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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,

Defendant-Intervenors.

Case No. 1:22-cv-00236-DCN

RANCHER INTERVENOR-DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT and RESPONSE TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

The United States Constitution is "the supreme law of the land." U.S. CONST. art. VI, cl. 2. The laws made by the United States Congress pursuant to the Constitution and interpreted and applied by the United States Supreme Court, say that water rights—including, specifically, stockwater rights on federal grazing lands—held by the United States are subject to state law.[2] *See, e.g.*, *United States v. New Mexico*, 438 U.S. 696, 716 (1978) (affirming a holding that "any stockwatering rights [on national forest lands] must be allocated under state law to individual stockwaterers"); 33 U.S.C. § 1251(b) ("[I]t is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of states to . . . plan the development and use of land and water resources[.]"). Congress saw no "need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited." *Id.* at 717.

When it comes to state law water rights in Idaho, then, federal lawmakers and courts agree: Idaho law *is* federal law. The executive agencies of the United States are charged with carrying out this clear and consistent directive of its Legislative and Judicial Branches, which are the author and interpreter, respectively, of federal law. But here, Plaintiff ("the United States," "federal agencies" or "the agencies") seeks again to thwart federal lawmakers and courts by evading application of Idaho's state water law—and thus evading the laws of the United States.

In the state of Idaho, there is no dispute that all water is held in trust by the State for the benefit of the people of Idaho. I.C. § 42-101. Under Idaho law, constitutional appropriation of

[1] In the interests of efficiency, Rancher Intervenor Defendants ("Ranchers") concur in and adopt by reference all arguments contained in State of Idaho Defendants' summary judgment briefing. *See generally* Dkt. 43-1.

[2] This general principle is subject to two narrow exceptions—reserved rights and navigation servitudes—not relevant to this case. *See* Dkt. 43-1 at 31-32.

stockwater rights requires application of the water to a beneficial use. *Joyce Livestock Co. v. United States*, 156 P.3d 502 (Idaho 2007) ("*Joyce*") ("The constitutional method of appropriation requires that the appropriator actually apply the water to beneficial use."). That requirement is ongoing; even if successfully acquired, such water rights are forfeited if not put to beneficial use for five years. I.C. § 42-222(2). In such a case, the water right reverts to the state and is again subject to appropriation. *Id.*

Federal executive agencies would prefer not to comply with these requirements of Idaho law, and accordingly would prefer not to comply with the directives of Congress and the United States Supreme Court that they do so. Having failed in the *Joyce* litigation to evade the substantive requirements of Idaho's water law, these federal executive agencies now seek to prevent enforcement of Idaho and federal law by asking this Court to outlaw the process for administering it. When Idaho's legislature created a process to identify decreed stockwater rights that the United States has forfeited by lack of beneficial use—a problem created in the first instance because the United States does not put the water to the required beneficial use—federal agencies initiated this lawsuit to halt the process and avoid scrutiny of how and by whom the State's stockwater water is used.

BACKGROUND

Early settlers of the western United States developed their own customs and laws to deal with competing land uses like mining and agriculture. Western states recognized a principle of first in time, first in right, or "Doctrine of Prior Appropriation." But the specifics of the doctrine "evolved to meet the specific needs of each state and thus differ[] among the western states." *Ickes v. Fox*, 300 U.S. 82 (1937). Though the original owner of land and water was the federal government, for more than 150 years Congress granted more control and ownership of water

resources to the sovereign states; ultimately subjecting the federal government to state water rights law.

Beginning with the "Ditch Act" of 1866, which became the foundation for western water law, Congress recognized common-law norms that had taken hold already in western territories, declaring:

> Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected.

43 USC § 661. The Desert Lands Act of 1877 declared that "surplus water over and above such actual appropriation and use … shall remain and be held free for appropriation and use of the public for irrigation, mining, and manufacturing." 19 Stat. 377. The Taylor Grazing Act of 1934 noted, "nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water[.]" 43 U.S.C. § 315b. *See also Joyce*, 144 Idaho at 18 ("The Taylor Grazing Act expressly recognizes that the ranchers could obtain their own water rights on federal land.").

Congress has continually reiterated its commitment to states' sovereignty over their water resources. In response to the United States' past assertions of sovereign immunity from water right adjudications in state courts, Congress passed the McCarran Amendment of 1952, "waiv[ing] the sovereign immunity of the United States for adjudications for all rights to use water." 43 U.S.C. § 666(a). "The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). 43 U.S.C. § 666(a). The 1967 Federal Land Policy and Management Act

noted that "[a]ll actions by the Secretary concerned under this act shall be subject to valid existing rights." 43 U.S.C.A. § 1701. *See also* Dkt. 43-1 at 30 (quoting note to FLPMA § 701). The Clean Water Act of 1972 noted that "it is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of states to . . . plan the development and use … of land and water resources[.]" 33 U.S.C. § 1251(b).

The Supreme Court has struck the same consistent tone in its treatment of state sovereignty over water resources—including, specifically, stockwater rights on federal grazing allotments. *See, e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 163-64 (1935) (noting Congress "recognize[d] and g[a]ve sanction … to the state and local doctrine of appropriation" when it declared non-navigable waters "subject to plenary control of the designated states"); *United States v. New Mexico*, 438 U.S. 696, 716 (1978) (affirming holding that "any stockwatering rights [on national forest lands] must be allocated under state law to individual stockwaterers"); *id.* at 715 (noting reserved rights doctrine as "an exception to Congress' explicit deference to state water law in other areas"); *California v. United States*, 438 U.S. 645, 653 (1978) (noting "consistent thread of purposeful and continued deference to state water law by Congress"); *Tarrant Reg'l Water Dist. v. Herrmann,* 569 U.S. 614, 631 (2013) ("[O]wnership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, is an essential attribute of sovereignty." (cleaned up)).

