

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' RESPONSE BRIEF AND BRIEF ON CROSS-APPEAL

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STATEMENT OF JURISDICTION

The United States brought this action in the United States District Court for the District of Idaho, challenging Idaho statutes under the Supremacy Clause, the Contracts Clause, and the Property Clause of the United States Constitution. The district court had original jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1345.

The district court entered an amended final judgment that resolved all claims and issues on December 16, 2024. The United States filed a notice of appeal on February 11, 2025, which was timely under Fed. R. App. P. 4(a)(1)(B). The State of Idaho, the Idaho Legislature, and the Ranchers filed cross-appeals on February 24 and 25, 2025, which were timely under Fed. R. App. P. 4(a)(3). This Court has jurisdiction over the appeal and the cross-appeals under 28 U.S.C. § 1291 because the district court's amended judgment resolved all claims and issues.

This brief has two parts. In the first part, the Ranchers¹ submit their responses to the United States’ brief—the First Brief²—which is about I.C. § 42-224. The district court dismissed the United States’ challenge to that statute, and the Ranchers argue that this Court should affirm the district court’s decision.

In the second part, the Ranchers explain why this Court should overturn the district court’s narrow decision to grant judgment to the United States on a different statute’s subsection, I.C. § 42-113(2)(B).

INTRODUCTION AND STATEMENT OF THE CASE AS TO BOTH PARTS

In 1952, Congress gave consent to join the United States in any suit “for the adjudication” and “the administration of” “State law” appropriated water rights. 43 U.S.C. § 666(a). The statute that did that is called the McCarran Amendment. Decades later, Idaho began the Snake River Basin Adjudication (the Adjudication or SRBA) to figure out all water rights within the State’s Snake River Basin water system. ER 21.³ The Adjudication took 27 years. *Id.*

In the meantime and responding to controversies that came up during the Adjudication, the Idaho Supreme Court issued a decision called *Joyce Livestock Co.*

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 In this brief, the Ranchers refer to the *First Brief on Cross Appeal for United States* as the “First Brief” or “First Br.”

³ References to the *United States’ Excerpts of Record* are stated as “ER” in this brief.

v. United States, 156 P.3d 502 (Idaho 2007),⁴ which took on questions from the Adjudication about how Idaho law applied to rights to use Idaho stockwater.

Among other points, the court held that longstanding Idaho water law required the United States *itself* to put stockwater to beneficial use—that is, water livestock—to prove a right to use that stockwater. *Id.* at 519–20. The United States does not like that decision, and here we are almost 20 years later with the United States trying to challenge the Idaho Supreme Court’s decision.

The United States would have this Court believe that our federal government can override Idaho law about water rights. The United States’ hook is that some ponds are on federal land. But under Idaho law, it doesn’t matter where the pond is. *Id.* at 519. A landowner in Idaho does not get a “riparian” right to use stockwater; rather, the person actually using the stockwater obtains the right. *Id.* So the landowner does not have a right to use stockwater just because the pond is on her land. If the landowner is not watering livestock, then she can only claim a right to use stockwater if the person watering livestock is the landowner’s “agent.” *Id.* But not every rancher watering cattle is the federal government’s agent.

After the final SRBA decree and recognizing the Idaho Supreme Court’s

⁴ It is worth resaying that Joyce Livestock Company is one of the Ranchers here.

explanation of longstanding Idaho law in *Joyce Livestock Co.*, the Idaho Legislature⁵ passed new laws about rights to use Idaho stockwater, the most important of which created an administrative procedure “for initiating forfeiture proceedings for stockwater rights.” ER 40. The codified procedure is at I.C. § 42-224.

The United States sued Idaho challenging I.C. § 42-224 on grounds that the statute’s procedure fell outside the McCarran Amendment, 43 U.S.C. § 666(a); it discriminated against the United States; it violated the U.S. Constitution’s Contracts and Property Clauses; and it violated the Idaho Constitution’s Retroactivity Clause. First Br. 25. The Idaho Legislature and the Ranchers on this brief intervened in the case to defend the statute alongside the State. ER 126, ER 252.

The district court resolved all the United States’ challenges to I.C. § 42-224 in the combined defendants’ favor. ER 9.⁶ And for good reason: the plain text of the statute shows that it fits squarely within the McCarran Amendment and does not target the United States for any discriminatory treatment. The statute does not reach back to interfere with any contracts or the SRBA, nor does it deprive the United

⁵ Here, appellees/cross-appellants the 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 are the “Idaho Legislature.”

⁶ In contrast, the district court found for the United States favor as to other statutes. In the cross-appeal part of this brief, the Ranchers challenge the district court’s decision regarding I.C. § 42-113(2)(b).

States of any property or otherwise work retroactively. Rather, it creates a forward-looking, neutral procedure that provides order and transparency in the State's efforts to figure out *who* is actually using stockwater and, accordingly, *who* can claim a right to use the water. If at some point the United States or anyone else had rights to use stockwater, then failing to *actually use* the stockwater acts as a forfeiture without regard to I.C. § 42-224. The only thing the statute does is provide a process to help everyone.

