

**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
COEUR D'ALENE-SPOKANE
RIVER BASIN WATER SYSTEM**

)
) **Case No: 49576**

)
) **MEMORANDUM DECISION ON**
) **PETITION TO COMMENCE COEUR**
) **D'ALENE-SPOKANE RIVER BASIN**
) **GENERAL ADJUDICATION**
)
)

**I.
ORIENTATION**

Appearances: Edward F. Anderson, *pro se*;

Brian J. Cleary, The Cleary Law Group, P.C., on behalf of the
Coeur d'Alene Indian Tribe;

Peter C. Monson, United States Department of Justice, on behalf of
the United States;

Attorney General Lawrence Wasden; David I. Stanish, Idaho
Attorney General's Office, on behalf of the State of Idaho;

Court: John M. Melanson, Presiding Judge.

Holding: Issue of whether stipulated deferral procedure for *de minimis*
domestic and stockwater claims is consistent with terms of the
McCarran Amendment constitutes a justiciable controversy at pre-
commencement stage of proceeding. Stipulated deferral procedure

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is consistent with terms of the McCarran Amendment. Court need not decide whether stipulation is binding on Indian tribes because deferral procedure is consistent with terms of McCarran Amendment and therefore no special consent is required. The adjudication of Coeur d'Alene-Spokane River Basin system as set forth in petition for commencement is consistent with terms of the McCarran Amendment. Court to issue separate order commencing general adjudication of Coeur d'Alene-Spokane River Basin system.

II. PROCEDURE

Idaho Code § 42-1406B(1) (Supp. 2008) authorizes the Director of the Idaho Department of Water Resources (“Director” or “IDWR”) to petition the district court to commence an adjudication for the determination of the water rights from the surface and groundwater sources of the Coeur d'Alene-Spokane River Basin water system within the terms of the McCarran Amendment, 43 U.S.C. § 666. The statutory authorization requires that the petition include:

[A] request for the deferral of the adjudication of domestic and stock water rights as defined by subsections (4) and (11) of section 42-1401A, Idaho Code, and a 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 subsections (4) and (11) of section 42-1401A, Idaho Code, within the terms of the McCarran Amendment.¹

¹ Idaho Code § 42-1401A (4) provides: “Domestic use” is defined in section 42-111, Idaho Code. Idaho Code § 42-111 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 (1/2) 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.
- (2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.

Idaho Code § 42-1406B(2) (Supp. 2008) specifies that the petition may be filed in any district court in which any part of the water source is located or before a court of special jurisdiction for water right adjudications but also provides that unless otherwise ordered by the Supreme Court, special jurisdiction for the water rights adjudication resides in 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.

On July 8, 2008, pursuant to I.C. § 42-1406B (1) the State of Idaho filed a petition (“*Petition*”) to commence an adjudication of the Coeur d’Alene-Spokane River Basin water system within the terms of the McCarran Amendment. The *Petition* seeks an order from the Court which does the following:

1. 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 Coeur d’Alene-Spokane River Basin water system within the state of Idaho;
2. Describes the boundaries of the water system;
3. Lists the counties wholly or partly located within the boundaries of the water system;

(3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

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.” Domestic and stockwater rights encompassed by these definitions are commonly referred to as “*de minimis*” claims. The Latin term “*de minimis*” (sometimes spelled “*de minimus*”) refers generally to something so small or minimal in difference that it does not matter or the law does not take it into consideration.

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4. Determines that it is possible to defer the adjudication of domestic and stock water rights within the terms of the McCarran Amendment as set forth in the *Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims (Stipulation)* filed concurrently with the *Petition*;
5. Establishes a process for the deferment of the adjudication of domestic and stock water rights as defined by I.C. § 42-1401A (4) and (11) that is consistent with the *(Stipulation)*;
6. 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 I.C. § 42-1409, unless claimants elect to defer the adjudication of domestic and stock water rights as defined by I.C. § 42-1401A (4) and (11);
7. Approves the method of ascertaining and serving claimants not disclosed following the completion of the service required by I.C. § 42-1408(2) (a) through (d), as set forth in I.C. § 42-1408 (2), (3) and (4);
8. 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
9. Includes 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.

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 set forth in the *Stipulation* and comply with the terms of the McCarran Amendment.

The State of Idaho filed concurrently with the *Petition* the aforementioned *Stipulation* entered into between the State of Idaho and the United States. The *Stipulation* provides an agreed upon comprehensive procedure for the adjudication of *de minimis* domestic and stock water rights as defined by I.C. § 42-1401A (4) and (11).

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.²

On July 11, 2008, 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 I.C. § 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 Coeur d'Alene-Spokane River Basin water system.

On August 27, 2008, the State of Idaho filed an *Affidavit of Service* describing the service process and establishing compliance with the service requirements set forth in the ***Order Setting Commencement Hearing and Procedures for Hearing*** and required by I.C. § 42-1407.

In accordance with the procedures set forth in the ***Order Setting Commencement Hearing and Procedures for Hearing***, appearances and pre-hearing statements were

² This *Provisional Order* superseded the *Order* previously issued on September 29, 2007.

filed on behalf of the State of Idaho, on behalf of the United States, on behalf of the Coeur d'Alene Tribe by special appearance, and by Edward F. Anderson, *pro se*.

The commencement hearing on the *Petition* was held August 28, 2008, in Coeur d'Alene, Idaho and all parties appearing in the matter were given the opportunity to address those matters raised in their pre-hearing statements. Thereafter parties were provided additional time within which to file post-hearing briefs.

III. ANALYSIS AND DISCUSSION

A. The Proposed Scope of the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA) 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." "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."³ In *In Re SRBA Case No. 39576*, 128 Idaho

³ 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:

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). This waiver or consent to state court jurisdiction also extends to tribal water rights. *Colorado River Water Conservation Dist.* 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

Provided, That no judgment for costs shall be entered against the United States in any such suit.

