

DISTRICT COURT - CFPRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUN 15 2021

By _____ Clerk

Deputy Clerk

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

IN RE: THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE CLARK FORK-PEND OREILLE RIVER BASINS WATER SYSTEM)	Case No.: 69576
)	MEMORANDUM DECISION ON PETITION TO COMMENCE CLARK FORK-PEND OREILLE RIVER BASINS ADJUDICATION

**I.
BACKGROUND**

On October 23, 2020, the State of Idaho filed a *Petition* seeking commencement of a general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Clark Fork-Pend Oreille river basins water system and for the administration of such rights. The *Petition* is filed pursuant to Idaho Code § 42-1406B(1), which authorizes the filing of the *Petition* before the Snake River Basin Adjudication District Court of the fifth judicial district of the state of Idaho, in and for the county of Twin Falls. The *Petition* seeks an order from the Court which does the following:

- a. Commences a general adjudication *inter se* of all rights arising under state or federal law to the use of surface and ground waters from the Clark Fork-Pend Oreille river basins water system within the state of Idaho.
- b. Describes the boundaries of the water system
- c. Lists the counties wholly or partly located within the boundaries of the water system.
- d. Determines that it is possible to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of Idaho Code § 42-1401A within the terms of the McCarran Amendment.

- e. Establishes a process to defer the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of section 42-1401A, Idaho Code.
- 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 subsections (2) and (3) of Idaho Code § 42-1408
- 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.6-7.

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.

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

On October 26, 2020, this Court entered an *Order Setting Commencement Hearing and Procedures for Hearing* for the purpose of determining those matters described in the *Petition*.

¹ This *Provisional Order* superseded the *Order* previously issued on September 29, 2007.

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 Clark Fork-Pend Oreille river basins water system.

On December 28, 2020, 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, followed by an *Amended Affidavit of Service* on January 7, 2021. The commencement hearing on the *Petition* was held on May 24, 2021. The United States appeared in opposition to those elements of the *Petition* related to the deferral of *de minimis* domestic and stock water rights.

II.

ANALYSIS

- A. The proposed scope of the Clark Fork-Pend Oreille River Basins 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 Clark Fork-Pend Oreille River Basins Adjudication to be commenced within the terms of the McCarran Amendment, the Court must find that 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).

proposed boundaries of the 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 Clark Fork-Pend Oreille river basins 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 Clark Fork-Pend Oreille river basins water system covers portions of northern Idaho located within Boundary, Bonner and Kootenai Counties. The *Petition* more particularly describes the boundaries for the adjudication as follows:

Beginning at the northwest corner of the state of Idaho at a point marking the northwest corner of Boundary County located in Section 7, Township 65 North, Range 5 West, B.M.; thence continuing west along the northern boundary of the state of Idaho to a topographic high point located within Protracted Boundary 38, Township 65 North, Range 04 West, B.M.;

Thence continuing southerly through Boundary County along the ridge lines and mountain peaks separating the Priest River drainage and the Kootenai River drainage to top of Harrison Peak in the NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 31, Township 62 North, Range 02 West, B.M.;

Thence continuing in an easterly and southerly direction along the ridge lines and mountain peaks that separates the Kootenai River drainage from the Pend Oreille River drainage, crossing the county line between Boundary and Bonner counties three times to a point in Bonner county on the eastern boarder of Idaho in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 15, Township 57 North, Range 3 East, B.M.;

Thence continuing south along the order shared by Idaho and Montana to the point where the border intersects the Shoshone County border within the SW corner of Government Lot 4, Section 35, Township 54N, Range 2 East, B.M.;

Thence continuing westerly along the ridge lines and mountain peaks that separate the Coeur d'Alene River drainage to the south from the Pend Oreille River drainage to the north, to a point on Chilco Mountain in Kootenai County in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 53 North, Range 2 West, B.M.;

Thence continuing northerly and westerly along the ridge lines, mountain peaks and hills separating the Coeur d'Alene River drainage from the Pend Oreille River

drainage to a point on the western boundary of the state of Idaho in Government Lot 2 (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 12, Township 54 North, Range 6 West, B.M.;

Thence north along the western boundary of the state of Idaho to the point of beginning.

Such that the water system includes all surface water and ground waters within the proposed boundary. This includes, but is not limited to the surface and ground waters of the Pend Oreille River drainage before such waters reach Washington, the Clark Fork River drainage downstream from the border shared by Idaho and Montana, the Upper Priest River and Priest River Drainage tributary to the Pend Oreille River, portions of the Blue Creek, Elk Creek, and Gold Creek drainages before such water reaches Montana, all of which are tributary to the Clark Fork River. All of these drainages are ultimately tributaries of the Pend Oreille River, and contain portions of Boundary, [Bonner]³ and Kootenai Counties in Idaho.

Petition, pp.4-5. The Court finds that the proposed boundaries for the Clark Fork-Pend Oreille River Basins Adjudication satisfy the requirements of a McCarran Amendment adjudication.

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

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

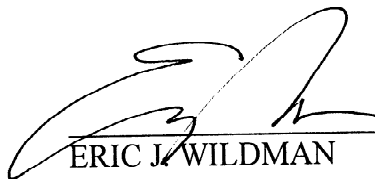
Idaho Code § 42-1406B (1) requires that a petition request that a commencement order be issued only if the court determines it is possible to defer the adjudication of domestic and stock water rights as defined by Idaho Code § 42-1401A(4) and (11) and comply with the terms of the McCarran Amendment. The State of Idaho made such a request in the *Petition*. The Court finds the deferral procedure proposed by the State for *de minimis* domestic and stock water claims is consistent with the requirements of the McCarran Amendment for the reasons set forth in this Court's *Memorandum Decision on Optional Deferral Process* issued contemporaneously herewith. The Court's *Memorandum Decision on Optional Deferral Process* is incorporated herein by reference and will not be repeated.

³ The legal description contained in the *Petition* incorrectly states "Boundary, Benewah and Kootenai Counties in Idaho."

III.
CONCLUSION

For the reasons set forth above, the Court concludes that the adjudication of the Clark Fork-Pend Oreille river basins water 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 stock water claims is within the terms of the McCarran Amendment, the Court will issue a separate order commencing the Clark Fork-Pend Oreille River Basins Adjudication contemporaneously with this *Memorandum Decision*.

DATED: June 14, 2021

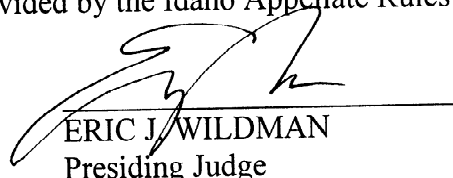


ERIC J. WILDMAN
Presiding Judge
Clark Fork-Pend Oreille River Basins Adjudication

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: June 14, 2021.



ERIC J. WILDMAN
Presiding Judge
Clark Fork-Pend Oreille River Basins Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION ON PETITION TO COMMENCE CLARK FORK-PEND OREILLE RIVER BASINS ADJUDICATION was mailed on June 15, 2021, with sufficient first-class postage to the following:

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