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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 INTERVENOR-DEFENDANTS' SUPPLEMENTAL BRIEF

Joyce Livestock Company, LU Ranching Company, Pickett Ranch & Sheep Company, and Idaho Farm Bureau Federation (together, the Ranchers) respectfully submit this supplemental brief in response to the Court's January 23, 2024 minute entry.

In its minute entry, the Court directed each party to file a five-page supplemental brief addressing any new cases or issues discussed at the January 23 hearing. The Ranchers contend that there are only two "new cases or issues" responsive (or, at least, potentially responsive) to this directive: (1) whether the plaintiff had provided any case law supporting the proposition, central to its claims, that it may use sovereign immunity as a "sword" rather than as a defense, or a "shield"; and (2) whether the plaintiff had abandoned its request that the Court invalidate I.C. § 42-222(2), and—relatedly—whether anything more than a ruling from the Bench is necessary to dispose of that issue.

Regarding the *first* issue, "sovereign immunity," "The basic rule of federal sovereign immunity is that the United States ***cannot be sued*** at all without the consent of Congress." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983) (emphasis added). The extension of this "basic rule" is that "Sovereign immunity is not a sword, but a shield." *United States v. Bankers Ins. Co.*, 245 F.3d 315, 320 (4th Cir. 2001).

Here, the plaintiff cited *Block* in its papers as the premise underlying its right to bring this case, but it did not mention this "basic rule"—which is that sovereign immunity is a shield, not a sword. *See* Pls.' Mem. in Supp. of Mot. for Summ. J. 15, ECF No. 34-1. And when the Court opened the hearing by asking the plaintiff for authority supporting the proposition that it could bring claims as a plaintiff using sovereign immunity as a sword, the plaintiff said in response that the decision in *Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d 941 (N.D. Cal. 2023), stood for that proposition. The plaintiff was wrong.

The *Yurok Tribe* decision does not address the "sword versus shield" issue, much less support the plaintiff's position. And the United States in that case was a "defendant," not a plaintiff. *Id.* at 949. While the United States filed a cross-claim, it raised "sovereign immunity" only as a shield—and not as a sword. *See* U.S.'s Cross-cl. for Declaratory and Injunctive Relief at 34–43 (ECF pagination), *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 3:19-cv-04405 (N.D. Cal. Oct. 1, 2021), ECF No. 963; *id.* at 19–20, ECF No. 1004.; *id.* at 10–11, 14, ECF No. 1033. The decision in the *Yurok Tribe* case is on appeal now, and the United States has not so far argued on appeal the "sword versus shield" issue. *See generally* Answering Br. for Fed. Appellees, *Yurok Tribe v. United States*, Nos. 23-15499, 23-15521 (9th Cir. Jan. 16, 2024). It is no wonder that by the end of the January 23, 2024 hearing in ***this*** case, the plaintiff had already begun walking away from its reliance on *Yurok Tribe*.

Put simply, the plaintiff did not support the proposition that it can use sovereign immunity as a sword; and when the Court pressed the issue, the plaintiff gave only a "precedent" that did not stand for the proposition. The plaintiff does not have authority for the proposition.

Further, as the Idaho Legislature defendants explained demonstratively at the hearing, the McCarran Amendment's text puts the United States on defense and does not suppose that the United States can pursue McCarran-esque claims using sovereign immunity as a sword, which is what the plaintiff is trying to do in this case. *See* 43 U.S.C. § 666(a) ("Consent is given to join the United States *as a defendant* in any suit . . . .") (emphasis added).

The plaintiff has no real answer to the Court's question: it cannot sue the State in this case, or any case like it, using sovereign immunity as a sword. The plaintiff's claims rely on a false premise, and—among the other bases presented in the papers and the hearing—the Court can resolve this case by rejecting the plaintiff's claims on that basis.

Regarding the *second* issue, the Ranchers understood at the hearing that the Court would deal with the plaintiff's abandonment of the claims regarding I.C. § 42-222(2) without need for further briefing. All the same, it became clear in the colloquy among counsel at the hearing that the Idaho State defendants would seek relief on this matter per Federal Rule of Civil Procedure 41, so that the plaintiff's abandonment of its I.C. § 42-222(2) claims would carry prejudice.

Rule 41 says that except for the conditions in Rule 41(a)(1), which have not occurred here, a plaintiff can only dismiss its claim "by court order." Going further, where a plaintiff simply chooses not to formally dismiss its claim per Rule 41, a defendant can ask the court to dismiss the claim, and the dismissal "operates as an adjudication on the merits." Fed. R. Civ. P. 41(b).

Here, the Ranchers understood from the hearing that the Court would deal with the plaintiff's abandonment or failure to prosecute its request to invalidate I.C. § 42-222(2). But based on the colloquy—and acknowledging that the parties have been ordered to file briefs roughly simultaneously—the Ranchers support the Idaho State defendants' intent to get the Court's ruling dismissing the I.C. § 42-222(2) claims with prejudice or otherwise "on the merits." Accordingly, if the Idaho State defendants move the Court for denial of the plaintiff's I.C. § 42-222(2) claims with prejudice or otherwise on the merits, then the Ranchers support and join that motion.

As they have done before, the Ranchers respectfully ask the Court to deny the plaintiff's request for judgment, and instead award the Ranchers judgment on the plaintiff's claims in this case and any other appropriate relief.

Dated: February 6, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2024, 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 per Fed. R. Civ. P. 5 and D. Idaho L.R. 5.1(k).

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