

Nos. 25-947, 25-1191, 25-1203, 25-1214

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellant – Cross-Appellee,

v.

STATE OF IDAHO et al.,
Defendants – Appellees – Cross-Appellants,

IDAHO HOUSE OF REPRESENTATIVES et al.,
Intervenor Defendants – Appellees – Cross-Appellants,

IDAHO FARM BUREAU FEDERATION, INC. et al.,
Intervenor Defendants – Appellees – Cross-Appellants.

Appeal from the United States District Court for the District of Idaho
No. 1:22-cv-00236-DCN (Hon. David C. Nye)

RANCHERS' REPLY BRIEF

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ARGUMENT

In the United States’ response/reply brief—here, the Third Brief—the United States barely mentions two points the Ranchers¹ raised in their Opening Brief.² *First*, the Ranchers explained that the main precedent that the United States uses to support its argument that it can wield “sovereign immunity” as a plaintiff and as a sword—*United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994)—does *not* invite “offensive” immunity to avoid the McCarran Amendment. *See* Ranchers’ Opening Brief 19–20. And *second*, the Ranchers explained that the United States’ attempt to use “offensive” sovereign immunity is repugnant to the Constitution. Ranchers’ Opening Brief 22–24. The United States barely pays lip service (no more than one or three sentences) to either argument, *see* Third Brief 30 (three sentences on *Oregon*), 32 (one sentence on the Constitution). But each argument by the Ranchers would justify upholding the district court’s correct dismissal of the United States’ “sovereign immunity claim.” As the district court explained, “The problem with the United States’ sovereign immunity ‘claim’ is that it is not a claim at all,” and thus the district court dismissed the claim. ER 44–45. This Court should uphold that decision.

¹ As they did before the district court, these appellees/cross-appellants—Joyce Livestock Co., LU Ranching Co., Pickett Ranch & Sheep Co., and Idaho Farm Bureau Federation, Inc.—refer to themselves as the “Ranchers.”

² For simplicity, the Ranchers will refer to that brief here as the Ranchers’ Opening Brief. The brief is docketed as *Ranchers’ Response Brief and Brief on Cross-Appeal*, and as Dkt. Entry 29.1 (July 30, 2025).

The Appellees/Cross-Appellants have already thoroughly covered everything that the United States addressed in the Third Brief. So rather than repeat those arguments, the Ranchers respectfully submit this targeted reply to reinforce two points that they raised in their opening brief and which the United States effectively ignored in the Third Brief: (A) this Circuit did not bless “offensive” immunity in *Oregon*; and (B) the Circuit should not use this case to bless the United States’ attempt to wield immunity as a sword.

A. This Circuit did not bless “offensive” immunity in *Oregon*.

“[T]he most fundamental principle of statutory interpretation” is to “Read the statute.” *Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr.*, 597 U.S. 424, 446 (2022) (Kavanaugh, J., dissenting); *see also, e.g., In re England*, 375 F.3d 1169, 1181–82 (D.C. Cir. 2004) (Roberts, C.J.) (citing Henry J. Friendly, *Benchmarks* 202 (1967), which “call[ed] to mind what Judge Friendly described as Felix Frankfurter’s ‘threefold imperative to law students’ in his landmark statutory interpretation course: ‘(1) Read the statute; (2) read the statute; (3) read the statute!’”).

Here, the United States sued Idaho and asserted that it can bring claims pursuant to the McCarran Amendment, 43 U.S.C. § 666. Subsection (a) of the statute says,

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 United States repeats in the Third Brief its argument that this language lets it wield sovereign immunity as an offensive weapon to cut down Idaho's stockwater-procedure statute even though the United States has not been sued. Third Brief 27–33. But the McCarran Amendment does no such thing; its language is clear: the condition precedent to the question whether the United States can invoke immunity from the application of Idaho's law turns on whether the United States is placed in a role "as a defendant." 43 U.S.C. § 666(a). Unless and until that happens, the United States has no basis for trying to invalidate the statute on sovereign-immunity grounds.

The district court saw this simple premise clearly. The district court further explained the premise:

The problem with the United States' sovereign immunity "claim" is that it is not a claim at all. Sovereign immunity is a defense from suit; it does not give rise to a cause of

action of its own. As the Ranchers correctly point out, “[a]t best, the agencies are anticipating the day when they are sued by the state” and affirmatively asserting their sovereign immunity defense as a claim for relief. But sovereign immunity is a shield to defend against suit, not a sword that may be wielded against a hypothetical foe in an imaginary future battle.