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 Coeur d'Alene-Spokane 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 groundwater sources within the Coeur d'Alene-Spokane 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 Coeur d'Alene – Spokane River Basin River system covers portions of northern Idaho and eastern Washington. The waters of the Basin move generally from the mountainous headwater tributaries of the Coeur d'Alene, St. Joe and St. Maries Rivers into Coeur d'Alene Lake and then leave the state via the Spokane River. The *Petition* proposes to adjudicate all of the rights to the use of surface and groundwater of the Coeur d'Alene-Spokane River Basin located in the five basins designated as IDWR hydrologic basins 91 through 95. The *Petition* more particularly describes the boundaries for the adjudication as follows:

All of the water systems being upstream between the state line of Idaho and Washington and the state line of Idaho and Montana beginning in the west part of the water system where the county line of the counties of Benewah and Latah meet the state line of Washington and Idaho at a point in the southwest corner of Section 25, Township 44 North, Range 6 West, B.M., then following said Idaho and Washington border north to a point on the state line of Idaho and Washington on a ridge line in Government Lot Two (2) that is otherwise approximately the southwest quarter of the northwest quarter (SW1/4 NW1/4) of Section 12, Township 54 North, Range 5 West B.M., then continuing generally easterly from each of those respective state line points along ridge lines and mountain peaks to the Idaho and Montana border, such that the water system includes all surface water and ground waters of the Hangman Creek drainage before such waters reach Washington, the Rock Creek drainage before such water reach Washington both of which creeks are tributaries of the Spokane

River, the St. Maries River drainage, the St. Joe River drainage, each river basins of which is wholly within Idaho, the Coeur d'Alene River drainage, most of which is in Idaho except two small tributary basins in the state of Washington, the Spokane River drainage before such waters reach Washington, the waters flowing and sinking into the Rathdrum Prairie Spokane Valley Aquifer before such waters reach Washington, the Salee Creek drainage, and the Bayview Creek drainage, both of which are near Lake Pend Oreille, but the water system does not include the waters of Lake Pend Oreille, Hoodoo Creek, or Cocolalla Creek that are tributaries of the Pend Oreille River drainage.

No counties are wholly located within the proposed boundaries. Counties where a portion of the county is located in the proposed boundaries include: Kootenai, Latah, Clearwater, Benewah, Bonner and Shoshone counties. **Exhibit 1** to this *Memorandum Decision* incorporated herein by reference shows the proposed boundaries for the adjudication.

Idaho Department of Water Resources Director David R. Tuthill, Jr. (Director” or “Director Tuthill”) testified at the commencement hearing that Basins 91 through 95 include the Spokane-Coeur d'Alene River and all of its tributary basins. Director Tuthill also testified that hydrologic modeling suggests that there is a “possible” groundwater connection between the Spokane-Coeur d'Alene River Basin water system and Lake Pend Oreille, which is located in basin 96. However, Director Tuthill explained that there is no scientific certainty as to this connection. Specifically, the possible connection is between the Rathdrum Prairie Aquifer and Lake Pend Oreille. No party appearing in this matter opposed the proposed boundaries or raised an objection based on this possible connection. The United States summarized its position on the proposed boundaries:

The United States’ preliminary review of the proposed boundaries suggests that the entire water system is included and the comprehensive requirements of the McCarran Amendment are satisfied. However, the United States reserves it rights to raise this issue in the future if further hydrologic analysis indicates that a portion of the Coeur d'Alene-Spokane River basin water system which is hydrologically connected has been excluded.

United States, Notice of Appearance and Pre-Hearing Statement at page 5. The United States re-iterated this position at the commencement hearing but also added that the issue

may never present itself because the State of Idaho has plans to commence an adjudication of adjacent Basins 96 and 97 in the future.

Therefore, considering the evidence presented, the position taken by the United States that the proposed boundaries are comprehensive of the entire water system located within the State of Idaho, and the absence of any objections to the proposed boundaries by any party, the Court finds that the proposed boundaries for the Coeur d'Alene-Spokane River Basin Adjudication 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 also filed the *Stipulation* entered into between the State of Idaho and the United States 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 and Order* 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. *See Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*, Snake River Basin Adjudication Case No. 39576. (Jan. 17, 1989), Exhibit 4 to *Aff. of David I. Stanish*; *SRBA Administrative Order No. 10. Order Governing Procedures in SRBA for Domestic and Stock Water Uses*, (Mar. 22, 1995); Exhibit 5 to *Aff. of David I. Stanish*.

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 at 6. The United States also concluded that the stipulated procedure met the requirements of the McCarran Amendment with respect to its capacity as a trustee for any Indian tribes in the basin:

[T]he United States is satisfied that the proposed adjudication meets the McCarran Amendment requirements despite potential deferral of *de minimis* rights. The United States reached that conclusion in all capacities, including its capacity as trustee for the Indian tribes in the basin. Indeed, the United States consulted extensively with legal counsel for the Coeur d'Alene Tribe and the Nez Perce Tribe during its analysis of the deferral issue.

United States' Notice of Appearance and Pre-hearing Statement at 7.

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)

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(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.

3. The Court has proper jurisdiction to determine the scope of the adjudication as part of the commencement hearing, including whether or not the deferral procedure satisfies the requirements of the McCarran Amendment.

Although the United States stipulated in its capacity as trustee for any potential Indian tribe claimants, no Indian tribes were signatories to the *Stipulation*. In its pre-hearing statement the United States included the following disclaimer:

[T]he United States' signature on the Stipulation does not equate to a tribal signature to the Stipulation. To the extent that any tribe within the basin has an objection to the deferral of *de minimis* rights for any reason, including whether such deferral violates the comprehensive requirements of the McCarran Amendment, the United States urges the Court to consider the tribal objections within the context of the briefing schedule and hearing established in the Order. *Cf. Az. v. San Carlos Apache Tribe of Az.*, 463 U.S. 545, 566, n.17 (1983) ("In addition, there is no indication in these cases that the state courts would deny the Indian parties leave to intervene to protect their interests.")

United States' Notice of Appearance and Pre-hearing Statement at 7.

The Coeur d'Alene Tribe ("Tribe") by special appearance raises the following challenges to this Court's jurisdiction. First, the Tribe challenges the subject matter jurisdiction of this Court to address the statutory requirement, as well as the State of Idaho's request in the *Petition*, for determination of whether the deferral procedure for *de minimis* domestic and stock water claims complies with the terms of the McCarran Amendment. The Tribe argues that the issue is non-justiciable because no live case or controversy exists and such a determination would result in the Court's issuance of an advisory opinion. The Tribe argues that the issue is not ripe for determination until after a commencement order is issued and at such time as a claimant of a *de minimis* right

actually elects to follow the deferral procedure. The Tribe argues that should no claimant elect to follow the deferral procedure, then the Court's determination would be preliminary, unnecessary and based on a hypothetical set of facts. Second, the Tribe challenges the Court's personal jurisdiction over the Tribe for purposes of determining whether the Stipulation signed by the United States, acting in its capacity as trustee for Indian tribes, is binding on the Tribe. The Tribe asserts that it is an indispensable party to the proceedings and neither the Tribe nor Congress on behalf of the Tribe has waived sovereign immunity. This Court disagrees with both of the Tribe's assertions.

a) The determination regarding the deferral process is justiciable and does not result in a feigned issue or advisory opinion.

The Idaho legislature authorized that the Coeur d'Alene-Spokane River Basin Adjudication be commenced within the terms of the McCarran Amendment and required that any petition for commencement include a request that the adjudication only be commenced if *de minimis* domestic and stockwater claims could be deferred. The Tribe argues that the determination of whether the deferral process is consistent with the McCarran Amendment at this pre-commencement stage of the hearing is constitutionally non-justiciable because the issue is not ripe for determination, constitutes a feigned issue, and would result in the issuance of an advisory opinion. This Court disagrees.

