



- 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.7-8.

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.

On June 17, 2020, the Idaho Supreme Court issued an *Order Re: Appointment of District Judge, Confirmation of Special Jurisdiction and Determination of Venue for the General Adjudication of the Bear River Basin* 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.

On November 25, 2020, 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 Bear River basin water system.

On March 3, 2021, 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 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 Bear 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 § 42-1406C(1) provides that: "Effective management of the waters of the Bear River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all 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. § 42-1406C(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."<sup>1</sup> In *In Re SRBA Case No. 39576*, 128 Idaho 246, 251, 912 P.2d 614, 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).

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<sup>1</sup> 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 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).

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 Bear River Basin Adjudication to be commenced within the terms of the McCarran Amendment, the Court must find that the 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 Bear River basin water system.**

Idaho Code § 42-1406C(1) requires that an order commencing the adjudication define the source or sources within the state to be adjudicated. The Bear River Basin water system covers portions of Idaho located within Bannock, Bear Lake, Caribou, Cassia, Franklin, Oneida, and Power Counties. The *Petition* more particularly describes the boundaries for the adjudication as follows:

Beginning at the southeast corner of the state of Idaho at a point marking the southeast corner of Bear Lake County located at the southeast corner of Government Lot 3, Section 26, Township 16 South, Range 46 East, B.M.; thence continuing west along the southern boundary of the state of Idaho to a point in Cassia county located at the southwest corner of Government Lot 7 (SE $\frac{1}{4}$ SE $\frac{1}{4}$ ), Section 28, Township 16 South, Range 28 East, B.M.;

Thence continuing northeasterly along the ridge lines and mountain peaks of the Black Pine and Deep Creek Mountains to a point on Deep Creek Peak in Power county located in the NE $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 13, Township 11 South, Range 32 East, B.M.;

Thence continuing southeasterly then turning northerly following the ridge lines and mountain peaks that mark the southern edges of the boundary of the Bannock Creek drainage to a point on Bradley Mountain in Power County locate in the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 14, Township 10 South, Range 34 East, B.M.;

Thence continuing southeasterly along the ridge lines and mountain peaks separating the Dairy Creek Drainage to the southwest and the Hawkins Creek drainage to the northeast to a point on the boundary line separating Bannock and Oneida counties in the NE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 22, Township 11 South, Range 35 East, B.M.;

Thence continuing southeasterly along the boundary separating Bannock and Oneida counties, diverting southerly from the county boundary briefly for about 3.5 miles in Township 12 South, Range 36 East, before rejoining and continuing to follow the county boundary to a point where Bannock, Franklin, and Oneida county boundaries intersect in the NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 22, Township 13, South, Range 37 East, B.M.;

Thence continuing southerly for about two miles until reaching Oxford Peak and turning northeasterly following the ridge lines and mountain peaks of the Portneuf Range crossing into Caribou County to a peak on Buckskin Mountain in the SW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 22, Township 09 South, Range 39 East, B.M.;

Thence continuing east and then northerly moving along the ridge lines and mountain peaks to a point in Caribou County located in the SW¼ of the NE¼ of Section 33, Township 06 South, Range 41 East, B.M.;

Thence continuing southeasterly along the ridge lines and mountain peaks of the Aspen Range to a point on the boundary line separating Caribou and Bear Lake counties located on the boundary between the SE¼ of the NE¼ of Section 36, Township 9 South, Range 43 East B.M. and Government Lot 2 (SW¼NW¼) of Section 31, Township 9 South, Range 44 East B.M.;

Thence continuing southeasterly along the county line to a point on the eastern boundary of the state of Idaho in Government Lot 1 (NE¼NW¼) of Section 35, Township 10 South, Range 46 East, B.M.; thence south along the eastern boundary of the state of Idaho to a 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 water of Beaver Creek, Christy Creek, Deep Creek, Cub River, Logan River, Malad River, Spring Creek, and Worm Creek drainages before such waters reach Utah; the Erwine Creek, Garrett Creek, Giraffe Creek, North Willow Creek, Poison Creek, Potato Creek, and Robinson Creek Drainages before such waters reach Wyoming; the Raymond and Salt Creek drainages after such waters cross into Idaho from Wyoming. All of these drainages are ultimately tributaries of the Bear River in Utah, except for the Deep Creek Drainage which is tributary to the Great Salt Lake, and contain portions of Bannock, Bear Lake, Caribou, Cassia, Franklin, Oneida and Power Counties in Idaho.

*Petition*, pp.4-5. The Court finds that the proposed boundaries for the Bear River Basin 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.**

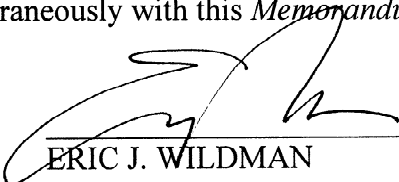
Idaho Code § 42-1406C(1) requires that a petition request that a commencement order be issued only if the court determines it is possible to defer the adjudication of domestic and stock water rights as defined by Idaho Code § 42-1401A(4) and (11) and comply with the terms of the McCarran Amendment. The 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.

**III.**  
**CONCLUSION**

For the reasons set forth above, the Court concludes that the adjudication of the Bear River basin water system as authorized by Idaho Code § 42-1406C 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 Bear River Basin Adjudication contemporaneously with this *Memorandum Decision*.

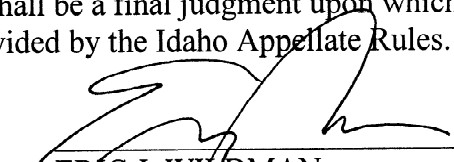
DATED: June 14, 2021

  
ERIC J. WILDMAN  
Presiding Judge  
Bear 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: June 14, 2021

  
ERIC J. WILDMAN  
Presiding Judge  
Bear River Basin Adjudication

**CERTIFICATE OF MAILING**

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

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