



adjudication of all rights arising under state or federal law to the use of surface and ground waters from the Palouse river basin. Both the CSRBA and the PRBA are ongoing before the Court. The third adjudication contemplated under Idaho Code § 42-1406B is the subject of this proceeding.

On October 23, 2020, the State filed a *Petition* to commence a general adjudication 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. The Court will refer to the proposed adjudication as the Clark Fork-Pend Oreille River Basins Adjudication (“CFPRBA”). The *Petition* recognizes “[t]here are no classes of uses proposed to be excluded from the adjudication.” However, it proposes a process for the optional deferral of the adjudication of domestic and stock water rights as defined by subsections (4)<sup>3</sup> and (11)<sup>4</sup> of Idaho Code § 42-1401A. The Court will collectively refer to these domestic and stock water rights as “*de minimis* rights.” The *Petition* requests the Court issue a commencement order only if it determines it is possible to defer the adjudication of *de minimis* rights within the terms of the McCarran Amendment. The State supports its *Petition* with a *Prehearing Statement and Memorandum of Law*.

The Court subsequently entered an *Order* requiring the State to take certain actions on its *Petition*. It required the State to prepare a *Notice of Filing Petition* containing the information and enclosures required under Idaho Code § 42-1407(3). The State was required to publish that *Notice* for three consecutive weeks in a newspaper of general circulation in each county in which any part of the water system proposed to be adjudicated is located. It was further required to serve the *Notice* on the United States, the Director of the Idaho Department of Water Resources, and on any Indian tribe residing in the proposed adjudication boundaries or having interests in any portion of the water system. On January 7, 2021, the State filed an *Amended Affidavit of Service* asserting that the *Notice* was published and served in compliance with the requirements of the Court’s *Order*. In its *Notice*, the State proposes a process through which the holder of a *de*

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<sup>3</sup> Idaho Code § 42-1401A(4) defines “Domestic use” as “(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (½) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.” I.C. § 42-111.

<sup>4</sup> Idaho Code § 42-1401A(11) defines “Stock watering use” as “the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.”

*minimis* right may elect to defer the adjudication of that right to a later date in the CFRBA. The proposed process is set forth in its entirety below and will be referred to herein as “the optional deferral process.”

The Court set a commencement hearing on the *Petition* for January 21, 2021. It required anyone intending to present evidence or argument to file a notice of appearance with the Court by January 14, 2021. The United States filed a *Notice of Appearance* on January 14, 2021. It requested additional time to consider whether the optional deferral process satisfies the McCarran Amendment.<sup>5</sup> The Court granted the request and continued the commencement hearing.

On April 30, 2021, the United States filed a document entitled *Special Appearance and Opposition to State of Idaho’s Proposal to Defer Adjudication of Certain Water Right Claims* (“*Opposition*”). The United States opposes the State’s *Petition* on the basis the optional deferral process removes the CFRBA from the purview of the McCarran Amendment. Replies to the United States’ *Opposition* were filed by Avista Corporation and the State. In addition, a group known as the Clark Fork-Pend Oreille Basin Water Users joined in the arguments set forth in the State’s *Reply*. A hearing on the *Petition* was held before the Court on May 24, 2021. Aside from the United States, no other water users oppose the *Petition*.

## II. ANALYSIS

The issue before the Court is whether the optional deferral process removes the CFRBA from the purview of the McCarran Amendment. Resolution of this issue is significant for two reasons. First, Idaho Code § 42-1406B(1) directs that commencement orders for the three proceedings contemplated to adjudicate water rights in northern Idaho be issued “only if the court determines it is possible to defer the adjudication of [*de minimis* rights] within the terms of the McCarran amendment.” The Court has already determined it is possible to defer the adjudication of *de minimis* rights within the terms of the McCarran Amendment in the CSRBA

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<sup>5</sup> The Court was also informed that the United States was meeting with the State of Idaho and other parties to discuss and attempt to negotiate a resolution surrounding the deferral of *de minimis* domestic and stock water rights in the CFRBA.

and the PRBA.<sup>6</sup> The Court's decisions in those proceeding were based on optional deferral processes that are substantially similar to that proposed here. Second, resolution of this issue affects whether the United States has waived its sovereign immunity for purposes of this proceeding.

As noted above, the Court has had the opportunity to examine this issue before. When the State filed its *Petition* to commence the CSRBA in 2008, it proposed substantially the same optional deferral process as it does here. While the United States stipulated to the optional deferral process in that proceeding, a challenge to the process was raised by the Coeur d'Alene Tribe. In a decision issued on November 12, 2008, the Court held that the optional deferral process proposed in the CSRBA satisfies the terms of the McCarran Amendment. *Memorandum Decision on Petition to Commence*, Twin Falls County Case No. 49576 (Nov. 12, 2008).<sup>7</sup> The optional deferral process proposed here is substantially the same as that proposed in the CSRBA.<sup>8</sup> Neither the McCarran Amendment, this State's adjudication statutes, nor any other law applicable to the United States' waiver of sovereign immunity has changed in any appreciable way since that time. Therefore, for the reasons set forth herein, the Court declines the United States' invitation to stray from its prior ruling on this issue.

