

- f. Directs all claimants of rights to the use of surface and ground waters from the water system, including holders of permits for which proof of beneficial use was filed on or prior to the date of entry of the commencement order, to file a notice of claim with the Director as provided in Idaho Code § 42-1409, unless claimants elect to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A.
- g. Approves the method of ascertaining and serving claimants not disclosed following the completion of the service required by Idaho Code § 42-1408(2) (a) through (d)
- h. Authorizes the Director to investigate all uses of water from the system in accordance with Idaho Code § 42-1410 and file a report in accordance with Idaho Code § 42-1411; and
- i. Contains a statement that the district court files will contain affidavits of service and other documents stating the persons served with a copy of the notice of commencement order.

Petition, pp.6-8.

The *Petition* seeks a determination by this Court of all rights to use of the water system including those of the United States as well as all determinations necessary for the proper administration of the water rights determined in the adjudication. The *Petition* also provides that an order commencing the adjudication be issued only if the Court determines that it is possible to defer the adjudication of *de minimis* domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A within the terms of the McCarran Amendment.

The State of Idaho and the United States subsequently filed a *Stipulation* which provides an agreed upon comprehensive procedure for the adjudication of *de minimis* domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A.

On August 8, 2008, the Idaho Supreme Court issued a *Provisional Order Re: Appointment of District Judge, Confirmation of Special Jurisdiction and Determination of Venue for the General Adjudications of the Coeur d'Alene-Spokane River Basin, the Palouse River Basin and the Clark Fork-Pend Oreille River Basins*, designating the Snake River Basin Adjudication District Court of the fifth judicial district of the State of Idaho as the county and court of venue for this general adjudication proceeding.¹

¹ This *Provisional Order* superseded the *Order* previously issued on September 29, 2007.

On October 5, 2016, this Court entered an *Order Setting Commencement Hearing and Procedures for Hearing* for the purpose of determining those matters described in the *Petition*. The *Order* set forth notice and service requirements for the commencement hearing as required by Idaho Code § 42-1407, the issues to be addressed at the commencement hearing as well as the procedures for appearing, presenting evidence, and making statements or legal arguments at the hearing. The *Order* also required service to any Indian tribes residing within the boundaries or having interests in any portion of the Palouse River Basin water system.

On January 12, 2017, the State of Idaho filed an *Affidavit of Service* describing the service process and establishing compliance with the requirements set forth in the Court's *Order* and Idaho Code § 42-1407. The commencement hearing on the *Petition* was held January 18, 2017, in Moscow, Idaho. No party appeared in opposition to the State's *Petition*.

II.

ANALYSIS

A. **The proposed scope of the Palouse River Basin Adjudication is consistent with the requirements of the McCarran Amendment.**

1. **The McCarran Amendment requires a comprehensive adjudication of all rights on the source and its tributary sources.**

Idaho Code § 42-1406B (1) provides that: "Effective management of the waters of northern Idaho requires that a comprehensive determination of the nature, extent and priority of the rights of users of surface and ground water be determined." The statute also provides that the adjudication be commenced "within the terms of the McCarran Amendment." I.C. § 42-1406B (1). "The McCarran Amendment waives federal sovereign immunity in certain general water adjudications, allowing the United States and Indian tribes' water rights to be determined in state-court proceedings."² In *In Re SRBA Case No. 39576*, 128 Idaho 246, 251, 912 P.2d 614,

² The McCarran Amendment provides, in relevant part:

Consent is hereby 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 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 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

619 (1995); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-10 (1976); *United States v. Dist. Court in and for Eagle County, Colo.*, 401 U.S. 520, 524 (1971). This waiver or consent to state court jurisdiction also extends to tribal water rights. *Colorado River Water Conservation Dist.*, 424 U.S. at 809.

Compliance with the McCarran Amendment requires a comprehensive adjudication of all of the water rights on the stream system. In *United States v. Dist. Court in and for Eagle County, Colo.*, the United States Supreme Court, explained the requirement, quoting the amendment's sponsor, Senator McCarran as follows:

S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherever it is necessary to adjudicate all of the rights of various owners on the given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream be joined as parties defendant, any subsequent decree would be of little value.

United States v. Dist. Court in and for Eagle County, Colo., 401 U.S. at 525. (quoting S. Rep. No. 820755). In *Colorado River Water Conservation Dist.*, the United States Supreme Court enunciated the policy behind the requirement:

The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. . . . The consent to jurisdiction given by the McCarran Amendment bespeaks policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

Id. at 819. In *In Re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988), the Idaho Supreme Court held that the McCarran Amendment required the Snake River Basin Adjudication to adjudicate the rights of all those who use a river system within a state, including those who use the water of the tributaries. *Id.* at 9, 764 P.2d at 86.

Accordingly, in order for the Palouse River Basin Adjudication to be commenced within the terms of the McCarran Amendment, the Court must find that the proposed boundaries of the

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).

adjudication include all hydrologically connected surface and ground water sources within the system located in the State of Idaho and include all claims to the use of water within that same system.

2. The proposed boundaries of the adjudication include all hydrologically connected surface and ground water sources within the Palouse River Basin water system.