In this case, however, the federal agencies argue that they do not have to comply with state water law, and they have sought for decades to own and retain water rights to which they are not entitled. In *New Mexico*, for example, federal executive agencies argued that stockwater rights on National Forest lands were reserved to the federal government by federal law and were thus not subject to state law. *New Mexico*, 438 U.S. at 697-99. The United States Supreme Court rejected

that argument, holding that "Congress intended that water would be reserved [by its setting aside of National Forest land] only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law." *New Mexico*, 438 U.S. at 718. Therefore "any stockwatering rights must be allocated under state law to individual stockwaterers." *Id.* at 716.

In the litigation that led to the *Joyce* decision, the United States took the position that it should be able to appropriate water rights, and avoid forfeiting them, even where neither the United States nor its agent had put those rights to beneficial use by watering livestock. *See Joyce*, 144 Idaho at 17. Specifically, the United States claimed that it, not ranchers, should reap the water rights accruing from ranching permittees' putting water to beneficial use. Now, federal agencies resurrect the same arguments not to argue that it is exempt from state law because the rights are reserved, or that the United States' claims satisfy state law's ongoing beneficial use requirement because the rights have been put to beneficial use, but that even though the rights are subject to state law it should (uniquely) be permitted to evade that law's application in perpetuity.

In the Snake River Basin Adjudication and related matters, the United States exploited the complexity of the law and adjudicatory processes, its vastly superior financial and legal resources, and its influence over livestock grazing permits to obtain default decrees to stockwater rights that it had never lawfully appropriated through beneficial use. *See* Dkt. 43-1 at 19-20, 22 (under SRBA settlements "the United States was decreed thousands of beneficial use-based stockwater rights based solely on IDWR's [recommendation] policy"). The United States has also pressured grazing permittees to enter agreements to act as its agents with the goal of appropriating those permittees' stockwater rights to itself. *See* Dkt. 19-5 ¶¶ 7, 10.

Faced with intransigent federal agencies hoarding thousands of unused decreed stockwater rights, Idaho's legislature created an administrative process to apply its longstanding law to

address allegations of stockwater right forfeiture. *See* Dkt. 43-1 at 24-26. Faced with the possibility of having to demonstrate compliance with the Idaho law, those federal agencies instead initiated this litigation. They ask this Court to declare that even though federal law makes them subject to the *substance* of Idaho's water law, they should be *procedurally* immunized in perpetuity from any application of its requirement that those rights be beneficially used or forfeited. This Court lacks jurisdiction over their claims, which are in any case meritless. Federal law is binding on the executive branch of the United States, and this Court should deny federal agencies' invitation to exempt them from the law imposed on them by Congress, United States Supreme Court, and the State of Idaho.

STANDARD OF REVIEW

Summary judgment is warranted where the movant demonstrates that there is no genuine dispute as to any material fact, and he is entitled to judgment as a matter of law on the record before the court. F.R.C.P. 56(a), (c). In determining the presence of material factual disputes, the court must evaluate the evidence in the light most favorable to the nonmoving party. *Zetwick v. Cnty. Of Yolo*, 850 F.3d 436, 440 (9th Cir. 2006). Where both sides have moved for summary judgment, each motion is evaluated separately and all reasonable inferences are made against each movant. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 790-91 (9th Cir. 2006).

ARGUMENT

There are no material facts in dispute here—the issues in this case present pure questions of law. First, the federal agencies' claims are largely barred by *res judicata*. They have asserted them before, and lost. In effect, the federal agencies seek this Court's review of an Idaho Supreme Court decision that did not go their way. The Court should not give them a second bite at the apple by effectively appealing here. Second, even if the Court considers the agencies' claims, it must

deny the requested injunctive relief. Federal and State law state clearly that the federal agencies must follow Idaho's water laws with respect to the water it now claims, and that therefore the federal agencies make "beneficial use" of the stockwater they now claim, which the agencies undisputedly have not done and cannot do. Accordingly, the Court must enter judgment for the Defendants.

I. This Court Lacks Jurisdiction over the Agencies' Claims

The agencies ask this Court to revisit issues briefed and disposed of by previous litigation. This Court lacks the jurisdiction to do so.

A. The Agencies' Claims Are Barred by *Res Judicata*

For more than a century, constitutionally appropriated Idaho state law water rights have been subject to forfeiture for lack of beneficial use. *See* I.C. § 42-222(2); 1905 Idaho Sess. Laws 27-28. Beneficial use is a fundamental element of every such right. *See, e.g.*, *Pioneer Irr. Dist.*, 144 Idaho at 113 ("Beneficial use is enmeshed in the nature of a water right"); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) ("Integral to the goal of securing maximum use and benefit of our natural water resources is that water be put to beneficial use. This is a continuing obligation."); *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982) ("Appropriative rights do not depend on land ownership and are acquired and maintained by actual use."). That includes decreed stockwater rights. *See, e.g.*, *Gilbert v. Smith*, 97 Idaho 735, 738 (1976); *Graham v. Leek*, 65 Idaho 279, 287 (1943); *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60 (1924). All the rights at issue in this litigation are subject to this requirement, including all stockwater rights decreed to the United States under the SRBA.