ER 44 (internal citation to summary-judgment briefing omitted). One would think that the premise is sufficiently straightforward that the United States would simply abandon the claim. But that is not what has happened here.

Instead, the United States in its Third Brief doubles down on its argument that this Court blessed “offensive” sovereign immunity in *United States v. Oregon*, 44 F.3d 758 (9th Cir. 1994). On what grounds? Because—says the United States—in *Oregon*, “this Court never questioned” the United States’ invocation of sovereign immunity. Third Brief 30. But the question whether the United States can take sovereign immunity “on offense” was not apparently raised to the district court in *Oregon*. See generally *United States v. State of Or. Water Res. Dep’t*, 774 F. Supp. 1568, 1581 (D. Or. 1991). Nor did the appellants or appellees in that case discuss it in their briefs to this Court. See generally *United States v. Oregon*, Nos. 92-36983, 92-36985, 92-36987, 92-37001 (Aug. 2, 1993), Br. for the United States of America as Appellant³; *Id.* (Oct. 15, 1993), Appellees/Cross-Appellants’ Br.

³ See also generally *United States v. Oregon*, Nos. 92-36983, 92-36985, 92-36987, 92-37001 (July 30, 1993), Br. of Appellant Klamath Allottees Water Users Ass’n; *Id.* (July 30, 1993), Br. for Appellant/Cross-Appellee Klamath Tribe.

For sure, the “party presentation principle is supple, not ironclad”; but “in our adversarial system of adjudication,” we generally still follow it. *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020). And it would have been a departure indeed for the Court in *Oregon* to have read the parties’ and lower court’s silence on whether the United States can wield an “offensive McCarran Amendment sovereign immunity claim” as a fully briefed invitation to answer the question—such an assumption of duty might have been considered immodest, at best. *See id.* at 376; *see also In re Nance*, No. 24-2745, 2025 WL 2908823, at *2 (9th Cir. Oct. 14, 2025) (citing *Sineneng-Smith*’s “abuse of discretion” standard).

Here, the United States offers to this Court a misunderstanding of *Oregon*: the United States says that this Court “never doubted” that the United States could wield “sovereign immunity” on offense, First Brief 33; put another way, “this Court never questioned” whether the United States could do so, Third Brief 30. But the parties never presented that question to the Court, and the lower court had not said anything about it either⁴—it was never presented to this Court. And it is too far a stretch to suggest that in its silence in the face of the parties’ *own* silence, the Court in *Oregon* nevertheless blessed the United States’ use of a novel “sovereign immunity” claim that could be wielded as a sword to cut down state water laws.

⁴ In contrast, the district court *here* cited to the defendants’ briefing of the issue during the proceedings below. ER 44.

B. This Circuit should not use this case to bless the United States’ attempt to wield immunity as a sword.

Further, the United States presents no policy basis for a court letting it use codified sovereign immunity offensively—essentially, letting it re-write Congress’s text in the McCarran Amendment. This Court did not do so in *Oregon* either.

At this Court, the Ranchers have laid out a policy basis for prohibiting the United States from using sovereign immunity as a sword. Ranchers’ Opening Brief 22–24. For example, “offensive” sovereign immunity would let the Executive Branch trample over the other two federal Branches and the States—not to mention the people. *Id.* at 23–24. The United States provides only an acknowledgement of the Ranchers’ point; there is no actual explanation in the United States’ Third Brief why the Ranchers are supposedly wrong. *See* Third Brief 32–33. As the brief puts it, “The Ranchers . . . contend that allowing the United States to assert sovereign immunity ‘offensively’ is ‘absurd,’ ‘repugnant’ to the U.S. Constitution, and contrary to principles of federalism.” Third Brief 32. That’s right! And the United States says nothing to rebut the contention.

Going further and with the McCarran Amendment specifically in mind, the idea of preventing federal regulators from roaming the Nation to strongarm ranchers informed Congress’s codification of the McCarran Amendment. As the State of Oregon described to this Court in 1993, including citations to the congressional record:

The McCarran Amendment was proposed to remedy a recurring problem in the arid and semi-arid Western States. The United States held claims to a substantial quantity of water rights in these States, but it consistently refused to participate in state adjudications designed to settle the priority of claims to particular rivers or stream systems. Hearings on S. 18 before the Subcommittee of the Senate Judiciary Committee, 82d Cong., 1st Sess., 3-4 (1951). The United States instead invoked sovereign immunity and settled disputes *or brought class actions in federal court to resolve disputes it could not settle*. *Id.* at 2-3, 6-7, 9, 27.