The federal justiciability requirement is a constitutionally-based requirement adopted and followed by Idaho. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.2d 1217, 1220 (citing *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). The federal justiciability requirement is derived from the Separation of Powers Doctrine. If the Idaho Legislature instructed the Idaho judiciary to hear controversies that would not otherwise be justiciable, that would constitute an impermissible exercise of power belonging to the judicial branch and which the legislature is not constitutionally permitted to exercise. *Noh* at 804, 53 P.2d at 1223 (J. Kidwell, special concurrence).⁴ In *Noh*, a

⁴ Justiciability is generally divided into subcategories including "advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions and administrative questions. *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989) (quoting 13 *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction*, § 3529 (2nd ed. 1984)).

declaratory action was filed challenging the constitutionality of an Indian gaming initiative and seeking a writ prohibiting the initiative from appearing on the ballot. Although the initiative qualified to appear on the ballot in the next election, the election had not yet taken place. A statute authorized the filing of the action to determine the constitutionality of an initiative immediately following the issuance of a certificate of review by the attorney general but prior to its approval by the electorate. The Idaho Supreme Court held that the action, although expressly authorized by statute, presented a non-justiciable controversy because it was not ripe for determination. The Court held that until the initiative passed, it was just a proposal, not law, and as such there was no need for an adjudication regarding its validity. *Id.* at 801, 53 P.2d at 1220. The Court summarized the justiciability requirement as follows:

While the elements of an actual or justiciable controversy are not subject to a mechanical standard, the United States Supreme Court aptly summarized the pivotal elements of a justiciable controversy in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

A ‘controversy’ in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.

Id. at 800, 53 P.2d at 1219 (quoting *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). The Court held that in order for a case to be ripe for determination a petitioner must prove “1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication.” *Id.* (citing *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996)).

In the context of the purpose and unique circumstances presented by a general stream adjudication, this Court finds the issue raised about the deferral procedure for *de*

minimus claims presents a definite and concrete issue, a real controversy for which there is a present need for determination. The Idaho legislature authorized the commencement of a McCarran adjudication. The significance of the McCarran adjudication is the jurisdiction of the state over federal and tribal claims. Accordingly, one of the purposes of the commencement hearing for a McCarran adjudication is to establish whether the proposed scope of the adjudication meets the requirements of the McCarran Amendment prior to issuing the commencement order, which among other things, defines the scope of the adjudication. This proceeding necessarily includes addressing issues pertaining to the proposed boundaries of the adjudication and whether the boundaries are comprehensive of all hydrologically connected sources and whether there are any categories of claims proposed to be excluded as well as any other procedures which may affect the Court's jurisdiction. The scope and purpose of this process is exemplified in the commencement proceeding for the Snake River Basin Adjudication (SRBA).

In *In Re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988), one of the issues raised in the commencement proceeding for the Snake River Basin Adjudication was whether previously adjudicated rivers tributary to the Snake River should be included in the SRBA. The statute which authorized the commencement of the SRBA provided in relevant part that:

The director shall not include in the petition . . . any adjudicated tributary unless the United States, or other parties whose consent is necessary, refuse to consent to the jurisdiction of the district court to adjudicate all federal or Indian water rights claims pursuant to the McCarran amendment, 42 U.S.C. section 666.

Id. at 4, 764 P.2d at 81 (quoting 1985 Idaho Sess. Laws, ch. 118, p.287). The petition for commencement provided that the Director was unable to determine whether or not the United States refused to consent if the adjudicated tributaries were excluded and included as part of its prayer for relief that the court describe the boundaries of the water system “determined to be necessary to obtain the consent of the of the United States to the jurisdiction of the district court for the adjudication of the Snake River basin water system.” *Id.* at 5, 764 P.2d at 82.

The United States by special appearance contested jurisdiction asserting that the petition did not meet the consent to suit provisions of the McCarran Amendment if the adjudicated tributaries were excluded from the SRBA. Following a commencement hearing, the SRBA district court issued a commencement order which included the adjudicated tributaries. On appeal the Idaho Supreme Court addressed two issues. First, whether the “consent to jurisdiction” provision in the commencement statute was intended to mean special consent to jurisdiction by the United States or the consent contained in the McCarran Amendment. The Court concluded that if the statute required special consent it would be unconstitutional as an unlawful delegation of authority to another government or agency. In upholding the constitutionality of the statute, the Court held that the statute referred to the consent to suit provisions of the McCarran Amendment. Second, the Court discussed at length the requirements of the McCarran Amendment and concluded that McCarran Amendment jurisdiction would exist only if the adjudicated tributaries were also included in the scope of the SRBA. The Court did not hold that the district court should have commenced the adjudication first and only then address issues pertaining to McCarran jurisdiction.

The one arguable distinction in the instant case as argued by the Tribe is that the affect of the deferral procedure on McCarran jurisdiction may never present an actual controversy if no party ultimately elects to follow the procedure. However, this argument somewhat oversimplifies the terms of the deferral procedure and ignores the unique characteristics of a general adjudication.⁵ Although all *de minimis* domestic and stockwater claimants will be joined as parties from the outset and bound by any decrees issued in adjudication, the actual filing of *de minimis* claims can potentially be deferred indefinitely.⁶ In this respect the deferral procedure arguably assumes some of the

⁵ A McCarran adjudication presents a unique set of circumstances. Although the adjudication is a single lawsuit, it is comprised of numerous individual distinct claims. Individual claims within the adjudication are filed at different times and advance separately through the process. The adjudication can take many years to complete. Accordingly, McCarran jurisdiction issues must be raised and determined from the outset.

⁶ The deferral procedure provides in relevant part (with emphasis) as follows:

1. All claimants of de minimus domestic and stock . . . shall be joined as parties in this proceeding and will be bound by all decrees entered in this case,

characteristics of an excluded category of claim which clearly creates an actual controversy concerning McCarran jurisdiction. As such, the jurisdictional issue for McCarran purposes is whether the deferral procedure is a deferral or a *de facto* exclusion of claims.

The deferral procedure does not require that claimants electing to follow the procedure provide notice to the Court or other parties that they are electing to defer their

including the final decree. Any objections which a de minimus claimant or any other claimant may have to any and all claims being adjudicated in this proceeding must be timely raised in this proceeding in accordance with Idaho Code § 42-1412 or be forever barred.

2. **De minimus claimants may elect to have their claims fully adjudicated now or to postpone the adjudication of their claims** by following the alternative procedure set forth in paragraph 23, *infra*. If a de minimus claimant elects to have his or her domestic or stock water claims (or both) fully adjudicated now, then the de minimus claimant must file a notice of claim. . . .