So contrary to the United States' conjuring of imaginary evils, I.C. § 42-224 does not "generally preclude federal agencies from acquiring or holding water rights for livestock on federal grazing land unless the agencies graze their own livestock." First Br. 1. The statute treats "the United States no differently than any other public or private stockwater rights owner." ER 41. Federal law requires the United States to follow Idaho's procedures, 43 U.S.C. § 666(a)(2), and that should be the end of the United States' appeal. This Court should affirm as to I.C. § 42-224.

It's fair to say that in its broad-brush frustration about not controlling all of the water in the West, the United States did convince the district court that an Idaho rancher cannot sell his right to use stockwater. The district court was right when it said the arguments either way were "misleading," ER 39, although it's unclear who the district court thought was being misleading. What the district court did on I.C. § 42-113(2)(b) is different in kind from its decision on I.C. § 42-224, and the

Ranchers respectfully ask this Court to undo what the district court did as to I.C. § 42-113(2)(B) but leave in place the district court's decision on I.C. § 42-224. There's no reason to think that a rancher cannot transfer his or her rights to use stockwater. If the rancher is actually watering livestock and the next owner of the ranch will do the same, then why cut off the right to use the stockwater? The obvious answer is that there's no reason to do that. The statute, I.C. § 42-113(b)(2), just codifies that idea, and the district court should have seen that.

PERTINENT STATUTES AND REGULATIONS

The Ranchers incorporate the First Brief's Addendum as if set forth here.

SUMMARY OF ARGUMENT ABOUT I.C. § 42-224

The proceedings to administer stockwater rights enabled by I.C. § 42-224 are within the McCarran Amendment's waiver of sovereign immunity. And what's more, the district court was correct to dismiss the United States novel "sovereign immunity claim" challenging Idaho's law because there is no such thing. Sovereign immunity is a defense that the United States can invoke only once it has been sued. But the United States admits, as it must, that it has not been sued under I.C. § 42-224, and the Declaratory Judgment Act does not help the United States avoid the deficiencies in its argument. Whatever "imaginary evils" the United States purports to be slaying by wielding a "sovereign immunity claim" as a sword, they pale in comparison to the real "evil" of letting the United States roam the Nation challenging state laws

that it does not like on “sovereignty” grounds even where it has not been sued. *See United States v. Lee*, 106 U.S. 196, 217, 221 (1882).

The United States raises several further arguments suggesting that I.C. § 42-224 is sinister. But it is not. It does not reach back to undermine any contracts or decrees arising from the SRBA or otherwise. It does not divest the United States or anyone else of property rights—if a putative rights holder does not actually use stockwater for five years, then the right goes away irrespective of I.C. § 42-224. The statute merely provides a process for figuring out *who* owns *what* right to use stockwater in Idaho. It is a fair and forward-looking law. The district court agreed and ruled against the United States’ challenge to I.C. § 42-224. This Court should affirm the district court in that regard.

STANDARD OF REVIEW

The Ranchers are satisfied that the district court’s grant of summary judgment is reviewed de novo. First Br. 32. But if the United States is questioning the district court’s application of the Declaratory Judgment Act, *see infra*, Argument § I(B)(3), then the district court’s application of the Declaratory Judgment Act is reviewed for abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288–90 (1995).

ARGUMENT IN RESPONSE

I. Congress waived the United States’ immunity from suits brought against it under I.C. § 42-224.

The point of the McCarran Amendment was to put the United States on a level

playing field with other water-appropriators in the West, whether by forcing the United States to take part in rights adjudications or in the other state procedures that give practical effects to the adjudications. The United States would prefer to opt out of its legal obligations, but it cannot get around the McCarran Amendment or I.C. § 42-224, which codifies a procedure that gives practical effect to the SRBA and rights to use stockwater in Idaho. The statute helps the State, the Ranchers, and others administer stockwater rights in an orderly, transparent way.

A. The McCarran Amendment requires the United States to take part in suits brought against it under I.C. § 42-224.

In the McCarran Amendment, Congress gave consent “to join the United States as a defendant in any suit . . . for the administration of [rights to the use of water of a river system or other source], 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.” 43 U.S.C. § 666(a)(2).

When there has been an “adjudication of rights to the use of water of a river system or other source,” 43 U.S.C. § 666(a)(1), the question moves to the next step, which asks whether the dispute is about “the administration of [water] rights.” *S. Delta Water Agency v. U.S., Dep’t of Interior, Bureau of Reclamation*, 767 F.2d 531, 541 (9th Cir. 1985) (holding there had been no adjudication, so not reaching the question of administration).

To be sure, the relevant precedent—binding or otherwise—on what it means to “administer” adjudicated rights per 43 U.S.C. § 666(a)(2) is thin. But the formulation by the United States District Court for the District of Nevada makes sense, at least as a pragmatic interpretation:

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. Once there has been such an adjudication and a decree entered, then one or more persons who hold adjudicated water rights can, within the framework of 666(a)(2), commence among others such actions as described above, subjecting the United States, in a proper case, to the judgments, orders and decrees of the court having jurisdiction.