In the SRBA and *Joyce* litigation, federal agencies argued that their administration of federal lands constituted beneficial use that fulfilled Idaho's requirement with regard to its

stockwater rights on grazing lands; the Idaho Supreme Court rejected that argument. *Joyce*, 144 Idaho at 17. Having lost on the substance of its claims, the federal agencies now seek *procedural* immunity from Idaho's state law, but they make the same arguments in favor of the same result: they ask to have their decreed rights recast as hybrid rights that transcend the state law, permanently impairing the rights of every other competing rights-holder. *See* Dkt. 43-1 at 41-43. In doing so, they also seek to evade the SRBA's Final Unified Decree, which explicitly and specifically confirms that those rights are subject to Idaho's longstanding beneficial use requirement and even sets a date for calculating its application to the decreed rights at issue here. See Dkt. 43-1 at 36-37.

Federal district courts lack jurisdiction to review such attempts to reverse state court decisions. *In re Gruntz*, 202 F.3d 1074, 1078 (9th Cir. 2000) ("Direct federal appellate review of state court decisions must occur, if at all, in the Supreme Court."); 28 U.S.C. § 1257. That's true whether the case would amount to appellate review in form (for example if the United States appealed directly to this court from the *Joyce* decision) or in substance (as the federal agencies have chosen to do in this case). *Doe v. Mann*, 415 F.3d 1038, 1041 (9th Cir. 2005) (no jurisdiction over cases "based on the losing party's claim that the state judgment itself violates the loser's federal rights").

Here, Idaho's Supreme Court rejected the federal agencies' arguments and articulated a set of legal rules applying Idaho law to stockwater rights on federal grazing allotments. Idaho's legislature codified those holdings and a process for administering them. The agencies resurrect the same arguments they offered in *Joyce* against *Joyce*'s holding; the only difference is that now they claim federal law bars Idaho from *administering* its law for the same reasons they previously argued federal law bars the substantive law itself. Such a claim seeks to re-adjudicate the nature

of *the same water rights* at issue in *Joyce* and other SRBA litigation, rendering them immune to the state law that the Idaho Supreme Court held applies to them. This Court lacks the authority to entertain such claims, which fall outside its limited jurisdiction—and for good reason. See *Black Canyon Irrigation Dist.*, 163 Idaho at 64 ("Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures.").[3]

B. The McCarran Amendment Subjects the United States to Stockwater Right Forfeiture Proceedings

All parties agree that the United States waived its sovereign immunity in the SRBA, and that it is therefore bound by the SRBA's Final Unified Decree. That includes the Decree's retained jurisdiction provision. *See* Dkt. 43-1 at 53-54.

The McCarran Amendment also subjects the United States to the procedures outlined by the challenged statutes on its face. In the Ninth Circuit, the question of forfeiture of a decreed water right is a question of "administration" of the decree. *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 execute it, to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." (cleaned up)). If a water right has been forfeited, the decree for that right can no longer be "execute[d]" or "enforce[d]," *id.*, 767 F.2d at 541, because the underlying water right has ceased to exist. *See also, e.g.*, *Gila River Indian Cmty. v. Freeport Minerals 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

[3] As Idaho State Defendants note, this case also meets the requirements for discretionary abstention under *Burford*. Dkt. 43-1 at 49-53.

the Decree, the water right forming the basis for Plaintiff's forfeiture claim is."); *Federal Youth Center v. District Court*, 595 P.2d 395, 401 (Colo. 1978) (McCarran Amendment's waiver applies when "substance of the plaintiffs adverse possession claim is that one or more of the claimants to water in the Warrior Ditch have lost their respective rights by failure to exercise them"). Indeed, the federal agencies implicitly concedes that the judicial processes they challenge here are suits for the administration of water rights when they repeatedly ask this Court to "construe and interpret" the language of the Final Unified Decree and "resolve conflicts as to its meaning." *S. Delta Water Agency*, 767 F.2d at 541. *See* Dkt. 34-1 at 19, 45.

The same goes for the pre-adjudicatory administrative processes that the United States seeks to evade. It attempted a similar strategy in *United States v. Oregon*, 44 F.3d 758, 765-67 (9th Cir. 1994). There, the Ninth Circuit rejected the United States' argument that the McCarran Amendment did not apply to proceedings that are initiated administratively before proceeding to adjudication by a court. *See id.* at 765. Such evasion is, according to the United States Senate Committee Report, what the McCarran Amendment exists to prevent:

> It is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years. … The Committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the Court in the same manner as if it were a private individual.

Dkt. 43-9 at 4, 6 of 10.

The administrative process of I.C. § 42-224 merely "paves the way" for a civil forfeiture proceeding in the SRBA District Court, where the United States has waived its sovereign immunity and the question of forfeiture will be decided by "judgment of the court" in "a normal civil case." *See id.* at 764-65. Of course, the reason the federal agencies here seek to evade the administrative

proceedings is that they fear that those proceedings will lead to adjudicatory proceedings, and they seeks to evade those adjudicatory proceedings because under state law, they have forfeited the rights at issue. But the possibility of losing is what makes waiver of sovereign immunity meaningful, and federal agencies should not be permitted to un-waive it whenever they expect to lose.

II. The Agencies' Claims Fail as a Matter of Law

Even if this Court had jurisdiction over the agencies' claims, Defendants would be entitled to summary judgment, because the federal agencies have articulated no claim on which relief can be granted as a matter of law.