Idaho Code § 42-1406B (3) requires that an order commencing the adjudication define the source or sources within the state to be adjudicated. The Palouse Basin River system covers portions of northern Idaho located within Benewah, Latah and Nez Perce Counties. The *Petition* more particularly describes the boundaries for the adjudication as follows:

Beginning on the western boundary line of the state of Idaho at the northwest corner of Latah County in Section 25, Township 44 North, Range 6 West, B.M.; thence continuing in a generally easterly direction from the western boundary of the state along the northern boundary of Latah County to the point where the county line common to Benewah and Latah counties meet the east side of Section 28, Township 43 North, Range 4 West, B.M.; thence continuing easterly into Benewah County along the ridge lines and mountain peaks separating the Palouse River drainage to the south, from the Coeur d'Alene-Spokane River to the north and east, while crossing the county line between Benewah and Latah counties multiple times to a point in the NE ¼ of the NW ¼ of Section 22, Township 42 North, Range I West, B.M. where the ridge lines and mountain peaks begin separating the Palouse River drainage to the west and north from the Clearwater River drainage to the east and south; thence continuing generally southerly and westerly along the ridge lines, mountain peaks and hills separating the Palouse River drainage from the Clearwater River drainage, into Nez Perce County to the western boundary of the state; thence north along the western boundary of the state to the point of beginning.

Such that all of the water system is upstream of the state line between Idaho and Washington and includes all surface water and ground waters of; the Cow Creek-Union Flat Creek drainage before such waters reach Washington, the Thorn Creek-Little Thorn Creek drainage before such waters reach Washington, the South Fork of the Palouse River drainage before such waters reach Washington, the Paradise Creek drainage before such waters reach Washington, the Missouri Flat Creek drainage before such waters reach Washington, the Fourmile Creek drainage before such waters reach Washington, the Duffield Creek drainage before such waters reach Washington, the Cedar Creek drainage before such waters reach Washington, the Silver Creek drainage before such waters reach Washington, the North and South Forks of Pine Creek drainage before such waters reach Washington and the Willow Creek drainage before such waters reach Washington. All of these drainages are ultimately tributaries of the Palouse

River in Washington, and contain portions of Benewah, Latah and Nez Perce Counties in Idaho.

Petition, pp.4-5. Exhibit 1 to this *Memorandum Decision* incorporated herein by reference shows the proposed boundaries for the adjudication. The Court finds that the proposed boundaries for the PRBA satisfy the requirements of a McCarran Amendment adjudication.

B. The deferral procedure for *de minimis* domestic and stockwater claims is consistent with the requirements of the McCarran Amendment.

1. The deferral procedure for *de minimis* domestic and stockwater claims.

Idaho Code § 42-1406B (1) requires that a petition request that a commencement order be issued only if the court determines it is possible to defer the adjudication of domestic and stockwater rights as defined by Idaho Code § 42-1401A(4) and (11) and comply with the terms of the McCarran Amendment. The State of Idaho made such a request in the *Petition*. The State of Idaho and the United States filed a *Stipulation* which sets forth an agreed upon process for the deferral of *de minimis* claims. A true and correct copy of the *Stipulation* is attached to this *Memorandum Decision* as Exhibit 2 and incorporated herein by reference. The *Stipulation* sets forth a procedure for the adjudication of *de minimis* domestic and stockwater claims similar to that which was adopted in the Snake River Basin Adjudication and the Coeur d'Alene-Spokane River Basin Adjudication.

2. The United States, in all capacities, including as trustee on behalf of Indian tribe claimants, stipulated that the deferral procedure set forth in the *Stipulation* satisfies the requirements of the McCarran Amendment.

The *Stipulation*, in addition to setting forth a comprehensive procedure, also provides:

Counsel for the United States is entering into this stipulation in order to accommodate the State of Idaho's desire to streamline the instant phase of the adjudication. Counsel for the United States and State of Idaho agree that the proposed procedures meet the requirements of the McCarran Amendment, 43 U.S.C. 666, because all water users, including those claiming *de minimus* domestic and stock watering rights, will be served and made parties to this adjudication, and will eventually have their rights adjudicated, either in this phase of the proceeding or pursuant to procedures set forth in the stipulation. It should not be inferred, however, that by signing this stipulation, the United States

recommends or otherwise encourages any water user to elect to defer the adjudication of his or her water rights.

Stipulation, p.6.

The purpose of a McCarran adjudication is to provide for a limited waiver of sovereign immunity by the United States enabling state courts to adjudicate federal water rights. While a commencement statute cannot condition commencement on the United States giving special consent to jurisdiction, other than the consent to suit provisions provided for in the McCarran Amendment, nothing precludes the United States from otherwise conceding that the scope of the adjudication satisfies McCarran requirements. *See In Re Snake River Basin Water System*, 115 Idaho 1, 6, 764 P.2d 78, 83 (1988) (commencement statute requiring special consent of United States would result in unlawful delegation of authority). Accordingly, because the United States stipulates that the deferral procedure complies with the McCarran Amendment, no issues exist regarding the United States' limited waiver of sovereign immunity for purposes of adjudicating its federal claims.

III.

CONCLUSION

For the reasons set forth above, the Court concludes that the adjudication of the Palouse River Basin system as authorized by Idaho Code § 42-1406B and as proposed in the *Petition* constitutes a comprehensive determination of all of the rights of the system within the State of Idaho and therefore satisfies the terms of the McCarran Amendment. Having further concluded that the deferral procedure for *de minimis* domestic and stockwater claims is within the terms of the McCarran Amendment, the Court will issue a separate order commencing the Palouse River Basin Adjudication contemporaneously with this *Memorandum Decision*.

DATED: March 1, 2017



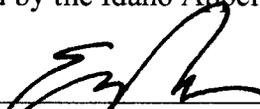
ERIC J. WILDMAN
Presiding Judge
Palouse River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is

no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: March 1, 2017



ERIC J. WILDMAN
Presiding Judge
Palouse River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION ON PETITION TO COMMENCE PALOUSE RIVER BASIN ADJUDICATION was mailed on March 01, 2017, with sufficient first-class postage to the following:

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