United States v. Hennen, 300 F. Supp. 256, 263 (D. Nev. 1968). In that case, the United States had obtained water rights that had been subject to an adjudication. *Id.* at 258–59. Upon learning that there was a clerical error in the adjudication that favored the United States, the United States challenged fixing the error. *Id.* But obviously, figuring out *who* had *what* rights fell well within the scope of “the administration of” those rights under 43 U.S.C. § 666(a)(2). *Id.* at 263–64.

So it is here. The United States admits that any stockwater rights that would be administered by I.C. § 42-224 meet the “adjudication” threshold of McCarran Amendment, 43 U.S.C. § 666(a)(1). *E.g.*, First Br. 38 (“the federal stockwater rights at issue here . . . were decreed in the SRBA”); *see also* ER 29 (“The SRBA was an administrative and adjudicative process to determine ownership and priority of water

rights in the Snake River Basin.”). And the question left is whether I.C. § 42-224 “give[s] practical effect” to that prior adjudication. *See State Eng’r of State of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*, 339 F.3d 804, 807 (9th Cir. 2003).

Of course it does. The United States’ argument on “administration” goes haywire at this point. According to the United States, I.C. § 42-224 is **both (i)** too targeted at the United States, *see, e.g.*, First Br. 36 (“§ 42-224 proceedings target, for a limited forfeiture review, the already decreed stockwater right(s) of a ‘single owner’ (here the United States)”)—to be clear, the statute does not do that; **and (ii)** too broad, *see, e.g., id.* at 38 (“although the federal stockwater rights at issue here (named in IDWR’s show-cause orders) were decreed in the SRBA, the forfeiture proceedings do not involve the administration of those rights in relation to other decreed rights. . . . IDWR must initiate forfeiture proceedings upon a petition by any person or persons”). The whole point is that I.C. § 42-224 creates a procedure to figure things out, and the United States cannot opt out of that procedure.

The statute does not target the United States, it just offers a way to administer decreed rights; it “gives practical effect” to the prior adjudication of rights. *See Te-Moak Tribe*, 339 F.3d at 807. For avoidance of doubt and for ease of reference, here is the statute in whole:

42-224. FORFEITURE OF STOCKWATER RIGHTS.
 (1) Within thirty (30) days of receipt by the director of the

department of water resources of a petition or other information that a stockwater right has not been put to beneficial use for a term of five (5) years, the director must determine whether the petition or other information, or both, presents prima facie evidence that the stockwater right has been lost through forfeiture pursuant to section 42-222(2), Idaho Code. If the director determines the petition or other information, or both, is insufficient, he shall notify the petitioner of his determination, which shall include a reasoned statement in support of the determination, and otherwise disregard for the purposes of this subsection the other, insufficient, information.

(2) If the director determines the petition or other information, or both, contains prima facie evidence of forfeiture due to nonuse, the director must within thirty (30) days issue an order to the stockwater right owner to show cause before the director why the stockwater right has not been lost through forfeiture pursuant to section 42-222(2), Idaho Code. Any order to show cause must contain the director's findings of fact and a reasoned statement in support of the determination.

(3) The director must serve a copy of any order to show cause on the stockwater right owner by personal service or by certified mail with return receipt. Personal service may be completed by department personnel or a person authorized to serve process under the Idaho rules of civil procedure. Service by certified mail shall be complete upon receipt of the certified mail. If reasonable efforts to personally serve the order fail, or if the certified mail is returned unclaimed, the director may serve the order by publication by publishing a summary of the order once a week for two (2) consecutive weeks in a newspaper of general circulation in the county in which the point of diversion is located. Service by publication shall be complete upon the date of the last publication.

(4) 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.

(5) The director may consider multiple stockwater rights held by a single owner in a single order to show cause.

(6) The stockwater right owner has twenty-one (21) days from completion of service of the order to show cause to request in writing a hearing pursuant to section 42-1701A(1) and (2), Idaho Code.

(7) If the stockwater right owner fails to timely respond to the order to show cause, the director must issue an order within fourteen (14) days regarding forfeiture stating the stockwater right has been forfeited pursuant to section 42-222(2), Idaho Code.

(8) If the stockwater right owner timely requests a hearing, the hearing shall be in accordance with section 42-1701A(1) and (2), Idaho Code, and the rules of procedure promulgated by the director. Following the hearing, the director must issue an order regarding forfeiture that sets forth findings of fact, conclusions of law, and a determination of whether the stockwater right has been forfeited pursuant to section 42-222(2), Idaho Code. The director must issue the order regarding forfeiture no later than forty-five (45) days after completion of the administrative proceeding.