A. The Challenged Statutes Do Not Violate the Supremacy Clause of the United States Constitution

The Supremacy Clause of the United States Constitution establishes that the "Constitution, and Laws of the United States which shall be made in Pursuance thereof, shall be the supreme Law of the Land," binding the judges of every state notwithstanding conflicting state law. U.S. CONST. art. VI, cl. 2. State laws that "regulate the [federal] Government directly or discriminate against it" are therefore invalid. *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (plurality opinion). The Supremacy Clause's bar on such discrimination is the "intergovernmental immunity" doctrine. *United States v. California*, 921 F.3d 865, 878 (9th Cir. 2019).

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). Rather, "[t]he Supreme Court has clarified that a state 'does not discriminate against the Federal Government and those with whom it deals *unless it treats someone else better than it treats them*.'" *United States v. California*, 921 F.3d at 881 (quoting *Washington v. United States*, 460 U.S. 536, 544–45 (1983)).

The Supreme Court also instructs that

> in analyzing the constitutionality of a state law, it is *not* appropriate to look to the most narrow provision addressing the Government or those with whom it deals. A state provision that appears to treat the Government differently on the most specific level of analysis may, in its broader regulatory context, not be discriminatory.

North Dakota, 495 U.S. 423 at 438 (emphasis added). Where a statute singles out the federal government either for uniquely *favorable* treatment or to ensure that it is, in some larger regulatory scheme, on *equal* footing, intergovernmental immunity is not implicated. *Id.*

The agencies argue that the challenged statutes violate the Supremacy Clause by "discriminating" against the federal government specifically. Dkt. 34-1 at 28-34. It argues that I.C. § 42-502 discriminates against it by requiring ownership of livestock; that I.C. § 42-113(2)(b) discriminates against it by making its stockwater rights appurtenant to private property; that I.C. § 42-224 discriminates against it by limiting defenses to forfeiture based on agency relationship; and that I.C. § 42-504 discriminates against it by prohibiting changes to purpose or place of use of its stockwater rights. None of these claims is true.

i. I.C. § 42-502

The agencies argue that I.C. § 42-502 discriminates against it by requiring ownership of livestock in order to obtain stockwater rights, and argues that the provision goes beyond codifying the holding of *Joyce* by applying to stockwater rights acquired by *permit*, in addition to the constitutionally appropriated rights directly at issue in *Joyce* and this litigation. Dkt. 34-1 at 30-31. But even if the United States' reading of this provision were correct, it is not subject to challenge here.

I.C. § 42-502 is not subject to an as-applied challenge, because I.C. § 42-502 has not been "applied" in this case in any sense, and the agencies offer no argument that it has. *See* Dkt. 43-1 at 63-64. And I.C. § 42-502 must survive a facial challenge, because even if the agencies are correct

that the provision is broader than the holding of *Joyce*, the provision *at least* codifies the holding of *Joyce*, and that is something Idaho is undisputedly within its rights to do. A facial challenge can succeed only where a plaintiff "establish[es] that *no* set of circumstances exists under which [the statute] would be valid." *Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1217 (9th Cir. 2020) (emphasis added) (cleaned up). If the agencies to raise the Supremacy Clause against I.C. § 42-502 in defense of their *permitted* stockwater rights in a different case, they should do so in that case; they cannot prevail on a facial challenge to a law that has constitutionally permissible application against them, nor on an as-applied challenge to a law that has not been applied to them.

ii. I.C. § 42-113(2)(b)

I.C. § 42-113(2)(b) does apply specifically to beneficial-use stockwater rights associated with grazing on federal lands (whether by United States or private permittees like Ranchers). It specifies that those rights are appurtenant to the base property, and when a grazing permit is transferred to a new owner, the stockwater rights may also be conveyed and become appurtenant to their new owner's base property. The agencies point to the background rule that water rights attach to the land to which the water is being beneficially applied to argue that the statute therefore unconstitutionally discriminates against them. Dkt. 34-1 at 31-32.

But I.C. § 42-113(2)(b) merely codifies *Joyce*'s holding that "water rights that ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties." *Joyce*, 144 Idaho 1, 12 (2007). That holding was an application of the very *generally*-applicable background rule to which the agencies point as evidence of discrimination: that constitutional stockwater rights are appurtenant to the property to which the beneficial use is applied. The *Joyce*

court reasoned that stockwater rights on grazing allotments are necessarily put toward the beneficial use of the ranch that owns the livestock being grazed:

> the water rights on public lands obtained by the predecessors of Joyce Livestock were beneficial and useful adjuncts to their cattle ranches and would be of little use apart from the operations of their ranches. Indeed, the patented property alone was not sufficient to sustain a livestock operation capable of supporting a single family unit in this arid part of the country. Also, those water rights would be of little use independent of the ranch properties.

Joyce, 144 Idaho 1, 13 (2007). In *Joyce*, the Idaho Supreme Court was asked to answer the question "toward what lands are stockwater rights on Joyce Ranch's federal grazing allotments in Idaho beneficially used?" It answered that question: the base property of the permittee ranch. Those rights do not belong to the United States in some general, vague, speculative, *unused* sense. The state law on which the *Joyce* court based this conclusion applies equally to all stockwater rights holders, the reasoning by which the *Joyce* court reached this holding applies equally in all such cases, and I.C. § 42-113(2)(b) properly applies it to stockwater rights owners on federal grazing allotments.

iii. I.C. § 42-224

The federal agencies allege that I.C. § 42-224 "discriminates against the United States by purporting to limit defenses to forfeiture based on an agency relationship for stockwater rights located on federal lands, whereas such defenses are still available on private lands." Dkt. 34-1at 32. But if anything, I.C. § 42-224 treats the United States *better* than it treats other rights-holders. I.C. § 42-224 singles out federal lands for special treatment in exactly two ways; since both are favorable, neither can violate intergovernmental immunity. *See United States v. California*, 921 F.3d at 881.