**A. The McCarran Amendment.**

The United States enjoys sovereign immunity, which protects it from being sued without its consent. However, it may voluntarily waive sovereign immunity with respect to specific classes of cases. In 1952, Congress chose to waive the United States' sovereign immunity with respect to comprehensive general stream adjudications via its passage of the McCarran Amendment:

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)

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<sup>6</sup> In fact, the optional deferral process proposed here is substantially the same as those that have been adopted in the other general stream adjudications in Idaho, including the Snake River Basin Adjudication ("SRBA"), CSRBA, and PRBA. The United States is a party to the SRBA, CSRBA, and PRBA. It has previously agreed via stipulation that the optional deferral processes in those three adjudications meet the requirements of the McCarran Amendment.

<sup>7</sup> The Court's decision was certified as a final judgment and/or order under Idaho Rule of Civil Procedure 54(b). No party appealed the Court's decision and the time for doing so has expired.

<sup>8</sup> The United States does not distinguish the deferral process proposed in this proceeding from that proposed and adopted by the Court in the CSRBA.

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. The McCarran Amendment permits the United States to be joined as a party to a comprehensive general stream adjudication, even if commenced by a state court. It also authorizes the United States' water rights to be determined before a state court within such a proceeding.

For an adjudication to fall within the scope of 43 U.S.C. § 666, the McCarran Amendment “requires the adjudication of the rights of all those who use the water of a river system within a state, including those who use the water of tributaries.” *In re Snake River Basin Water System*, 115 Idaho 1, 9, 764 P.2d 78, 86 (1988). This includes the adjudication of all categories of water right claims on the system. *Id*; *See e.g., United States v. Dist. Ct. in and for Eagle Cnty., Colo.* 401 U.S. 520, 524 (1971) (the McCarran Amendment “is an all-inclusive statute concerning ‘the adjudication of rights to the use of water of a river system’ which in [§] 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights”). Whether the United States has waived sovereign immunity under the McCarran Amendment is an issue of law. *See e.g., Memorandum Decision on Petition to Commence*, Twin Falls County Case No. 49576 (Nov. 12, 2008) (“the Court views the issue of whether or not the deferral procedure satisfies McCarran Amendment requirements as an issue of law”).

**B. The optional deferral process does not remove the CFRBA from the purview of the McCarran Amendment.**

The United States asserts its waiver of sovereign immunity does not apply here because the optional deferral process removes the CFRBA from the purview of the McCarran Amendment. As a result, it is the United States' position that the adjudication cannot be properly

commenced under Idaho Code § 42-1406B(1) and that it is not subject to the jurisdiction of this Court. The Court disagrees.

In considering whether the CFRBA falls within the scope of the McCarran Amendment, the Court turns to the *Petition*. The plain language of the *Petition* requests “an action for the 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.” *Petition*, ¶1 (underline added). Thus, the Court finds the *Petition* seeks a comprehensive adjudication of all water rights in the system. Indeed, the stated scope of the CFRBA provides that “[t]here are no classes of uses proposed to be excluded from the adjudication.” *Id.* at ¶13. As the *Petition* seeks the adjudication of all rights, and no classes of uses are to be excluded, the Court finds the CFRBA is the type of comprehensive general adjudicated contemplated by the McCarran Amendment.

That the *Petition* also proposes the optional deferral process does not alter the comprehensive nature of the CFRBA. The optional deferral process is set forth in the State’s *Notice of Filing Petition*. For ease of reference, the Court will include it in its entirety herein:

**PROPOSED PROCESS TO DEFER THE ADJUDICATION OF DOMESTIC AND STOCK WATER RIGHTS:**

All claimants of *de minimis* (small) domestic and/or stock (D&S) water rights as defined in Idaho Code § 42-1401A(4) and (11) shall be joined as parties in this proceeding and shall be bound by all decrees entered in this case, including the final decree. Any objection to any and all claims being adjudicated in this proceeding, including those of a D&S claimant, must be timely raised in accordance with Idaho Code § 42-1412 or be forever barred.

Water users of D&S rights may elect to file a Notice of Claim at the time of commencement of the Clark Fork-Pend Oreille River Basins Adjudication or defer (postpone) the filing. If a D&S claimant elects to have the claim adjudicated now, then the D&S claimant must file a notice of claim (Idaho Code § 42-1409) and pay any fees (Idaho Code § 42-1414). Election to defer will not result in a loss of the D&S water right nor will a D&S claimant be prevented from making a D&S claim in the future. The owner of a D&S water right who elects to defer the filing of a Notice of Claim will be required to have the water right adjudicated prior to the water right being distributed by a watermaster (Idaho Code § 42-607) and/or before an application for change of the water right may be filed with IDWR (Idaho Code § 42-222).