(9) Any order determining that a stockwater right has been forfeited pursuant to subsection (7) or (8) of this section shall have no legal effect except as provided for in subsection (11) of this section. No judicial challenge to an

order determining that a stockwater right has been forfeited pursuant subsection (7) or (8) of this section shall be allowed except within the civil action authorized in subsections (10) and (11) of this section.

(10) Within sixty (60) days after issuance of an order by the director determining that a stockwater right has been forfeited, the state of Idaho, by and through the office of the attorney general, must initiate a civil action by electronically filing in the district court for the fifth judicial district, Twin Falls county, the following: a complaint requesting a declaration that the stockwater right is forfeited; certified copies of the order regarding forfeiture; and the record of the administrative proceeding. A copy of the complaint and accompanying documents shall be served on the stockwater right holder who shall be named as the defendant in the action, all parties to the administrative proceeding, and any holder or holders of livestock grazing permits or leases for the place of use of the stockwater right for which the director possesses an address. Any person may move to intervene in the action pursuant to the Idaho rules of civil procedure, but only if such a motion is filed at least twenty-one (21) days before the date set for the hearing under the scheduling order.

(11) After the initiation of the civil action required by this section, the proceedings in the district court shall be like those in a civil action triable without right to a jury, provided that the department of water resources shall not be a party to the civil action but may appear as a witness to explain the basis for the director's forfeiture determination. In any such proceeding, the director's order determining forfeiture shall constitute prima facie evidence that the right has been forfeited but shall not change the standard of proof for forfeiture of the water right established by section 42-222(2), Idaho Code.

(12) At the conclusion of the action, the district court shall issue an order determining whether the stockwater right has been forfeited pursuant to section 42-222, Idaho Code. If the district court determines that the stockwater right has

been forfeited, the court shall also enter a judgment that the stockwater right has been forfeited.

(13) For purposes of this section, the following terms have the following meanings:

(a) “Stockwater right” means water rights for the watering of livestock meeting the requirements of section 42-1401A(11), Idaho Code.

(b) “Stockwater right owner” as used in this section means the owner of the stockwater right shown in the records of the department of water resources at the time of service of the order to show cause.

(14) This section applies to all stockwater rights except those stockwater rights decreed to the United States based on federal law.

I.C. § 42-224; First Br. Addendum 5–8.

A few things stand out immediately when reading this statute. *First*, it is absolutely about administering decreed water rights. *See* 43 U.S.C. § 666(a)(2); *Hennen*, 300 F. Supp. at 263. *Second*, it does not target the United States—it does not mention the United States at all except for carving out exceptions in favor of the United States about notice and federal reserved water rights. *See* I.C. § 42-224(4), (14). And *third*, that leaves the United States having to argue the following to fulfill its theory: the McCarran Amendment waiver of sovereign immunity in 43 U.S.C. § 666(a)(2) *only* applies when a state statute exclusively and expressly invokes a specific basin-wide adjudication yet does not in any way suggest that the United States might have been involved in the water rights at issue.

The McCarran Amendment, of course, does not say that. *See* 43 U.S.C. § 666. The United States offers no support for that proposition, nor could it. *See, e.g.*, First Br. 37–40⁷; *see also United States v. State of Or.*, 44 F.3d 758, 769 (9th Cir. 1994) (rejecting such parsimonious interpretations of the McCarran Amendment’s waiver of sovereign immunity).⁸

The result is that in 43 U.S.C. § 666(a)(2), Congress has already told the United States that it must follow statutes exactly like I.C. § 42-224, which give practical effect to—or, administer—prior adjudications like the SRBA. *See Te-Moak Tribe*, 339 F.3d at 807. In other words, Congress has waived the United States’ sovereign immunity to suits brought against the United States per I.C. § 42-224, and the Court should deny the United States’ appeal and its attempt to assert otherwise.

B. The district court correctly denied relief on the “sovereign immunity claim.”

1. The United States may not wield sovereign immunity as a sword.

In the United States, “It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent.” *The Siren*, 74 U.S.

⁷ The United States’ suggestion (First Br. 38) that there is some analogy to its position in this Court’s decision in *Te-Moak Tribe*, 339 F.3d at 811 is unfounded. *Te-Moak Tribe* says nothing of the sort at the cited page or elsewhere, and it does not lend any support to the United States’ proposition.

⁸ This Court’s decision and explanation in *United States v. Oregon* is discussed more fully and in a different context below, *infra*, at Argument § I(B)(4).

152, 153–54 (1868). It is a judge-made doctrine that does not appear in the Constitution, yet it is a “fundamental principle,” *Carr v. United States*, 98 U.S. 433, 437 (1878); it is “axiomatic,” *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (discussing the Tucker Act’s waiver of sovereign immunity). Said again as the courts have repeatedly said it, “the United States may not *be sued* without its consent.” *E.g.*, *Mitchell*, 463 U.S. at 212 (regarding sovereign immunity as a defense and arguing that the Court of Claims lacked jurisdiction) (emphasis added).

