JOSHUA D. HURWIT, Idaho State Bar No. 9527
United States Attorney, District of Idaho
CHRISTINE ENGLAND, Idaho State Bar No. 11390
Assistant United States Attorney, District of Idaho
Tel: (208) 334-1211; Fax: (208) 334-9375
Christine.England@usdoj.gov

TODD KIM, Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
STEPHEN G. BARTELL, Colorado Bar No. 21760
Assistant Section Chief, Natural Resources Section
JENNIFER A. NAJJAR, Colorado Bar No. 50494
Trial Attorney, Natural Resources Section
P.O. Box 7611 Washington, DC 20044
Telephone: (202) 305-0234, (202) 305-0476 Fax: (202) 305-0506
stephen.bartell@usdoj.gov, jennifer.najjar@usdoj.gov

THOMAS K. SNODGRASS, Colorado Bar No. 31329
Senior Attorney, Natural Resources Section
JEFFREY N. CANDRIAN, Colorado Bar No. 43839
Trial Attorney, Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Telephone: (303) 844-7233, (303) 844-1382 Fax: (303) 844-1350
thomas.snodgrass@usdoj.gov, jeffrey.candrian@usdoj.gov

Counsel for Plaintiff United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF IDAHO; IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho; and GARY SPACKMAN, in his official capacity as Director of the Idaho Department of Water Resources, Defendants,	)	Case No. 1:22-cv-00236-DCN **UNITED STATES' SUPPLEMENTAL MEMORANDUM ADDRESSING NEW CASES OR ISSUES RAISED DURING THE SUMMARY JUDGMENT HEARING IN CONFORMANCE WITH THE COURT'S DOCKET TEXT MINUTE ENTRY (ECF 70)**

v.

IDAHO HOUSE OF REPRESENTATIVES; MEGAN BLANKSMA, in her official capacity as Majority Leader of the House; IDAHO SENATE; and CHUCK WINDER, in his official capacity as President Pro Tempore of the Senate,

and

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

Intervenor Defendants.

1. The United States may seek affirmative relief based on sovereign immunity.

At oral argument on January 23, 2024, the Court asked counsel for the United States for any case law where it has raised the McCarran Amendment affirmatively as a plaintiff to support a claim for relief rather than as a defendant to oppose joinder to a proceeding for lack of a waiver of sovereign immunity. In response, counsel for the United States cited *Yurok Tribe v. U.S. Bureau of Reclamation*, 654 F. Supp. 3d 941 (N.D. Cal. 2023) ("*Yurok*") (appeals pending).

In *Yurok*, the United States filed a crossclaim against the Oregon Water Resources Department ("OWRD") challenging an administrative order issued by that state agency. That order prohibited the U.S. Bureau of Reclamation from releasing stored water from the Klamath Project, a federal reclamation in southern Oregon and northern California, "in excess of amounts that may be put to beneficial use" under a state water right held for the Project for irrigation purposes. 654 F. Supp. 3d at 955. The order effectively prohibited Reclamation from releasing stored water from the Project to meet the requirements of the federal Endangered Species Act. *Id*. at 968. The United States sought declaratory and injunctive relief that the order exceeded OWRD's jurisdiction and authority and is preempted by federal law. *Id*. at 956.

In granting the United States' motion for summary judgment, the court ruled only on the preemption arguments and did not specifically address whether OWRD exceeded its jurisdiction and related arguments under the McCarran Amendment. *Id*. at 961-62, 969-71. However, the parties extensively briefed whether the waiver of sovereign immunity for "administration" of decreed rights under McCarran authorized the challenged order. *See*, *e.g*., Case 3:19-cv-04405-WHO (N.D. Cal.), ECF 1072 at 39, 90-96; ECF 1064 at 12, 15, 17-24. Further, consistent with the United States' McCarran arguments, the court denied a motion to abstain from hearing the federal court proceedings, holding that the United States' crossclaim concerns constitutional

questions, not adjudication of water rights. 654 F. Supp. 3d at 961. *Yurok* affirms the United States can raise sovereign immunity under McCarran to support a declaratory judgment action.