Water right holders who choose to delay filing on D&S water rights will be required to file a motion for determination of the use (motion), with an attached

notice of claim, in order to obtain an adjudicated water right. Notice of the motion and information describing the claim must be published by the claimant for at least three (3) weeks in a newspaper of general circulation in the county where the point of diversion is located. In addition, claimant must serve the motion and claim on the Director, the State of Idaho, the United States, and persons against whom relief is sought. Service upon the United States must be via certified mail to the United States Attorney for the District of Idaho and the United States Attorney General in Washington, D.C.

Any party can object to the claim by filing written notice of the objection with the district court within forty-five (45) days from the date of the first publication of the notice. A copy of the objection shall be served on the State of Idaho, Director, United States, the person whose claim is being objected to, and all persons who have appeared in response to the motion.

Within thirty (30) days of the objection deadline, the Director will file a notice with the Court stating whether the Director will examine the deferred D&S claim and whether the Director will prepare a report on the claim to the district court. The Director's notice will contain the Director's estimated costs, due from the claimant, for examination of the claim and preparation of the report. The notice will also contain the Director's approximation of time for filing the report. Prior to filing the report, the D&S claimant shall pay the balance of the Director's costs or be refunded by the Director any unused advanced estimated costs. If the D&S claimant contests the Director's costs, the district court shall determine a reasonable cost to be paid by the claimant. Deferrable domestic claimants are also required to pay their own filing fees. The Director will investigate the claim and submit the report to the Court with copies to the State of Idaho, United States, all parties who filed objections, and all parties against whom relief is sought. The court will then set objection and response deadlines and set a hearing (Idaho Code § 42-1412).

If the Director notifies the Court that the Director does not intend to prepare a report, then the District Court will proceed with a hearing and any party who timely objected may appear and challenge the D&S motion and claim. The district court may order the Director to prepare a report after a hearing on the motion and D&S claim.

Proof of service is required for any motion under this deferred procedure. Claimant must certify the date and manner of service of the motion on the State of Idaho, Director, United States, and persons against whom relief is sought.

Appeals of any orders or decrees entered under the deferred procedure are governed by the rules applicable to appeals of orders in the Clark Fork-Pend Oreille River Basins Adjudication.

The district court retains continuing jurisdiction of the subject matter in this proceeding and the parties to the proceeding for the purpose of adjudicating deferred D&S claims.

The proposed process above meets the requirements of the McCarran Amendment, 43 U.S.C. § 666, because all water users, including those claiming *de minimis* D&S 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 the proposed procedures set forth in this notice.

*Notice of Filing Commencement Petition*, pp. 4-5.<sup>9</sup>

The United States claims that the CFPRBA does not satisfy the McCarran Amendment because claimants of *de minimis* rights are not required to file claims or have their rights adjudicated under the optional deferral process. The United States mischaracterizes the optional deferral process in this respect. A review of the process establishes that it does not exclude the holders of *de minimis* rights from the CFPRBA. Holders of *de minimis* rights will be joined as parties to the adjudication and will be bound by any orders or decrees entered in the adjudication. Further, they will be required to claim and have their rights adjudicated prior to seeking any priority administration of such rights and/or before an application for change of the water right may be filed with IDWR.

In addressing substantially the same optional deferral process in the CSRBA, this Court summed up these points as follows:

This Court agrees with the reasoning of both the United States and the State of Idaho.<sup>[10]</sup> The deferral procedure does not exclude *de minimis* domestic and stockwater rights from the adjudication. All water users on the Coeur d'Alene-Spokane Basin River system in the State of Idaho, including *de minimis* water users, will be served and joined as parties to the adjudication. All parties, including *de minimis* water users, will be bound by any orders or decrees entered in the adjudication. As such, any party electing to defer a claim will be estopped from collaterally attacking any such orders or decrees. Parties who timely file non-deferrable claims or elect not to defer their claim will not be prejudiced by the procedure as a *de minimis* water user will not be able to object to the claim of another or otherwise appear in any proceedings without first filing their claim. A *de minimis* water user also will not be able to have their "water right" administered as against decreed rights until such time as their claim has been adjudicated. Once

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<sup>9</sup> A copy of the *Notice of Filing Commencement Petition* is attached as Exhibit 1 to the *Amended Affidavit of Service* filed by the State on January 7, 2021.