3. **De minimus claimants may elect to defer adjudication of their claims to a later time in this proceeding If this option is elected a deferred de minimus claimant will not be required to file a notice of claim at this time or to pay any filing fee until such time as the claimant seeks to have the deferred claim decreed.**

A. Election of this procedure will not result in a loss of such de minimus domestic or stock water claim nor will such deferred de minimus claimant be precluded from establishing the requisite elements of his or her de minimus claim at a subsequent time using the summary procedure described herein.

. . .

C. **In order to obtain an adjudicated water right, a claimant of a deferred de minimus domestic or stock water claim shall file a motion for determination of the claim with this court.**

D. The following provisions are required to instate a determination of a deferred de minimus domestic or stockwater claim.

. . .

9. **Venue for hearings on deferred domestic and stock water claims shall be in the county in which the point of diversion is located unless otherwise ordered by this district court.**

F. **The district court retains continuing jurisdiction of the subject matter in this proceeding, and the parties to this proceeding, for the purpose of adjudicating deferred de minimus domestic or stock water claims.** The district court on the motion of any party hereto, including a successor-in-interest, may adjudicate a deferred de minimus domestic or stock water claim under the alternative procedure set forth in this stipulation.

claim(s). Therefore prior to the filing of the motion to file the claim, it would not be known whether claimants were electing to follow the deferral procedure, whether water users were simply ignoring the adjudication altogether, or whether a claim to a deferrable water right even existed. The Court, as well as any other party to the adjudication, would not know whether the deferral process was being followed until after the first motion to file a deferrable claim was actually filed. Deferrable claims filed after the deadline for filing non-deferrable claims but during the pendency of the on-going adjudication would be adjudicated and thus no longer implicating McCarran issues. The problem is that the filing of the motion could occur anytime as early as after the deadline expired for filing non-deferrable claims or as late as after all non-deferrable claims, including both federal and tribal, were adjudicated and a final unified decree entered. At a minimum, this creates significant problems if McCarran jurisdiction issues still exist after all claims are filed as a general adjudication requires a herculean effort from its outset. At the other extreme the entire adjudication process is compromised if such issues remain unresolved and viable after all non-deferrable claims are adjudicated and a final unified decree is entered. The other problem is that if the Court waited until the first motion to file a deferrable claim was filed in order to support a finding of a justiciable controversy, and the first motion was filed well into the adjudication process or after a final unified decree was entered, parties may well have waived their right to challenge McCarran jurisdiction after participating in the adjudication up to point where the issue is considered “ripe.” This may well violate due process by depriving parties the opportunity to be heard at a meaningful time and in a meaningful manner. *See e.g. San Carlos Apache Tribe v. Superior Court of Arizona, County of Maricopa*, 972 P.2d 179, 196 (Ariz. 1999) (holding that waiting to challenge *de minimis* water right claim status in post-decree proceedings may violate due process rights because of extended delay). The Idaho Supreme Court readily acknowledged with respect to the SRBA that: “water right adjudications present unique circumstances, often requiring a departure from established rules of procedure. *State v. United States*, 128 Idaho 246, 254, 912 P.2d 614, 622 (1995).

Finally, the Idaho Legislature authorized the commencement of a general adjudication conditioned on the implementation of certain procedures, namely the

deferral of *de minimis* claims. The fact that the Legislature conditioned the commencement of the adjudication does not result in the Legislature seeking an advisory opinion from the Court. The Court views this situation as being no different than if the Legislature authorized a McCarran adjudication and expressly defined the boundaries of the adjudication or expressly excluded a category of water uses, and then following a commencement hearing, the Court determined that the defined boundaries or excluded uses did not satisfy the consent to suit provisions of the McCarran Amendment. The result would be the same in that the Court could not commence the adjudication as authorized. In this case, the only difference is that the legislation expressly provides that the petition request that the adjudication not be commenced if the conditions do not meet the criteria of the McCarran Amendment. In either situation, the Legislature is not seeking an advisory determination from the Court. In a lot of respects this is what occurred with the commencement of the SRBA. The Idaho Legislature included a similar condition in the statute authorizing the commencement of the SRBA. The Idaho Supreme Court upheld the constitutionality of the statute despite the statute requiring previously adjudicated tributaries to the Snake River only be included in the scope of the adjudication if required to satisfy the consent to suit provisions of the McCarran Amendment. *In Re Snake River Basin Water System*, 115 Idaho at 4, 764 P.2d at 81 (1988). The issue was appropriately decided prior to the commencement of the adjudication in conjunction with the hearing on the petition for commencement.

In sum, the deferral procedure adds a new twist to the established requirements of the McCarran Amendment. Because of the way in which the deferral procedure operates in conjunction with the unique mechanics of a McCarran adjudication, the Court finds that the issue regarding the deferral procedure implicates McCarran jurisdiction from the outset of the proceedings and presents a controversy which must be addressed in conjunction with the commencement hearing process. Accordingly, this Court holds the issue is justiciable and therefore jurisdiction to decide the issue is proper.

4. The deferral procedure does not exclude *de minimis* claims and therefore satisfies the terms of the McCarran Amendment.

At the commencement hearing, conflicting testimony was presented regarding the cumulative effect of *de minimis* claims on the water supply. Director Tuthill testified that domestic rights have a very small consumptive component. He explained that most of the water diverted from a domestic groundwater well returns to the aquifer through the septic system. The consumptive component is primarily the quantity applied to irrigating the lawn. The Director also testified that although a *de minimis* domestic or stockwater right is limited to a diversion of 13,000 gallons per day, the right is still limited to historical beneficial use. The typical domestic user diverts about 200 gallons per day. He testified that the entire population of the counties to be covered by the adjudication is approximately 160,000 people. Director Tuthill testified that the estimated annual water production of the Coeur d'Alene-Spokane Basin River system exiting the basin into the Spokane River at Post Falls Dam is approximately 4,475,000 acre feet per annum (AFA). Based on those figures, he calculated the maximum quantity diverted to satisfy domestic uses represents less than 1% of the total estimated annual water supply. However, this percentage also includes domestic users of municipal claims which are non-deferrable. In his pre-filed testimony Director Tuthill stated that although domestic uses represent less than 1% of the water supply for the basin, domestic uses represent more than half of the total potential number of claims. *See Exhibit 3 to Aff. of David I. Stanish.* Director Tuthill also testified that in the SRBA, as the adjudication progressed, a large number of *de minimis* water users who initially elected to defer filing recognized the benefit of having their claim adjudicated and eventually filed claims.