Though not discussed at oral argument, a second case in which the United States raised the McCarran Amendment to support affirmative claims for relief related to the Klamath Basin Adjudication is *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994) (previously cited in this case in parties' summary judgment briefing). In *Oregon*, like here, the United States sought a declaratory judgment that it had not waived sovereign immunity to the challenged proceedings. *Id*. at 762. Although the United States ultimately did not prevail on most of its claims in *Oregon*, the court resolved the case on the merits, not based on a defense that the United States cannot raise McCarran as the basis for a Declaratory Judgment Act claim. Nothing in *Oregon* suggests the United States can only raise McCarran defensively. If that were the case, the United States would have had to raise this issue solely in the Klamath adjudication state court, the very proceeding that it asserted lacked jurisdiction over it in the first place. The United States properly raised sovereign immunity affirmatively in this suit for federal court resolution.

2. Settlement agreements remain binding after rights are decreed in the SRBA.

State Defendants newly argued at oral argument that, upon entry of partial decrees and/or the Final Unified Decree confirming the United States' stockwater rights, the State's settlements with the United States – as implemented in certain cases through Standard Form 5s, or "SF-5s", withdrawing the State's objections in accordance with stipulated elements of the claimed rights (ECF 45-5 at 20; *id*. at 52-58) – no longer had any meaning because the decrees instead controlled. The State appears to suggest that, because the decrees do not expressly state that the United States' rights may not be forfeited for lack of agency agreements, the State may enact legislation imposing this requirement, notwithstanding its settlements. The State is incorrect.

The State's settlements are contracts that survive entry of the Final Unified Decree. ECF 60 at 55. The settlements also gave rise to the Decree, ECF 37 ¶¶ 10-12, which the State cannot challenge, as it is protected by res judicata. Res judicata encompasses not only matters actually litigated in prior litigation but matters that *could have been offered* to support or defeat the claims at issue. *Nevada v. United States*, 463 U.S. 110, 129–30 (1983). Here, the State knew that the federal agencies generally did not own the cattle using the United States' stockwater rights when it elected to settle its objections and not to dispute those claims based on the lack of agency agreements.[1] Whether the parties implemented those settlements through SF-5s or other filings, the time to litigate that objection was in the SRBA, not many years later after entering settlements and the issuance of the Final Unified Decree. The SRBA was intended to fully resolve the water rights claims of all parties based on their then-existing claims and objections, and all decreed rights, including those resulting from settlements, are deemed adjudicated on the merits. ECF 60 at 51-53. Res judicata precludes the State from enacting new legislation to revive objections available but not pursued to challenge the United States' settled rights.

3. Administration of decreed rights does not include their re-adjudication.

At oral argument, the United States cited *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 154 P.3d 433, 449 (Idaho 2007), to support its claim that the forfeiture process under Idaho Code § 42-224 falls outside the waiver of sovereign immunity for "administration" of decreed water rights under the McCarran Amendment. 43 U.S.C. § 666(a)(2). An excerpt

[1] The United States argued in its briefing – and similarly at oral argument – that "the State decided to withdraw its objections after unsuccessfully seeking to litigate . . . in an SRBA 'test case'" the issue of "whether the United States must produce evidence of an agency agreement as a condition to establishing the validity of its claimed stockwater rights." ECF 60 at 50. To clarify this argument, the United States recognizes that the State prevailed in a test case on its argument that the United States is not entitled to stockwater rights based solely on its management of federal lands for grazing. ECF 43-1 at 21. However, the State was then denied leave to amend its objections to "assert that the United States was not entitled to *any* beneficial use-based stockwater rights," and it subsequently settled all its objections to those rights, agreeing to a 1934 priority date. *Id*. at 21-22. The State is bound by that decision.

from the SRBA court's memorandum decision quoted in the United States' response/reply brief cited to this case, ECF 60 at 39, but the United States did not further discuss this case in its brief.