First, I.C. § 42-224(4) specifically applies to federal *or* state grazing lands, and it bars the director from issuing a show-cause letter if he has or receives certain evidence of a principal-agent

relationship between the owner of the water right and the permittee/lessee. This provision has two beneficiaries: the State of Idaho and the United States. They would otherwise be subject to a show-cause letter even if the director were in possession of such evidence. They benefit equally from the provision, and neither benefits at the expense of the other. This provision is not unfavorable to the United States in any respect; it therefore cannot discriminate *against* it. *See North Dakota*, 495 U.S. at 439 ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it.").

The federal government argues that the statute "purport[s] to limit defenses to forfeiture based on an agency relationship for stockwater rights located on federal lands." Dkt. 34-1 at 32. But I.C. § 42-224 does no such thing. The agencies misrepresent I.C. § 42-224(4) as "narrow[ing] the common-law defense" of a principle-agent relationship to "require[e] express 'written evidence signed by the principal and the agency[.]'" But I.C. § 42-224(4), which concerns when a show-cause letter may issue or not, and has no bearing whatsoever on the substantive standards that will apply in adjudicating forfeiture allegations, does not even *reference* such a defense, let alone bar the United States from raising it in adjudication or require special evidence to support it. It reads in full:

> 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.

This language does nothing to limit (or affect in any way) any common-law defenses against forfeiture. Rather, it offers Idaho and the United States special *favorable* treatment by exempting

them—and only them—from even *being issued* a show cause order under I.C. § 42-222(2) where the director possesses written evidence signed by the principle and the agency. Nothing in I.C. § 42-222(2) limits the United States from providing *any* other form of evidence of a principle-agent relationship, either in response to the letter or in its defense against a resulting civil action. *See North Dakota*, 495 U.S. at 439 ("A regulatory regime which so favors the Federal Government cannot be considered to discriminate against it."). *See also id.* at 448 (Scalia, J., concurring in judgment).

Second, I.C. § 42-224(14) specifically exempts from the provisions of the section "stockwater rights decreed to the United States based on federal law." This provision, too, is favorable to the United States, and uniquely favorable treatment cannot violate the intergovernmental immunity doctrine. *North Dakota*, 495 U.S. at 439.

iv. I.C. § 42-504

The agencies argue that I.C. § 42-504 "singles out the government by limiting the United States and its permittees from using stockwater rights 'for any purpose other than the watering of livestock on the federal grazing allotment that is the place of use for that stockwater right.'" Dkt. 34-1 at 34, quoting I.C. § 42-504.

As the Idaho State Defendants observe, I.C. § 42-504 effected no relevant substantive change in the requirements applicable to stockwater rights on federal lands. Dkt. 43-1 at 73-74. Moreover, the limitations imposed by this provision are *favorable* to the United States and its grazing programs. *Id.* at 74. And I.C. § 42-504 imposes *precisely* the same restrictions on privately owned stockwater rights owned by Ranchers on their grazing allotments that it imposes on such rights owned by the United States. *See* I.C. § 42-504 ("If any agency of the federal government, *or the holder or holders of any livestock grazing permit or lease on a federal grazing allotment*,

acquires..."). I.C. § 42-504 simply establishes that such stockwater rights to water stock on federal grazing allotments will remain stockwater rights to water stock on those federal grazing allotments. The United States complains that I.C. § 42-504 denies it (and Ranchers) the right to avail themselves of an application for change or place or purpose under I.C. § 42-222(1), but I.C. § 42-504 effectively *defines* the result of the analysis I.C. § 42-222(1) would require the director to complete in response to such an application. Moreover, the United States' own arguments for injunctive relief establish that it benefits from this provision. *See infra* at 24-25.

B. The Challenged Statutes Do Not Violate the Property Clause of the United States Constitution

The Property Clause of the U.S. Constitution specifies that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

The United States claims that I.C. § 42-113(2)(b), I.C. § 42-222(2), I.C. § 42-224, I.C. § 42-501, and I.C. § 42-502 "as applied by Defendants purport to divest the United States and its agencies of vested property decreed to the United States . . . or licensed by IDWR." Dkt. 11 at 28. But the provisions do not divest the United States of any right at all; stockwater rights subject to forfeiture are creatures of and governed by Idaho state law, and by passing the McCarran Amendment, Congress rendered the United States subject to that law for purposes of having its water rights decreed in an adjudication. 43 U.S.C. § 666(a). The Final Unified Decree expressly contemplates that those water rights are subject to forfeiture. *See* Dkt. 43-1 at 36-37. As Idaho State Defendants point out, it is *the United States* that seeks to void the terms of the Final Unified Decree. Allowing this would create an unmanageable and incoherent hybrid state-federal law water right. Dkt. 43-1 at 69-70. This Court should decline the United States' invitation to create such a right.

C. The Challenged Statutes Do Not Violate the Contract Clause of the United States Constitution

The Contract Clause, U.S. CONST., Art. I, § 10, cl. 1, provides that "no State shall … pass any . . . Law impairing the Obligation of Contracts . . . ." The United States correctly notes that the clause applies to settlement agreements and consent decrees. Dkt. 34-1 at 42-43. But the United States fails to survive "[t]he threshold issue" of "whether the state law has operated as a substantial impairment of a contractual relationship" at all. *Sveen*, 138 S. Ct. at 1821-22 (cleaned up).

