkt. 65 at 20.

In *Oregon*, the state served the U.S. Attorney General with a notice of a general stream adjudication that spurred the U.S. to sue Oregon seeking a declaratory judgment that the McCarran Amendment did not apply. *Oregon*, 44 F.3d at 762. The Ninth Circuit’s decision does not address how the U.S. morphed from a defendant in Oregon’s stream adjudication suit to a plaintiff in a federal declaratory judgment suit where the U.S. made its McCarran arguments.

There are multiple reasons to reject plaintiff U.S.’s sovereign immunity cause of action in the case at bar. *First*, the plain language of the McCarran Amendment requires the U.S. to be a defendant, not a plaintiff. 43 U.S.C. § 666(a). The U.S. is a defendant only in the pending

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<sup>1</sup> But the U.S. does assert that “Under this [prior appropriation] doctrine, any person who appropriates water from a public stream for beneficial use acquires a water right ... *which must be maintained by use.*” Answering Br. for Fed. Appellees at 19, *Yurok Tribe, et al. v. U.S., et al.*, Nos. 23-15499, 23-15521 (9th Cir. Jan. 16, 2024) (emphasis added).

<sup>2</sup> The BLM recently entered an appearance in the IDWR dockets. *See, e.g.*, Ex. A, attached.

proceedings for administration of the stockwater rights through the application of I.C. § 42-224. *Second*, I.C. § 42-224 does not prohibit the U.S. from raising its McCarran defense before the IDWR or subsequently before the state district court. I.C. §§ 42-224(8), (10). If it prevails in either venue, the resources of this Court will not be needed to resolve the issue. *Third*, the U.S. could seek to remove the suit to federal court as it did in another Oregon water allocation dispute first filed in that State’s court. *In re Klamath Irrigation District*, 69 F.4th 934, 937, 940 (9th Cir. 2023). The U.S.’s and Idaho’s jurisdictional arguments related to the McCarran Amendment, including the doctrine of prior exclusive jurisdiction, should be argued in the context of the removal action. *Id.* at 941-42; *State Eng’r v. S. Fork of the Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 808-11 (9th Cir. 2003). Allowing the U.S. to make those arguments as a plaintiff here allows it to bypass any need to effect a proper removal under 28 U.S.C. § 1442(a)(1); 1 Moore’s Manual: Federal Practice and Procedure §§ 8.6, 8.43, LexisNexis (database updated Nov. 2023). *Fourth*, by filing an as-applied challenge to I.C. § 42-224, the U.S. is depriving this Court (and the state court) of a fully developed administrative record. That record would include the detailed proceedings before the IDWR required by I.C. § 42-224. The U.S. cites *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 154 P.3d 433 (Idaho 2007).<sup>3</sup> As the Idaho Supreme Court explained there, a court “should not rule that a statute is unconstitutional “as applied” to a particular case until administrative proceedings have concluded and a complete record has been developed.” *Id.* at 441.<sup>4</sup> Withholding judgment

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<sup>3</sup> Presumably the U.S. offers this case for the proposition that decreed water rights cannot be re-adjudicated. However, the court quoted the lower court’s recognition that “a partial decree is not conclusive as to any post-adjudication circumstances.” *Id.* at 447. Forfeiture, by definition, looks only at post-adjudication non-use of a decreed water right.

<sup>4</sup> Two exceptions to the rule—the interests of justice and when an agency has acted outside its authority—are not at issue. *Id.* at 443. The U.S. contends that I.C. § 42-224 authorizing IDWR to issue show cause orders is unconstitutional, not that IDWR has acted contrary to the statute.

until the record is completed serves the important policies of providing the IDWR “the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for quasi-judicial functions of the administrative body.” *Id.* at 443 (citations omitted).

**C. Other pertinent holdings from the *Yurok* decision**

In the present case, the U.S. has disclaimed any reliance on preemption to support their Supremacy Clause argument. *See* Dkt. 34-1 at 25, n.9. The *Yurok* court analyzed the Oregon state actions under obstacle preemption principles and forwent intergovernmental immunity analysis to avoid redundancy and “reach[ing] farther than is necessary to answer the question” underlying the litigation. *Yurok*, 654 F. Supp. 3d at 971. This Court should do likewise and forgo analyzing the U.S.’s intergovernmental immunity claim.

The *Yurok* court also denied a state agency counterclaim because the agency could not show a concrete and particularized injury necessary to establish standing. *Id.* at 972. The court held that the plaintiff (counterclaimant) “bears the burden of showing that [it] has standing for each type of relief sought.” *Id.*, citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The U.S. is not harmed where the Idaho statutes benefit the federal agencies and they have made no showing of concrete, particularized harm. *See* Dkt. 65 at 11-15, 22-24.

**IV. CONCLUSION**

For the forgoing reasons, the Court should dismiss or rule against the U.S.’s sovereign immunity cause of action.



Respectfully submitted this 6th day of February, 2024.

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Bureau of Land Management*

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

IN THE MATTER OF CERTAIN  
BASIN 79 WATER RIGHTS, IN THE  
NAME OF THE UNITED STATES OF  
AMERICA ACTING THROUGH THE  
DEPARTMENT OF THE INTERIOR,  
BUREAU OF LAND MANAGEMENT

Docket No. P-OSC-2021-004

**NOTICE OF APPEARANCE**

**(BUTCHER BAR AND CHINA  
CREEK ALLOTMENTS)**

**NOTICE OF APPEARANCE**

Marc A. Shumaker, of the Department of the Interior’s Office of the Solicitor, Boise Field Office, hereby makes a notice of appearance in the above-entitled matter on behalf of the Bureau of Land Management. All further pleadings, papers, correspondence, and Orders related to this matter should be served on Mr. Shumaker at the above listed address.

Dated: February 1, 2024

/s/ Marc Shumaker  
Marc Shumaker  
Attorney-Advisor  
Office of the Solicitor

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of February, 2024, I served or caused to be served the **NOTICE OF APPEARANCE** to the parties by the following method(s):

**DOCUMENT SERVED:**

<p>David Negri                  Stephen G. Bartell                  Thomas K. Snodgrass                  U.S. Department of Justice  <a href="mailto:david.negri@usdoj.gov">david.negri@usdoj.gov</a>  <a href="mailto:stephen.bartell@usdoj.gov">stephen.bartell@usdoj.gov</a>  <a href="mailto:thomas.snodgrass@usdoj.gov">thomas.snodgrass@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> Email  <input type="checkbox"/> USPS Mail (postage paid)  <input type="checkbox"/> Certified Mail / Return Receipt Requested  <input type="checkbox"/> Hand Delivery</p>
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/s/ Christine Baker  
 Christine Baker  
 Paralegal Specialist