The Tribe presented the testimony of Scott Fields, the hydrologist responsible for managing the Tribe's water resource program. Mr. Fields testified that the problem with the Director's figures is that the 4,475,000 AFA is annualized over twelve months and doesn't take into account critical summertime flows. During hot September or August days, the flows of the Spokane River have been reduced to 300 cubic feet per second. Mr. Fields testified that according to publically available groundwater data from IDWR, he could identify approximately 12,500 groundwater wells in Basins 91 through 95. Of that figure he could verify that approximately 10,700 or 89% of the wells are *de minimis*

in nature. Mr. Fields testified that using the maximum withdrawal rate of 13,000 gallons per day multiplied by the 10,700 wells would result in a cumulative withdrawal rate of 215 cubic feet per second. Mr. Fields testified that if the *de minimis* wells had direct surface ties to the Spokane River then theoretically under a “worst case scenario” the cumulative withdrawals from the *de minimis* wells could represent two-thirds of the flow of the Spokane River.

Despite the conflicting evidence about the cumulative effect of *de minimis* claims, the Court views the issue of whether or not the deferral procedure satisfies McCarran Amendment requirements as an issue of law. Although the term “*de minimis*” refers to something so small or minimal that it does not matter or the law does not take it into consideration, no authority exists supporting a threshold quantity regarding when a claim can be excluded from a general adjudication while the requirements of the McCarran Amendment are still met. In *United States v. Dist. Court in and for Eagle County, Colo.*, the United States argued that the consent to suit provisions of the McCarran Amendment did not include federal reserved water rights. The United State’s Supreme Court rejected the argument holding: “[W]e reject that conclusion for we deal with an all-inclusive statute concerning ‘the adjudication of rights to the use of water of a river system’ which in s 666 (a) (1) [of the McCarran Amendment] **has no exceptions** and which, as we read it, includes appropriate rights, riparian rights, and reserved rights.” *Id.* at 524 (emphasis added). In *In Re Snake River Basin Water System*, the Idaho Supreme Court concluded:

This history of the McCarran Amendment and the interpretations that the federal courts have given to it convince us that in order for the United States to be subject to the jurisdiction of the trial courts in the Snake River basin adjudication, **the rights of all claimants on the Snake River and all of its tributaries** within the state of Idaho must be included in the adjudication.

Id. at 8, 764 P.2d at 85 (emphasis added). That being said, as a result of the sheer number of small domestic and stockwater claims typically present and the relatively small quantity of water these claims represent, it is not uncommon for small domestic and

stockwater rights to be processed differently, or at least attempted to be processed differently, than the rest of the claims in a general adjudication.⁷

In the instant case, the United States analyzed why the deferral of *de minimis* claims is consistent with the McCarran Amendment:

The United States agrees that the comprehensive requirement of the McCarran Amendment is satisfied despite deferral of the *de minimis* rights for the following reasons. First, the State of Idaho and the United States held extensive discussions regarding the issue of deferral of *de minimis* rights prior to the execution of the Stipulation which is attached to the *Petition*. Counsel for the Coeur d'Alene Tribe also participated in many of those discussions. Those discussions were helpful to clarify the concept of deferral for the United States. Second, language in the *Petition*, p. 5, states that "[t]here are no classes of uses proposed to be excluded from the adjudication." Third, the *Stipulation* states that "[a]ll claimants of *de minimis* [sic] domestic and stock water uses as defined in Idaho Code § 42-1401A(4) and (11), (hereinafter referred to as "*de minimis* [sic] claimants") shall be joined as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree." The clear inclusion of the potentially deferred *de minimis* rights within the adjudication satisfies the United States' concerns regarding the comprehensive nature of the McCarran Amendment. *Cf. United States v. District Court in and for Water District No. 5, Colorado*, 401 U.S. 527, 529 (1971) ("The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality.").

United States' Notice of Appearance and Pre-hearing Statement at 6. The State of Idaho agreed.

The proposed procedures for *de minimis* claimants are entirely consistent with the McCarran Amendment's requirement that all water right claimants be joined as parties. The procedures make it clear that all claimants, including *de minimis* claimants, are to be joined as parties to the adjudication and are to be bound by all decrees entered in the adjudication, including the final decree. Joinder applies to all *de minimis* claimants, whether they choose to defer adjudication of their rights or not. Any objections which a *de minimis* claimant or any other claimant may have to any and all claims being adjudicated must be timely raised pursuant to

⁷ For example in the Big Horn Adjudication in Wyoming, domestic and stockwater rights were summarily "adjudicated." A similar process was attempted in Arizona but issues arose over whether the court or the legislature had the power to define *de minimis*. *San Carlos Apache Tribe v. Superior Court of Arizona, County of Maricopa*, 972 P.2d 179, 196 (Ariz. 1999).

Idaho Code § 42-1412 or forever be barred. As such, any partial decree determining water rights of the United States or any other claimant would not be subject to collateral attack by a *de minimis* claimant. Since all claimants, including *de minimis* claimants, are to be joined in this adjudication and will be served by IDWR, the proposed procedures for adjudication of *de minimis* claims comply fully with the McCarran Amendment

State of Idaho's Memorandum in Support of Pre-hearing Statement at 4.

This Court agrees with the reasoning of both the United States and the State of Idaho. 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 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.⁸

⁸ The Court uses the term "may" because deferrable claims filed after the deadline for filing claims but before any final decree is entered will be adjudicated in the same manner as late claims during the main phase of the adjudication. See e.g. *SRBA Administrative Order 10, Order Governing Procedures in the SRBA for Domestic and Stockwater Uses* (Mar. 22, 1995) (defining procedures for processing deferrable claims during pendency of adjudication) attached as Exhibit 5 to *Aff. of David I. Stanish*. A similar process would have to be ordered in this case.

In *United States v. District Court in and for Water District No. 5, Colorado*, 401 U.S. 527, 529 (1971), the United States challenged the McCarran jurisdiction of a state adjudication procedure which contemplated new rights applications on a monthly basis before a referee. The United States argued that the procedure did not constitute a general adjudication of water rights for McCarran Amendment purposes because all water rights and all water users on a stream system were not implicated in the referee's determinations. Rather the only water rights considered in the proceeding were those for which an application was filed in a given month. In addition, all water rights confirmed under the procedure would be junior to those previously awarded. The United States Supreme Court rejected the argument holding:

As we said in the Eagle County case, the words 'general adjudication', were used in *Dugan v. Rank*, 372 U.S. 609, 618, 83 S.Ct. 999, 1005, 10 L.Ed.2d 15, to indicate that 43 U.S.C. s 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality.

...