The proposition that sovereign immunity arises when the United States *is sued*—not when it is suing—is familiar in this Circuit. The Court has recited the doctrine in this way:

The United States, as a sovereign, is immune *from suit* unless it has waived its immunity. A court lacks subject matter jurisdiction over a claim against the United States if it has not consented *to be sued* on that claim. “When the United States consents *to be sued*, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction.” A waiver of sovereign immunity by the United States must be expressed unequivocally. As a general matter, purported statutory waivers of sovereign immunity are not to be liberally construed.

Consejo de Desarrollo Económico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1173 (9th Cir. 2007) (citations omitted, emphasis added). So it is nothing new to say that *a plaintiff* does not have a cause of action for “sovereign immunity.”

2. The United States has not been sued here.

Here, as the United States concedes, “Idaho has not yet commenced a civil

suit for the declared forfeiture of federal stockwater rights.” First Br. 34. In other words, the United States has not “been sued” without its consent—it has not “been sued” at all in this case, and the district court properly considered this dispositive in dismissing the United States’ “sovereign immunity claim.” ER 44–45.

3. The Declaratory Judgment Act does not save the case.

The United States’ breezy invocation of the Declaratory Judgment Act, *see* First Br. 32, does not save its attempt to wield sovereign immunity as a sword. Under the Declaratory Judgment Act, “any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201(a) (emphasis added).

To the extent the United States is questioning the district court’s application of the Act, *see* First Br. 24, 27–28, 32–35, the Act plainly gives a district court discretion to grant or deny a request for declaratory relief. *Id.*

By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court’s quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close.

Wilton v. Seven Falls Co., 515 U.S. 277, 288 (1995). “[D]istrict courts’ decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief,

should be reviewed for abuse of discretion.” *Id.* at 289–90.

Here, the United States brought a novel “sovereign immunity claim” to strike down the procedure in I.C. § 42-224 while acknowledging that it has not been sued pursuant to the statute, and it argues that the Declaratory Judgment Act *prevented* the district court from dismissing its novel claim. First Br. 32. If the United States’ contention is that the district court had to reach some other result on the “sovereign immunity claim” *because* the United States invoked the Declaratory Judgments Act, the United States is wrong; the Act imposed no such restraint on the district court. 28 U.S.C. § 2201(a); *Wilton*, 515 U.S. at 288; *Siino v. Foresters Life Ins. & Annuity Co.*, 133 F.4th 936, 943 (9th Cir. 2025). Either way, the district court did dismiss the “sovereign immunity claim,” and—whether this Court reviews the decision *de novo* or for abuse of discretion—it provided ample basis for doing so. *E.g.*, ER 44–45.

Further, the United States does not point to any court decision—binding here or not—holding that the Act requires a district court to let *the United States*, as “plaintiff,” offensively state a “sovereign immunity claim” to avoid the McCarran Amendment or otherwise. *Contra* First Br. 32–33.⁹ Given the Act’s permissive nature, *see* 28 U.S.C. § 2201(a), that is not a surprising result. And the cases that the United States cites do not support its proposition. In *In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264 (5th Cir. 2001), a foreign nation (so, not the United States)

⁹ And to finish the point, the Ranchers have likewise found no such decision.

through its ambassador, brought an *in rem* action for declaratory and injunctive relief, asserting that an aircraft, purportedly owned by the nation’s royal family but sequestered by a Texas sheriff, was subject to the nation’s immunity as a foreign sovereign. True, as the United States says, the Fifth Circuit Court of Appeals did say that a declaratory judgment action “is an appropriate mechanism for obtaining a determination of immunity.” *Id.* at 270. But that was not really at issue in the case, and it was not necessary to the Fifth Circuit’s disposition of the case,¹⁰ in which the court held that there was no independent basis for subject matter jurisdiction. *Id.* at 270–76; *accord* First Br. 34.

If anything, the court’s explanation cut against the United States’ argument here. One of the plaintiff’s arguments pointed to the Foreign Sovereign Immunities Act. *Id.* at 275. That law says, “Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution” 28 U.S.C. § 1609. While that statute was an affirmative *grant* of immunity by Congress rather than a waiver of the United States’ own sovereign immunity, the Fifth Circuit nevertheless found it an insufficient basis for a plaintiff to state a cause of action—“The right to be free from attachment, however, concerns FSIA immunity (28 U.S.C. §§ 1602–1611) and is not an independent cause of action

¹⁰ As the court acknowledged, “this case is quite unusual.” *Id.* at 271.

that would fall under § 1331 (federal question).” *B-727*, 272 F.3d at 275. So while there are differences between the immunities at issue in *B-727* and this case, *B-727* does not support the United States’ contention that it can wield a “sovereign immunity claim” as a way to get around the McCarran Amendment.