In *American Falls*, the Idaho Supreme Court considered the validity of rules adopted by the Director of the Idaho Department of Water Resources concerning the administration of water rights. 154 P.3d at 437–38. One of the challenges to those rules – raised by a party who held rights already decreed as valid in the SRBA – asserted that the rules "improperly shift[] the burden to the senior appropriator who has already obtained a decreed right and force[] the senior right holder to re-adjudicate or re-prove his decreed right whenever he makes a delivery call." *Id*. at 448. The Idaho Supreme Court disagreed, concluding that rules for the *administration* of decreed water rights cannot be read to require water users to reprove the validity of their rights:

> *The Rules should not be read as containing a burden-shifting provision to make the petitioner re-prove or re-adjudicate the right which he already has*. . . . While there is no question that some information is relevant and necessary to the Director's determination of how best to respond to a delivery call, *the burden is not on the senior water rights holder to re-prove an adjudicated right*. . . . *The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place* . . . .

Id. at 448-49 (emphasis added). *American Falls* affirms that, even under Idaho law, "administration" means enforcement and distribution – not re-adjudication – of decreed water rights. Because Congress has not consented to the United States' joinder to the new forfeiture suits under the "administration" prong of McCarran or otherwise, Section 224 is invalid.

4. The United States does not challenge Idaho Code § 42-222(2).

At oral argument, counsel for State Defendants newly argued that the United States needs a stipulation with all the parties or court approval under Fed. R. Civ. P. 41(a) to drop its alleged challenge to Idaho Code § 42-222(2). This argument fails. First, the United States referenced Section 222(2) in its complaint to provide context to its challenges to the manner in which Idaho seeks to apply this longstanding forfeiture law through Idaho Code § 42-224. ECF 11 ¶ 110(a).

But the United States did not intend to challenge Section 222(2) itself. *See* ECF 34 at 1-4. And, as State Defendants acknowledge, the United States repeatedly affirmed in its briefing that it does not challenge Section 222(2), only Idaho's recently enacted statutes. ECF 64 at 11-12 (citing pages in U.S. brief). The United States' counsel also categorically disavowed any intent to challenge Section 222(2) in this case at oral argument.

Second, even if the Court determines the United States challenged Idaho Code § 42-222(2) in its Amended Complaint, it has ample discretion to allow the withdrawal of any such request for relief. The applicable rule here is Fed. R. Civ. P. 15, which addresses amended complaints, not Fed. R. Civ. P. 41(a), which applies to dismissal of "actions," not individual claims. *Hells Canyon Pres. Council v. U.S. Forest Service*, 403 F.3d 683, 687 (9th Cir. 2005). Under Rule 15(a), leave to amend shall be "freely give[n] when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has affirmed that "this mandate is to be heeded," and that it is an abuse of discretion to deny leave to amend in the absence of a factor "such as undue delay, bad faith or dilatory motive . . . , repeated failure to cure deficiencies . . . , undue prejudice to the opposing party . . . , [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Here, none of these factors apply, as: (1) the United States has not previously sought the Court's leave to amend its complaint; (2) Defendants have made no showing of bad faith; and (3) no delay or prejudice to Defendants would result from amendment, given that the United States seeks to clarify rather than expand the issues and given the lack of any argument in the United States' briefs seeking to show the purported unlawfulness of Section 222(2) under any of its five claims. Further, "[l]eave to amend also may be requested in open court instead of by formal motion." Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1485 (3d ed.) (2023). Therefore, even if the Court should deem amendment necessary, it has ample discretion to allow it here.

Respectfully submitted this 6th day of February, 2024.

JOSHUA D. HURWIT
United States Attorney
CHRISTINE ENGLAND
Assistant United States Attorney

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
STEPHEN G. BARTELL
Assistant Chief, Natural Resources Section
JENNIFER A. NAJJAR
Trial Attorney, Natural Resources Section
JEFFREY N. CANDRIAN
Trial Attorney, Natural Resources Section

/s/ Thomas K. Snodgrass
THOMAS K. SNODGRASS
Senior Attorney, Natural Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Telephone: (303) 844-7233
thomas.snodgrass@usdoj.gov