<sup>10</sup> The United States did not oppose the optional deferral process in the CSRBA, but rather supported it by way of stipulation and argument.



a deferred claim is filed and ultimately decreed, the partial decree issued for the claim will be incorporated into and subject to any final unified decree issued for the entire adjudication. The Court will retain jurisdiction over any final unified decree entered in the adjudication for this purpose. Therefore, although the proceedings for adjudicating a deferrable claim may take place in a different stage or phase of the adjudication, the proceedings for the claim will still be part of and incorporated into the same adjudication.

*Memorandum Decision on Petition to Commence*, Twin Falls Case No. 49576, p.23 (Nov. 12, 2008).

The same rationale and reasoning set forth in the Court's 2008 decision applies here. The United States has not set forth any change in the McCarran Amendment, this state's adjudication statutes, or in any other law applicable to the United States' waiver of sovereign immunity that would work to disrupt this Court's conclusion in that case. Therefore, the Court adopts the reasoning and rationale set forth in its *Memorandum Decision* issued in the CSRBA on the issue of whether the optional deferral process satisfies the McCarran Amendment.

The Court will not repeat the entirety of its analysis set forth in its *Memorandum Decision* in the CSRBA. However, the Court notes that here, as in the CSRBA, the optional deferral process proposed does not exclude *de minimis* rights from the adjudication. Claimants of *de minimis* water rights within the adjudicated water system will be served and joined as parties to the adjudication and will be bound by any orders or decrees entered in the adjudication. The plain language of the *Petition* contemplates that all *de minimis* rights will be adjudicated either through the standard adjudication process or through the optional deferral process. While the United States may prefer some alternative process to the optional deferral process, the Court notes the McCarran Amendment leaves it to the discretion of an adjudication court to determine how to structure and process an adjudication proceeding. *See e.g., U.S. v. District Court in and For Water District No. 5, Colo.*, 401 U.S. 527, 529 (1971) (providing that an adjudication may be structured to adjudicate claims in phases and still comply with the McCarran Amendment so long as it is comprehensive "in the totality"). In fact, the Court views the issues raised by the United States in this proceeding as issues of case management, not issues of jurisdiction, and the Court finds that issues of case management are left to its discretion.

On that same note, the Court finds the McCarran Amendment does not require the Court to set specific timelines for the adjudication of claims at the outset of an adjudication. Setting specific timelines in such a manner is simply impractical given the scope of a general stream

adjudication and the large number and diversity of claims involved. And, the Court finds the setting of timelines to be an issue of case management, not jurisdiction.

Contrary to the United States' argument, parties who timely file claims in the CFPRBA will not be prejudiced by the optional deferral process. Under the optional deferral process, the holder of a *de minimis* right will not be able to have his or her water right administered as against decreed rights until it has been claimed and adjudicated. Therefore, claimants who elect to defer the adjudication of their *de minimis* rights may not assert senior priority against any other decreed water rights until they have their rights adjudicated. Furthermore, parties who timely file claims will have the opportunity to object to, and be heard on, claims filed for deferred *de minimis* rights. Therefore, as it did in the CSRBA, the Court finds the optional deferral process satisfies the requirements of the McCarran Amendment. The Court thus finds it is possible to defer the adjudication of *de minimis* rights within the terms of the McCarran Amendment as set forth in the proposed optional deferral process.

Given the foregoing, the Court finds the CFPRBA (1) complies with the terms of the McCarran Amendment, (2) is authorized to be commenced under the plain language of Idaho Code § Idaho Code § 42-1406B(1), and (3) is a comprehensive general stream adjudication proceeding through which this Court may exercise jurisdiction over the United States.

### **C. Issue preclusion.**

The State alternatively argues the United States is barred from relitigating whether the optional deferral process satisfies the requirements of the McCarran Amendment under the doctrine of issue preclusion. As the Court finds the optional deferral process satisfies the McCarran Amendment for the reasons set forth above, it need not reach this alternate argument.

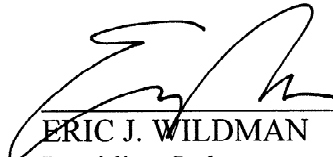
## **III.**

### **CONCLUSION**

Based on the foregoing, the Court concludes it is possible to defer the adjudication of *de minimis* rights in the CFPRBA within the terms of the McCarran Amendment through the optional deferral process proposed by the State. The Court concludes the CFPRBA complies with the terms of the McCarran Amendment. The Court concludes the CFPRBA is authorized to be commenced under the plain language of Idaho Code § Idaho Code § 42-1406B(1). The Court

concludes the CFPRBA is a comprehensive general stream adjudication proceeding through which this Court may exercise jurisdiction over the United States under the McCarran Amendment.

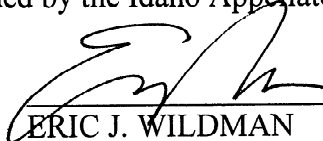
DATED: June 14, 2021.

  
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 OPTIONAL DEFERRAL PROCESS was mailed on June 15, 2021, with sufficient first-class postage to the following:

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