The United States claims that I.C. § 42-113(2)(b), I.C. § 42-222(2), I.C. § 42-224, I.C. § 42-501 and I.C. § 42-502 "collectively abrogate legal settlements negotiated and agreed to by the United States and numerous other parties." Dkt. 11 at 28-29. But it points to no provision of any such settlement agreement that is in any way undermined, let alone abrogated, by the challenged statutes. Those settlement agreements resolved objections to various United States state law based stockwater claims in the SRBA. See, e.g., Dkt. 36 ¶ 22, Ex. 3; Dkt. 36-3 at 4-64; Dkt. 11-3 at 2-10. If the terms of any such settlement agreement or decree rendered the decreed rights immune to state law in perpetuity, those terms are not cited in the United States' brief. See Dkt. 34-1 at 42-44. And the forfeiture laws from which the agencies seek such immunity have been in place for well over a century. Dkt. 43-1 at 36. In fact, not only does the Final Unified Decree fail to immunize the rights it decreed to the United States from ordinary forfeiture law, it *specifically and explicitly contemplates* that those rights are subject to such forfeiture. 1905 Idaho Sess. Laws 27-28 (Dkt. 43-2); *see also* Dkt. 34-1 at 21 (agencies conceding I.C. § 42-222(2) is "a longstanding provision of the Idaho Code"); Dkt. 43-1 at 36-43 (recounting history).

In any case, the agencies' *only* briefed argument in support of their Contract Clause claim is specific to I.C. § 42-113(2)(b), and is that I.C. § 42-113(2)(b) reduces the expected value of their decreed stockwater rights by retroactively declaring them appurtenant to permittees' base property;

the agencies have therefore waived any argument that I.C. § 42-222(2), I.C. § 42-224, I.C. § 42-501, or I.C. § 42-502 violate the Contract Clause. *Cf.* Dkt. 34-1 at 43 ("S.B. 1305, by declaring those same rights to be appurtenant to the permittee's base property, entirely undermines that 'contractual bargain[.]'").

Even with respect to I.C. § 42-113(2)(b), the agencies' argument fails, because they offers no support for the contention that I.C. § 42-113(2)(b) is retroactive. As Idaho State Defendants observe, nothing in I.C. § 42-113(2)(b) indicates that it applies retroactively. Dkt. 43-1 at 70-71. And it is, in Idaho as elsewhere, "'a well-settled and fundamental rule of statutory construction' … to construe statutes to have a prospective rather than retroactive effect." *Guzman v. Piercy*, 155 Idaho 928, 937 (2014) (citation omitted). Indeed, the United States concedes that the Idaho Code *explicitly forecloses* its interpretation of the challenged provisions. *See* Dkt. 34-1 at 44 n.15; I.C. § 73-101.

The United States offers no argument in support of its contrary reading of I.C. § 42-113(2)(b). It asserts that the challenged statutes are "being applied to the property rights of the United States retroactively," Dkt. 34-1 at 44 n.15, but its assertion is supported by no argument or evidence, and anyway the United States' argument fails as a matter of law.

Article III standing requires that "[t]he issues presented must be definite and concrete, not hypothetical or abstract," rather than "hang[] on future contingencies that may or may not occur[.]" *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009) (cleaned up). Unless and until the unlikely event that a court applies this statute retroactively to such decreed rights, the United States' challenge is not ripe. This Court therefore lacks jurisdiction to hear it. *See id.* ("The constitutional component of ripeness is a jurisdictional prerequisite.").

D. The Challenged Statutes Do Not Violate the Retroactivity Clause of the Idaho Constitution

i. The Retroactivity Clause is inapplicable

The Retroactivity Clause of the Idaho Constitution provides that "[t]he legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation." IDAHO CONST. art. XI, § 12. "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; rather, a law is retroactive only when it operates upon . . . rights which have been acquired . . . prior to its passage." *Frisbie v Sunshine Mining Co.*, 93 Idaho 169, 172 (Idaho 1969) (cleaned up). The United States claims that I.C. § 42-113(2)(b), I.C. § 42-224, and I.C. § 42-504 apply retroactively in violation of the Retroactivity Clause. Dkt. 11 at 29-30.

The agencies' Retroactivity Clause claim is novel because it is so plainly a nonstarter under Idaho law. That clause governs only legislation passed to benefit a discrete and identifiable corporation or "individual or association of individuals;" it does *not* concern legislation passed "enacted for the benefit and protection of the state of Idaho . . . through its legislative department[.]" *Rogers v. Hawley,* 115 P. 687, 691 (Idaho 1911). *See also, e.g.*, *Oregon Short Line R. Co. v. Clark Cnty. Highway Dist.*, 22 F.2d 681, 686 (D. Idaho 1927) (holding Retroactivity Clause irrelevant to law "enacted in furtherance of a general policy, and for the benefit of the public"); 1991 Idaho Op. Att'y Gen. 21 (1991) (concluding even certain retroactive legislation permitted because "as long as the retroactive legislation is for the public good, this clause is not violated"). Moreover, the Clause bars only to "enactments constitut[ing] substantive law"—not to purely procedural provisions like I.C. § 42-224.