The United States’ selective quotation of *United Food & Commercial Workers Local Union v. Food Employers Council, Inc.*, 827 F.2d 519, 525 (9th Cir. 1987), fares no better. *Contra* First Br. 33. That was a contract case, and this Court was explaining that contract defenses could be tested before a coercive breach-of-contract lawsuit; it was not an immunity or United States sovereign immunity lawsuit. *See United Food & Com. Workers Loc. Union*, 827 F.2d at 524–26. Replicating the United States’ chosen quotation *without* the United States’ chosen ellipses results in the following: “As we have seen, one of the primary purposes of the Declaratory Judgment Act is to enable a party *to a contract* to determine the legitimacy of a defense *based on the illegality of the contract without waiting to be sued.*” *Id.* at 525 (emphasis added and used to show the withheld parts of the quotation).

In any event, neither of these supposed Declaratory Judgment Act authorities indicates any error by the district court in this case.

4. Oregon does not invite “offensive” immunity to avoid the McCarran Amendment.

The United States’ invocation of this Court’s decision in *United States v.*

Oregon, 44 F.3d 758 (9th Cir. 1994), does not save its “immunity as a sword” argument either. In *Oregon*, the United States and the Klamath Indian Tribe sued the Oregon Water Resources Department seeking a declaratory judgment that they did not have to take part in “a complex procedure” created by Oregon law to fully resolve water claims in the Klamath River Basin. *Id.* at 762. As the United States acknowledges, First Br. 33, this Court rejected the United States’ attempts to opt out of the McCarran Amendment’s waiver, knocking down several arguments that the proposed Oregon adjudication was not sufficiently comprehensive to invoke the Amendment. *Oregon*, 44 F.3d at 763–70. But the United States goes too far when it says that this Court “never doubted the district court’s jurisdiction” to consider sovereign immunity as a sword. *Contra* First Br. 33. In *Oregon*, this Court simply never addressed the question. *See* 44 F.3d at 763–70. Far from condoning the United States’ approach, the Court did not discuss it at all.

Further undermining the United States’ point, *contra* First Br. 33–34, this Court did not mention *United States v. Washington* 872 F.2d 874 (9th Cir. 1989), in its *Oregon* opinion. And as in *Oregon*, the Court did not condone “offensive” immunity in *Washington*, it simply did not discuss the issue. And even if this Court implicitly had done so, the district court here would have been well within its discretion to declare that the United States could not assert a “sovereign immunity claim” as a plaintiff. *See Wilton*, 515 U.S. at 288.

5. “Offensive” immunity yields an absurd jurisdictional result.

Further, in this Circuit, sovereign immunity acts as a jurisdictional bar. *See, e.g., Consejo de Desarrollo Económico de Mexicali, A.C.*, 482 F.3d at 1173 (“When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court’s jurisdiction.”). So what to make of the United States filing a “sovereign immunity” lawsuit? One implication is that the United States is filing a lawsuit that the receiving court—here, the district court—has no “judicial Power” to hear. U.S. Const. art. III, § 2, cl. 1. Surely, that is not the United States’ intent in this case. *See* First Br. 1 (“The United States brought this action in federal district court to challenge the stockwater amendments under the Supremacy Clause of the United States Constitution and other constitutional provisions . . .”).

No, the absurd result exposes what the district court found obvious: “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.” ER 44. But the United States has not been sued, whether here or otherwise under I.C. § 42-224. First Br. 34. There is no basis for this Court to overturn the district court and let the United States turn its jurisdictional shield into a “sword that may be wielded against a hypothetical foe in an *imaginary* future battle,” there is simply no basis to let the United States use “sovereign immunity” to cut down the Idaho statute. ER 44–45.

The United States asked the district court and is now asking this Court to grant it immunity from legal process in a *different* court involving cases and claims that have *never* been filed against the United States. Those are absurd requests asking for absurd results. Accordingly, the Court should affirm the district court’s dismissal of the United States’ “sovereign immunity claim.”

6. “Offensive” immunity is repugnant to the Constitution.

An example from the U.S. Supreme Court, *United States v. Lee*, 106 U.S. 196 (1882), helps explain why the United States cannot roam the Nation looking for ways to use sovereignty as a sword. The case arose from a dispute over the Arlington Estate, a tract of land that had belonged to George Washington Custis Lee, the son of Confederate General Robert E. Lee. *Id.* at 197, 198–99. Mr. Lee alleged that in furtherance of a plan to turn the property into what is now Arlington National Cemetery, individual federal officers had illegally forced the transfer of the property to the United States by levying taxes and then preventing the payment of those taxes. *See id.* at 198–99.

At first, the United States refused to submit to the court’s jurisdiction, gambling instead that the individual officers would prevail as defendants. *See id.* at 197. But in the process—and as the plaintiff reached trial against two of the officers, in which the plaintiff ultimately prevailed—the United States moved to make the court “understand and be informed” that sovereign immunity barred the plaintiff’s

claims even though the United States had not “been sued” and was not a defendant in the case. *Id.* at 197–98. To its credit, the court refused to let the United States interject sovereign immunity to dispose of the case. *Id.* at 198.