The deferral procedure in the instant case is no different. Deferrable claims will not be adjudicated on a piecemeal basis or pursuant to separate private actions but rather as part of the overall general adjudication proceedings for the entire source.⁹ Although the claims may be adjudicated at a later time, they will still be adjudicated within the

⁹ The interrelationship of water rights requires that in order to fully define and effectively administer water rights, all rights on the same hydraulically connected source need to be bound by the same decree as opposed to different decrees issued in multiple suits. The problem of having multiple suits to adjudicate a source is that the decrees are binding only on the parties to the adjudication and their privies. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). The 1994 Interim Legislative Committee on the Snake River Basin Adjudication summarized the problem of multiple decrees best when it stated:

There are presently a number of decrees affecting surface and ground water tributary to the Snake River plain. These decrees were created and operate in a vacuum. They do not acknowledge the existence of other tributaries they may affect or rights listed in the decrees are or may be subordinate to other rights not listed. These decrees are not effective vehicles for management of the entire system.

1994 Interim Legislative Committee on Snake River Basin Adjudication at pp. 1-2 9 (quoting 1983 *Technical Advisory Committee Report, Needed Water Resources Programs in the Snake River Basin.*).

MEMORANDUM DECISION ON PETITION TO COMMENCE COEUR D'ALENE-SPOKANE RIVER BASIN GENERAL ADJUDICATION

confines of the same single suit and all parties will be bound by the same orders and decrees entered in the case including the same comprehensive final decree.

Therefore, for the reasons set forth above, the Court concludes that it is possible to defer the adjudication of *de minimis* domestic and stock water rights as set forth in the *Stipulation* within the terms of the McCarran Amendment.

5. The Court need not decide issue of whether the Stipulation is binding on Indian tribes for purposes of establishing McCarran jurisdiction.

Since this Court holds that the procedure for deferring *de minimis* domestic and stockwater claims complies with the McCarran Amendment, the Court need not decide whether the *Stipulation* of the United States in its capacity as trustee on behalf of tribal claimants is binding on Indian tribes for purposes of satisfying the terms of the McCarran Amendment.

C. Remaining Issues Raised at Commencement Hearing.

Edward F. Anderson, appearing *pro se*, raised two issues. The first is whether multiple water users diverting from a common well will be limited to a half-acre of irrigation. The second issue deals with an individual's right to collect rain water and diffused surface water on their property. Although these issues have relevance to specific claims, they do not pertain to the commencement of the adjudication. Mr. Anderson and any other party to the adjudication may raise these issues in the context of individual subcases once the adjudication is commenced.

E. The Proposed Method for Second Round Service Satisfies the Provisions of Idaho Code § 42-1408 (4) and Procedural Due Process.

The *Petition* seeks approval of IDWR's proposed method for providing second round service of the notice of commencement as required by I.C. § 42-1407 (4) (e). That statute requires that a commencement order include a determination by the court of the method of service for claimants not disclosed following completion of first round of service. The process works as follows. Idaho Code § 42-1408 (1) requires the Director to prepare a "*Notice of Order*" indicating that an order commencing a general adjudication has been entered. The *Notice of Order* must be served after the district court issues the order commencing a general adjudication. Idaho Code § 42-1408 (1) (a)-(m) sets forth the information and enclosures the Director is required to include in the *Notice of Order*.¹⁰ Idaho Code § 42-1408 (2) and (3) set forth the service requirements for the

¹⁰ Idaho Code § 42-1408 (1) provides:

Service of notice of order commencing a general adjudication. -- (1) Upon entry of a district court's order commencing a general adjudication, the director shall prepare a notice of order, using plain and concise language, that contains the following information or enclosures:

- (a) an order commencing a general adjudication has been entered, the date of entry of the order, and the district court that entered the order;
- (b) an illustration of the boundaries of the water system to be adjudication and administered;
- (c) that section 42-1409, Idaho Code, requires in a general adjudication all claimants, except as specifically excluded by law, to file for each water right, a notice of claim on a form furnished by the director; failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed;
- (d) a notice of claim is required for any water right license and for any water right permit on file for which the director requires a permit holder to file a notice of claim in accordance with section 42-1409, Idaho Code; a notice of claim may be filed for any other water right permit;
- (e) a notice of claim is not required for a water right evidenced by an application on file with the department;
- (f) a notice of claim, if the court order excludes any uses from an adjudication, may be filed for the excluded use prior to the filing of the director's report with the district court and the right will be determined, even though a notice of claim is not required;
- (g) a notice of claim is not required for any person who receives water solely by virtue of ownership of shares of stock in, or by being located within the boundaries of, a water delivery organization, if the water delivery organization holds legal title to the water right and if the water delivery organization files a notice of claim;
- (h) the date set by the director for filing a timely notice of claim, which shall not be less than ninety (90) days after service;
- (i) that section 42-1409A, Idaho Code, imposes substantial restrictions on the filing of amended or late notices of claim;
- (j) the locations at which the notice of claim forms will be available;
- (k) section 42-1414, Idaho Code, requires each claimant, other than those exempted by federal law, to pay a variable fee to the director with a notice of claim; failure to pay the

Notice of Order. ¹¹ Finally, I.C. § 42-1408 (4) requires that after the expiration of the period for filing notices of claims has expired that the Director conduct a second round of service of the *Notice of Order.* ¹²

fee will result in rejection of the notice of claim; failure to file a timely notice of claim will result in assessment of a late fee in the amount of fifty dollars (\$50.00) or fifteen per cent (15%) of the original filing fee, whichever is greater;

(l) section 42-1409, Idaho Code, requires that all purchasers of a water right inquire of the director whether a notice of claim has been filed, and if not, to file a notice claim, except as specifically excluded by law, and that all claimants and purchasers provide the director written notice of any change in ownership, along with some evidence of ownership or of any change in mailing address; and

(m) the files of the district court will contain affidavits of service or other documents stating the persons served with a copy of the notice of order.

¹¹ Idaho Code § 42-1408 (2) and (3) provide:

(2) The director shall serve copies of the notice of order as follows:

(a) the director shall serve the notice of order on the state of Idaho and the United States;

(b) the director shall serve the notice of order on claimants other than the persons in paragraph (a) of subsection (2) of this section, initially by publication once a week for three (3) consecutive weeks in a newspaper or general circulation published in each county in which any part of the water system, which is the subject of the general adjudication, is located. If there is no newspaper published within a county, then the copies shall be published in a newspaper having general circulation in that county;

(c) the director shall post the notices of order in each county courthouse, county recorder's office, and county assessor's office in which any part of the water system is located. The director shall complete the posting on or before the date of the last publication within each county;

(d) the director shall serve the notice of order by ordinary mail on each person listed as owning real property on the real property assessment roll within the boundaries of the water system to be adjudicated at the address listed on the real property assessment roll; and

(e) the director shall file a copy of the notice of order commencing a general adjudication in the office of the county recorder in each county in which any part of the water system is located; notwithstanding the provisions of section 5-505, Idaho Code, the notice, from the time it is filed with the recorder for record, is constructive notice of the contents thereof within the county in which the notice is recorded, to subsequent purchasers and mortgagees.