The challenged statutes were enacted by Idaho, the undisputed sole owner of *all* waters at issue in this case, "for the benefit and protection of the state of Idaho . . . through its legislative department[.]" *Rogers v. Hawley,* 115 P. at 691. The agencies make no attempt to identify the

requisite "individual or association of individuals" for whose benefit the challenged statutes are purportedly intended to operate. Dkt. 34-1 at 44-46. They notes that any rights they have forfeited will be subject to appropriation by them or others, but their vague gesture at "other water users" or "third parties" is a far cry from identification of an "individual or association of individuals" for whose benefit the statute is intended to operate—as opposed to operating for the benefit of the State of Idaho. *See id.* Even if "water users" amounted to an "association of individuals," *the United States would itself* be a member of that all-inclusive "association," because the United States has the same opportunity as any other party to appropriate the forfeited stockwater rights by beneficial use.

ii. The challenged statutes do not apply retroactively

Even if the Retroactivity Clause were relevant, the three provisions purportedly challenged under it (I.C. § 42-113(2)(b), I.C. § 42-224, and I.C. § 42-504) do not operate retroactively.

1. I.C. § 42-113(2)(b) is not retroactive

I.C. § 42-113(2)(b) does not apply retroactively to prejudice stockwater rights held by the United States prior to its enactment. *See* Dkt. 43-1 at 70-72. The United States again offers no textual or other basis for its interpretation, and indeed concedes that its interpretation is contrary to Idaho law. *See* Dkt. 34-1 at 44 n.15.

2. I.C. § 42-224 is not retroactive

I.C. § 42-224 creates no new substantive law whatsoever, let alone substantive law as the federal agencies claim. Its brief asserts that I.C. § 42-224 "authorize[s] forfeiture of thousands of stockwater rights decreed to the United States," but this is a flat misrepresentation for which no support is offered. I.C. § 42-224 is, as its text demonstrates, a purely procedural statute, and effects no substantive change whatsoever to the long-established legal standards by which the United

States has (or has not) forfeited any stockwater rights by lack of beneficial use. In fact, I.C. § 42-224 repeatedly and specifically refers to I.C. § 42-222(2)'s codification of longstanding forfeiture law as the substantive standard that applies throughout the process it outlines. *See* I.C. § 42-224(1) (instructing director to determine whether petition presents prima facie evidence "that the stockwater right has been lost through forfeiture *pursuant to section* I.C. § *42-222(2)*" (emphasis added)); I.C. § 42-224(2) ("forfeiture pursuant to section I.C. § 42-222(2)"); I.C. § 42-224(7) ("pursuant to section I.C. § 42-222(2)); 42-224(8) ("pursuant to section I.C. § 42-222(2)"); I.C. § 42-224(8) ("pursuant to section I.C. § 42-222(2)"); I.C. § 42-224(12) ("pursuant to section I.C. § 42-222(2)").

Even where the director concludes as part of the process outlined in I.C. § 42-224 that stockwater rights have been forfeited, the only legal effect of his conclusion is on the State of Idaho—which is then required to initiate a civil suit, in which the director's conclusion will be merely *prima facie* evidence—and the resulting court process; his conclusion has no legal effect on the United States or any other claimant or party. *See* I.C. § 42-224(10) (requiring initiation of suit); I.C. § 42-224(11) (describing resulting court process); I.C. § 42-224(9) (providing that the director's determination and order have no legal effect except as provided in I.C. § 42-224(11)).

3. I.C. § 42-504 is not retroactive

I.C. § 42-504 likewise does not create new substantive law that could have retroactive effect. Earlier Idaho stockwater permits and licenses to the United States were conditioned on compliance with these terms. *See* Dkt. 43-1 at 73-74. Even if it did create substantive law, the United States argues elsewhere in its brief that such law benefits *the United States*, and raises the specter of the behavior it prohibits as a reason to enjoin Idaho's enforcement of other statutory

provisions. *See infra* at __. And even if I.C. § 42-504 created *new* law, its forward-looking plain text forecloses retroactive application:

> **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.

I.C. § 42-504 (emphasis added). And even if I.C. § 42-504's text were ambiguous and did not preclude retroactive application, Idaho's law would preclude such an interpretation and application. *See supra* at __.

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

The federal agencies ask the Court to permanently enjoin application of the challenged statutes to the United States. Dkt. 11 at 30. Success on the merits is a prerequisite to such an injunction, and the United States' claims cannot succeed. But the federal government would not be entitled to such an injunction even if its claims did not fail and merit dismissal as a matter of law.

To receive injunctive relief, a party must (1) prevail on the merits and (2) show that it has suffered irreparable injury, (3) that the balance of equities tips in its favor, and (4) that injunctive relief is in the public interest. *See Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 546 n.12 (1987). Every factor of this inquiry weighs against injunctive relief in this case. "It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 158 (2010) (emphasis in original).

a. Irreparable Harm

The agencies make no argument that they have suffered the requisite irreparable injury. *See* Dkt. 34-1 at 46-53. It asserts that *if* its stockwater rights are scrutinized, *and* it is found to have forefeited those rights by lack of beneficial use, various negative consequences *might* occur. *See* Dkt. 43-1 at 75 (gathering citations).

The agencies' most concrete support for their position is an anecdote: they allege that in another state, a rancher subject to a different state's water law successfully applied to change the point of diversion and place of use of his stockwater rights on federal allotments to his private property.[45] Dkt. 48-49. This anecdote is surprising, given that *in this case* the agencies *ask this court* to enjoin enforcement of an Idaho statutory provision (I.C. § 42-504) that bars any such application by a similarly situated permittee in Idaho, precisely *because* that statutory provision would bar such an application. I.C. § 42-504 provides:

> 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.