The United States’ litigation strategy was not well received. . . . The United States’ settlement efforts with individual water rights claimants were also viewed as unsatisfactory because, as one Senator put it during the hearings, the government’s immunity from suit put the private parties negotiating with the government “over the barrel.” *And the government’s use of a class-action in federal court was seen as putting other water users at a procedural disadvantage*. *Id.* at 27, 38. . . . The McCarran Amendment was Congress’ answer to this problem. . . . [T]he problem Congress sought to solve — the United States’ water rights litigation strategy — was endemic to all the western States.

United States v. Oregon, Nos. 92-36983, 92-36985, 92-36987, 92-37001 (Oct. 15, 1993), Appellees/Cross-Appellants’ Br. 15–16 (emphasis added, citations to the congressional record in the original).⁵

⁵ Also available at 1993 WL 13011225, at *15–16. To be fair, the State of Oregon further proposed that the McCarran Amendment does not prevent the United States from “initiating suit” “to have its rights declared.” *Id.* at *43–44. But that language and the case the State cited were strictly addressing filing a suit to adjudicate disputed “rights to waters in certain rivers,” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976), not a declaration that the United

In this case, the point of such legislative history is *not* to replace the text as Congress wrote it. No doubt, the United States *does* want to rewrite the McCarran Amendment; but that would infringe on the Legislative Branch’s congressional authority as well as the Judicial Branch’s “province and duty . . . to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177, (1803). No, the point of such legislative history in McCarran Amendment cases is just to explain that Congress did find repugnant the federal regulators’ heavy-handed approach to water in the West; and this Court has acknowledged such use of legislative history before: “Although an examination of Congress’ purposes and the historical context of the statute may not serve to waive immunity when the text of the statute fails to do so unequivocally, the scope of such a waiver can only be ascertained by reference to underlying congressional policy.” *Oregon*, 44 F.3d at 765–66 (internal citations and quotations omitted). As the Court further explained, “The Supreme Court has repeatedly looked to indicia of congressional intent in order to construe the scope of the unequivocally expressed waiver of immunity in the McCarran Amendment.” *Id.* at 766. Reading the McCarran Amendment in a way that would let the United States go on *offense* with it would indeed undermine Congress, the States, the people, and the Constitution.

States could wield “sovereign immunity” as a sword to kill codified state procedures for administering water rights.

To finish the point, the U.S. Supreme Court has similarly looked down upon the United States' attempts to render the McCarran Amendment "largely nugatory." *United States v. Idaho ex rel. Director, Idaho Department of Water Resources*, 508 U.S. 1, 7 (1993). There, as here, the United States sought to avoid Idaho laws that governed administration of water rights. The United States contended that the McCarran Amendment only waived immunity as "to state substantive law of water rights," but not to the procedural laws the States used to implement those substantive laws. *Id.* at 6–7. But the Court would not let the United States twist the McCarran Amendment's waiver to avoid state-law procedures for administering water rights, because Congress did not "intend[] to create such a legal no-man's land in enacting the McCarran Amendment." *Id.* at 7.

So it is here. If the United States is immune from I.C. § 42-224 administration, then private stockwater-rights holders lose the forum in which they can protect their rights against erroneous or inflated claims—federal or otherwise. Ranchers would again have no pragmatic mechanism to test whether the federal government's or anyone else's stockwater use (or non-use) has legal consequences. And ultimately, the United States would become the single stockwater-right claimant in Idaho whose decreed rights can never be subject to state-law enforcement or examination, even when federal nonuse prejudices others' stockwater rights.

CONCLUSION

The United States’ sovereign-immunity “claim” does not withstand scrutiny. The government seeks to use sovereign immunity offensively—not as a shield against suit but as a mechanism to block Idaho’s application of neutral, generally applicable state water-administration procedures that apply to all stockwater rights. Nothing in the Constitution, the McCarran Amendment, or federal immunity doctrine—and no hint of this Court’s opinion in *Oregon*—authorizes the federal government to proactively nullify state-law administration simply because the State’s process might, hypothetically and someday, subject the federal government to suit over its asserted stockwater rights.

Accordingly, the Ranchers again ask the Court to affirm the district court as to I.C. § 42-224, and to reverse as to the narrow issue in I.C. § 42-113(b).

Respectfully submitted this 18th day of November, 2025,

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 25-947, 25-1191, 25-1203, 25-1214

I am the attorney or self-represented party.

This brief contains 2,526 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief:

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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