In review, the U.S. Supreme Court explained at length why although the United States *can* use sovereign immunity as a defense when *it* has been sued, the United States cannot go around the Nation wielding sovereign immunity as a sword to impose its will. *Id.* at 204–23. For starters, “Under our system the *people*, who are [in England] called *subjects*, are the sovereign.” *Id.* at 208 (emphasis in original). And the people do not reflexively owe the United States any deference. *See id.*; *see also* U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). As a result, the United States cannot go around invoking “imaginary evils” as the basis for asserting its authority and immunity. *Lee*, 106 U.S. at 217. “[I]f the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.” *Id.* Further,

The evils supposed to grow out of the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations ***will be seen to be small indeed compared to this evil***, and much diminished, if they do not wholly disappear, upon a recurrence to a few considerations.

Id. at 221 (emphasis added). In other words, the United States’ “offensive” use of sovereign immunity as a sword is antithetical to checks and balances, federalism,

individual liberties, and justice in this Nation—it cuts against the things that gave rise to and make up America.¹¹

The “evil” of letting the United States roam the Nation using sovereign immunity “offensively” outweighs any “imaginary evils” the United States might face in having to use sovereign immunity as a shield rather than a sword. *See Lee*, 106 U.S. at 221. The United States must be constrained to raise sovereign immunity when—indeed, if—it ever is called into a court to defend itself in a proceeding to implement I.C. § 42-224.

¹¹ The U.S. Supreme Court went further:

Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of congress and approved by the president to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession? *If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.*

Lee, 106 U.S. at 220–21 (emphasis added).

II. I.C. § 42-224 does not discriminate against or target the United States.

Under the Constitution’s “Supremacy Clause,”

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. “The Constitution’s Supremacy Clause generally immunizes the Federal Government from state laws that [1] directly regulate or [2] discriminate against it.” *United States v. Washington*, 596 U.S. 832, 835 (2022); *Nwauzor v. GEO Grp., Inc.*, 127 F.4th 750, 759 (9th Cir. 2025). As to discrimination, “a state law discriminates against the Federal Government . . . if it singles them out for less favorable treatment or if it regulates them unfavorably on some basis related to their governmental status.” *United States v. Washington*, 596 U.S. at 839 (citations omitted, punctuation removed to clean up the quote). In *United States v. Washington*, 596 U.S. at 839, for example, a Washington law unconstitutionally discriminated against the United States because on its face it only applied to federal workers and explicitly singled them out for treatment that was different from the treatment given to state and private workers.

Here, the United States says I.C. § 42-224 unlawfully discriminates against the United States, even though the only mentions of the United States in the statute

are carve-outs *in favor* of the United States about notice and federal reserved water rights, *see* I.C. § 42-224(4), (14). First Br. 40–47. The district court had no problem reading the plain language of the statute and concluding that it did not discriminate against the United States at all. ER 40–41. The statute “does not single out the federal government for special disfavor either on its face or in application.” ER 41.

Because the statute does not facially discriminate against the United States, the United States must again invent a series of “imaginary evils,” *see Lee*, 106 U.S. at 217, that require this Court to first believe in a crafted strawman only to knock that strawman down—whether it be, as the United States contends, that *Joyce Livestock Co.* invented a “beneficial use” standard, First Br. 41; that I.C. § 42-224 applies retroactively as opposed to prospectively, *id.* at 42; that the statute only applies to stockwater rights on federal and state lands, *id.*; that the statute collaterally attacks the SRBA, *id.*; and that the statute actually *does not* provide an administrative process for responding to and resolving claims that an Idaho stockwater right has not been put to beneficial use for a term of five years, *id.* at 43–44.

But the Idaho Supreme Court did not invent the “beneficial use” standard in *Joyce Livestock Co.*; for more than a century Idaho law has “require[d] that the appropriator actually apply the water to a beneficial use,” and “If that use is stock watering, then the appropriator must actually water stock.” *Joyce Livestock Co. v. United States*, 156 P.3d 502, 520 (Idaho 2007).

III. The Property Clause does not help the United States.

The United States mentions its Property Clause claim, *see* First Br. 25, 26, but it doesn't make any meaningful argument to support it. And that makes sense to the Ranchers just as it did to the district court, *see* ER 45–49. But it's worth mentioning all the same. Under the Property Clause, only Congress has the “Power to dispose of” federal property.” U.S. Const. art. IV, § 3, cl. 2. But without regard to whether the United States is sued under I.C. § 42-224, once the United States has stopped beneficially using Idaho stockwater, its “right” is no longer federal property—the United States has already lost it. *See Joyce Livestock Co.*, 156 P.3d at 516, 518–19.