I.C. § 42-504. First, the agencies complain that it is unconstitutional for Idaho to ban this practice. *See* Dkt. 34-1 at 34. They complain (incorrectly) that the ban applies retroactively to previously decreed stockwater rights. *See id.* at 45-46. Then, they ask this Court to enjoin enforcement of Idaho's statute banning this practice against the United States or its agencies. *See id.* at 46. *Then*,

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[4] The United States offers an anecdote from Idaho, as well, but that anecdote is unsupported. *See* Dkt 43-1 at 75-76.

[5] The United States misrepresents *United States v. State Eng'r*, 117 Nev. 585, 587 (Nevada 2001) (per curiam), which did not involve a successful challenge to Nevada's water laws; the Nevada Supreme Court interpreted those laws so as to avoid the alleged constitutional issue. *See id.* at 52 (construing statute to avoid alternative constitutional argument); *id.* at 591 (Becker, J., concurring in part and dissenting in part) ("I concur in the majority's decision because it construes the statute in such a way as to avoid any constitutional infirmities.").

as a *reason* for granting such an injunction, the agencies say that if Idaho's statute is allowed to stand, *someone might do what the statute prohibits*. Dkt. 34-1 at 48-49. The agencies here exhibit "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." *Embury v. King,* 361 F.3d 562, 566 n.22 (9th Cir. 2004), as amended (May 17, 2004), amended, No. 02-15030, 2004 WL 1088297 (9th Cir. May 17, 2004).

The federal agencies exhibit the same quality when they argue that that even the possibility of subjecting their state law water rights to state law "creates uncertainty for federal grazing permittees . . . requir[ing] them to invest time and money to protect their interests." Dkt. 34-1 at 50-51. In the SRBA, the United States appropriated *thousands* of stockwater rights by means of decrees, because the ranchers who could have successfully objected lacked such time and money to protect their interests *against the United States*. Now, having potentially forfeited those rights, the United States seeks to immunize them from state law against the meritorious claims of these permittees. Having forced Ranchers to spend decades and hundred of thousands of dollars obtaining the certainty of the results of the SRBA and related litigation, the United States now not only demands that this court undermine that hard-won certainty and extend that burden and expense, but cites the burden and expense it continues to inflict on Ranchers as a *reason* to enjoin the legal protections of which the United States fears Ranchers will avail themselves.

That includes Rancher LU Ranching. In the SRBA, LU Ranching filed for stockwater rights on its private land and the grazing allotments where it engaged in beneficial use. Dkt. 19-6 at ¶ 5. The United States objected to its filings. *Id.* at ¶ 6. LU Ranching was misinformed by a state official that because the United States objected to LU Ranching's filings, LU Ranching did not need to object to the United States' competing filings, and so failed to timely object. *Id.* at ¶ 13.

The United States was thus able to obtain default decrees concerning junior stockwater rights to which it was not otherwise entitled. *Id.* LU Ranching was left with no way to challenge the United States' decreed rights, which it believes the United States has since forfeited by lack of beneficial use. *Id.* The challenged statutes provide an administrative mechanism for the state to scrutinize those decreed and forfeited rights. The United States seeks to avoid that application of longstanding state law to which the law of the United States subjects it, to the detriment of the grazing permittees on whose behalf it now purports to demand an injunction protecting it from that application.

Injunctive relief is an equitable remedy; what the agencies seek here is not equity. Ultimately, the agencies' claim in this case is that they are harmed by the law of the United States, and therefore wish to evade it. The law of the United States subjects state law water rights held by the United States to state law. The agencies argue here that this policy interferes with their ability to operate the federal grazing program, but that argument would, if it proved anything, prove far too much; if it were true, the rights at issue here would be *federal* water rights subject to the reserved rights doctrine, which exists to prevent exactly what the the agencies claim here is the "harm" they will suffer. Executive agencies have made this argument before, and the United States Supreme Court has rejected it. *See New Mexico*, 438 U.S. 696. *See also* Dkt. 43-1 at 77-79. So has the Idaho Supreme Court. *See Joyce*, 144 Idaho 1. *See also* Dkt. 43-1 at 78-80. At some point, litigation of the same settled question of federal law becomes vexatious.

b. Balance of Equities and Public Interest

The balance of equities and public interest likewise weigh against enjoining application of Idaho's law to Idaho state law water rights. Such injunctive relief would upend the system of water rights established by Congress, creating hybrid state-federal water rights perpetually immunized

from the requirements of state law. Not just stockwater rights; the United States seeks to avoid the fundamental requirement (beneficial use) of Idaho law with regard to *all* its Idaho state law water rights. *See* Dkt. 11 at 30. *This* would indeed upend settled expectations on which the SRBA settlements relied. *This* would indeed result in vastly disparate treatment of stockwater rights held by the United States and stockwater rights held by every other actor in Idaho's regime. *This* would indeed undermine the supremacy of federal law—law that is made by the United States Congress and interpreted by the United States Supreme Court, the very law the executive agencies here seeking to subvert are charged with executing. *These* are the outcomes Congress passed the McCarran Amendment to avoid.

CONCLUSION

Defendants are entitled to summary judgment as a matter of law, and the United States' motion for summary judgment merits denial as a matter of law. Ranchers therefore request that this Court grant their cross-motion for summary judgment, deny the United States' motion for summary judgment, and dismiss this case.

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Respectfully submitted this 17th day of April 2023.

Respectfully submitted,

/s/ Norman M. Semanko

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CERTIFICATE OF SERVICE

I hereby certify that, on April 17, 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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