(3) The director shall send the notice of order by ordinary mail to all persons who submit a written request to the director to be notified of the commencement of an adjudication. The director may circulate copies in any additional manner the director deems appropriate.

¹² Idaho Code § 42-1408 (4) provides:

(4) Upon expiration of the period for filing notices of claims, the director shall conduct a second round of service in conformance with this subsection. The director shall compare the notices of claims with department records and other information reasonably available to determine whether there are any rights to water from the water system for which no notice of claim was filed. In the event the director determines that not all claimants have

In the instant case, the Director has proposed a process for completing second round service which complies with I.C. § 42-1408 (4). Exhibit 6 to *Aff. of David I. Stanish*. Subject to a couple of amendments, the process is in all respects the same process that was adopted and approved for use in completing second round service in the SRBA under the same statute. See ***Order Approving Proposed Method of Second Service of the Commencement Notice in the SRBA***, *In re SRBA*, No. 39576 (Jan. 14, 2000). Exhibit 6 to *Aff. of David I. Stanish*. The amendments to the process used in the SRBA include:

1. References to the SRBA and the SRBA commencement notice will be amended to recognize the different geographic scope and procedural status of the CSRBA;
2. The Geographic Information Systems (GIS) analysis set forth in Part III.B relies on updated National Agricultural Imagery Photography Program from 2006; and
3. The time for service set forth in Part V.B now reads “not less than 90 days” instead of “90 days” making the time frame identical to that specified in the statute.

Exhibit 3, p.5 to *Aff. of David I. Stanish*.

No issues regarding second round service were raised in conjunction with the commencement proceedings. Accordingly, the Court approves the proposed service procedures. This is essentially the same procedure implemented in the SRBA, a process

filed claims, the director shall make a reasonably diligent effort in accordance with the court order to determine the land to which the possible claim is appurtenant, the last known owner of that land, and the last known address of that owner. The director shall prepare a second round notice of order. The director shall serve this notice on the last known owner in accordance with the court order. The notice shall contain the information specified in subsection (1) of this section, except that the notice shall state a final date for filing notices of claims. The final date shall be an additional period of time, in no case less than ninety (90) days from the date the notice is served, in which the notice of claim must be received by the director.

which was contested on due process grounds as part of a challenge to the overall notice procedures adopted in the SRBA. The constitutionality of the notice procedures used in the SRBA was upheld by the SRBA district court and reviewed and affirmed by the Idaho Supreme Court. See *Memorandum Decision and Order on Motion to Set Aside subcase 55-02373 et al (LU Ranching), In re SRBA*, No. 39576 (May 1, 2001) *affm'd LU Ranching Co. v. United States*, 138 Idaho 606, 67 P.3d 85 (2003). The Supreme Court noted that “[i]n order for the Legislature to provide for an adjudication, including the claims within the scope of the McCarran Amendment, and in light of the absence of applicable rules of civil procedure, it was necessary for the Legislature to provide special procedural rules for the initiation of the SRBA.” *LU Ranching Co.* at 610, 67 P.2d. at 89. The Supreme Court upheld these same procedural rules. The Court finds that the Director’s proposed method of ascertaining and serving claimants not disclosed following the completion of the service required by I.C. § 42-1408(2) (a) through (d), as set forth in I.C. § 42-1408 (2), (3) and (4); complies with both the requirements of I.C. § 42-1408 (4) and fundamental concepts of due process. Accordingly, the Court approves the procedures. The proposed method, excluding the above-referenced amendments, is attached to this *Memorandum Decision* as **Exhibit 3** and is incorporated herein by reference.

IV. CONCLUSION

For the reasons set forth above, the Court concludes that the adjudication of the Coeur d’Alene-Spokane River Basin system as authorized by I.C. § 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 Coeur d’Alene-Spokane River Basin system adjudication (CSRBA) contemporaneously with this *Memorandum Decision*.

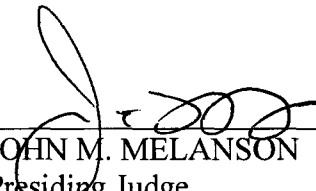
V.

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

IT IS SO ORDERED.

DATED: November 12, 2008.



JOHN M. MELANSON
Presiding Judge

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **MEMORANDUM DECISION ON PETITION TO COMMENCE COEUR D'ALENE-SPOKANE RIVER BASIN GENERAL ADJUDICATION** were mailed on November 12, 2008, by first-class mail to the following:

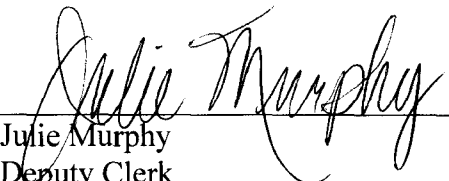
Director, Idaho Department of Water Resources
PO Box 83720
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Office of the Attorney General
State of Idaho
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Boise, ID 83711-4449

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Coeur d'Alene Tribe
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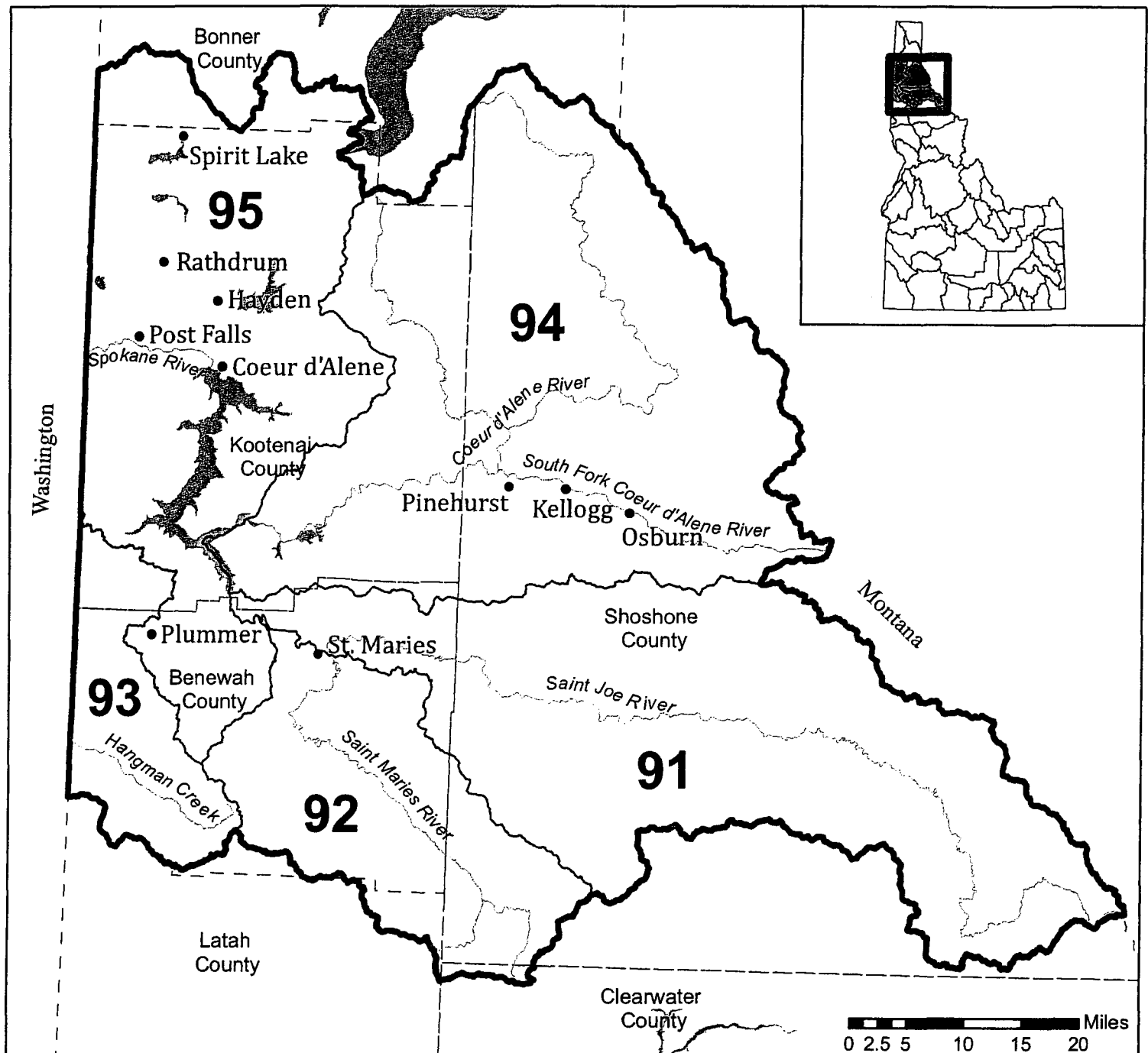
Edward F. Anderson
PO Box 327
Kingston, ID 83839