IV. I.C. § 42-224 does not collaterally attack or impair SRBA decrees.

The United States fares no better on its dressed-up contract claims. The U.S. Constitution's Contract Clause says that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts” U.S. Const. art. I, § 10, cl. 1. And no State has done that here. The thrust of the United States' argument (First Br. 39–40, 51–56), is that because some of the United States' state-law stockwater rights were affirmed or otherwise recognized through settlement agreements in a basin-wide adjudication, therefore the United States are constructively “immune” from Idaho water law. *See id.* You can tell the United States doesn't believe its own arguments by how it more selectively and then further selectively starts cherry-picking its quotations once it gets to the Contract Clause parts of its brief. But there is no actual

support for the United States’ novel argument. Here, no one owes the United States anything or has messed with the United States’ contract obligations. *See Ashley Sveen v. Kaye Melin*, 584 U.S. 811, 818–20, (2018). In the Contracts Clause cases, there’s no reason to conclude that Congress meant anything other than what it said in the McCarran Amendment, 43 U.S.C. § 666(a)(2).

V. I.C. § 42-224 does not apply retroactively.

With respect to the United States’ last main “constitutional” argument, the United States again gets things backward. They contend that the Idaho Legislature has “retroactively” changed their state-law stockwater rights. *See* First Br. 56–60. But *Joyce Livestock Co.* is all about what Idaho law has always been. *See, e.g.*, 156 P.3d at 509 (“The rule in this state, both before and since the adoption of our constitution, is . . . that he who is first in time is first in right.”) (punctuation in original). And I.C. § 42-224 is about how to move forward in Idaho. It does not impose any new conditions on the United States, and the whole point is that it does not apply retroactively. Instead, it provides a forum—tomorrow, or the day after tomorrow—for anyone to say that “a stockwater right has not been put to beneficial use for a term of five (5) years.” I.C. § 42-224(1).

CONCLUSION TO PART I

There’s nothing wrong with I.C. § 42-224. The district court saw that plainly, and this Court should affirm the district court’s decision on that.

ARGUMENT IN CROSS-APPEAL

The Ranchers are less sanguine about the district court’s ruling on I.C. § 42-113(2)(b), and they respectfully ask the Court to reverse the district court on that narrow issue.

The Idaho Legislature said:

For rights to the use of water for in-stream or out-of-stream livestock purposes, associated with grazing on federally owned or managed land, established under the diversion and application to beneficial use method of appropriation: (b) The water right shall be an appurtenance to the base property. When a federal grazing permit is transferred or otherwise conveyed to a new owner, the associated stockwater rights may also be conveyed and, upon approval of an application for transfer, shall become appurtenant to the new owner’s base property.

There’s simply nothing controversial about this statute. Once one accepts that the right to use stockwater in Idaho is not a “riparian” right, *e.g.*, *Joyce Livestock Co.*, 156 P.3d at 512, then it makes sense that a non-riparian landowner can both have and then transfer the right.

The United States said that this statute violated the Contract Clause. The argument makes no sense, as the district court acknowledged. ER 12; ER 51–53. The statute also does not violate the “retroactivity” principle. ER 12. And initially, it seemed like the district court found in the Ranchers’ favor on the statute. *See* ER 11–12. The tough thing, which is what troubled the district court, is that the United States

wrapped all its grievances into its “sovereign immunity claim.” ER 44–45. But the district court was correct in saying, “The problem with the United States’ sovereign immunity ‘claim’ is that it is not a claim at all.” ER 44. Nevertheless, the district court ruled in the United States’ favor on the statute. ER 3, at § 1. The district court should have stuck to its instincts on dismissing the United States “claim” about I.C. § 42-113(b)(2).

CONCLUSION TO PART II

There was no reason for the district court to change its mind on I.C. § 42-113(b)(2). It had already explained in detail why the statute was constitutional and otherwise lawful. And this Court should overturn the district court on that narrow issue so that the district court can revisit how it ended up resolving the United States’ challenge to that statute.

STATEMENT OF RELATED CASES

Like the United States, First Br. 62, the Ranchers are not aware of any related cases currently pending in this Court.

Respectfully submitted this 30th day of July, 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 8,299 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.

is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because:

it is a joint brief submitted by separately represented parties.

a party or parties are filing a single brief in response to multiple briefs.

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Dated: July 30, 2025

/s/ Ivan L. London

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

FORM 15. CERTIFICATE OF SERVICE FOR ELECTRONIC FILING

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

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Service on Case Participants Who Are Registered for Electronic Filing:

I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

Description of Document(s) (required for all documents):

RANCHERS' RESPONSE BRIEF AND BRIEF ON CROSS-APPEAL

Signature: /s/ Ivan L. London

Date: July 30, 2025

ADDENDUM TO THE RANCHERS' FIRST BRIEF ON CROSS-APPEAL¹²
Nos. 25-947, 25-1191, 25-1203, 25-1214

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¹² Except for the following, all pertinent constitutional provisions, statutes, and regulations are contained in the addendum to the State of Idaho's First Brief on Cross-Appeal.

28 U.S.C. § 2201(a)

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

United States Constitution, Article IV, § 3, Clause 2
(“Property Clause”)

The 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

United States Constitution, Article III, § 2, Clause 1
(“Jurisdiction of Courts”)

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amendment X
(“Reserved Powers to States”)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.