Julie Murphy
Deputy Clerk

Northern Idaho Adjudication

Coeur d'Alene - Spokane River Basin Water System

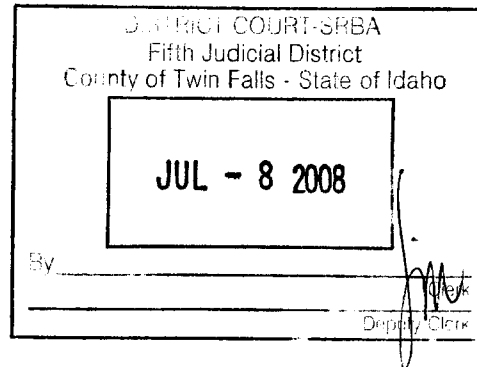


Legend

- Cities
- Coeur d'Alene - Spokane River Basin Water System Boundary
- - - County Boundaries
- IDWR Administration Basins Boundaries

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**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 Coeur d'Alene-Spokane River Basin Water System) CASE NO. 49576)) STIPULATION FOR ESTABLISHMENT OF) PROCEDURE FOR THE ADJUDICATION OF) DOMESTIC AND STOCK WATER CLAIMS)
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DESCRIPTIVE SUMMARY

This document sets forth the agreement between the United States and the State of Idaho regarding the procedure for the adjudication of de minimus domestic and stock water claims in the Coeur d'Alene-Spokane River Basin Water System.

STIPULATION

The State of Idaho and its agencies and the Director of the Department of Water Resources, by and through their attorney, Clive J. Strong, and the United States, by and through its attorney, Vanessa Boyd Willard, stipulate that the following procedures for the adjudication of de minimus domestic and stock water claims as defined by Idaho Code § 42-1401A(4) and (11) shall be used in the above-entitled proceeding:

1. All claimants of de minimus domestic and stock water uses as defined in Idaho Code § 42-1401A(4) and (11), (hereinafter referred to as "de minimus claimants") shall be joined
- STIPULATION FOR ESTABLISHMENT OF PROCEDURE FOR THE ADJUDICATION OF
DOMESTIC AND STOCK WATER CLAIMS - 1

Exhibit 2

as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree. Any objections which a de minimus claimant or any other claimant may have to any and all claims being adjudicated in this proceeding must be timely raised in this proceeding in accordance with Idaho Code § 42-1412 or be forever barred.

2. De minimus claimants may elect to have their claims fully adjudicated now or to postpone the adjudication of their claims by following the alternative procedure set forth in paragraph 3, infra. If a de minimus claimant elects to have his or her domestic or stock water claims (or both) fully adjudicated now, then the de minimus claimant must file a notice of claim as provided by Idaho Code § 42-1409 and pay any filing fees required by Idaho Code § 42-1414.

3. De minimus claimants may elect to defer adjudication of their claims to a later time in this proceeding; provided however, each deferred claim when finally adjudicated shall be limited to no more than those amounts and for those uses set forth in Idaho Code § 42-1401A(4) and (11) as enacted by the Act of March 24, 1997, ch 374, 1997 Idaho Sess. Laws 1192.

Additionally, each de minimus claimant must agree to have any domestic or stock water claim decreed prior to seeking authorization from the Director to change the point of diversion, place of use, purpose of use, or period of use; provided that if any such change is for the purpose of aggregating more than one individual domestic or stock water claim, the consumptive quantity of each right to be aggregated may not exceed the lesser of that amount historically used or 13,000 gallons per day. There shall be no presumption that either the diversion requirement or the actual consumptive use for the water right to be changed was equal to 13,000 gallons per day or any other quantity greater than actual historic use. If this option is elected, a deferred de minimus claimant will not be required to file a notice of claim at this time or to pay any filing fee until such time as the claimant seeks to have the deferred claim decreed.

A. Election of this procedure will not result in a loss of such de minimus domestic or stock water claim nor will such deferred de minimus claimant be precluded from establishing the requisite elements of his or her de minimus claim at a subsequent time using the summary procedure described herein.

B. As provided by Idaho Code § 42-604, as rights in a basin are adjudicated, the Idaho Department of Water Resources will establish water districts. If a call is made for water within a water district, the Director will administer all rights within the water district pursuant to Idaho Code § 42-607. A claimant who has elected to defer adjudication of a de minimis domestic or stock water claim will be required to seek a final adjudication of the claim prior to requesting distribution pursuant to Idaho Code § 42-607.

C. In order to obtain an adjudicated water right, a claimant of a deferred de minimus domestic or stock water claim shall file a motion for determination of the claim with this court.

D. The following provisions are required to institute a determination of a deferred de minimus domestic or stock water claim.

1. The deferred de minimus claimant shall file with this district court a motion for determination of the domestic and stock water claim with an attached notice of claim on a form provided by the Director and shall serve the State of Idaho, the Director, the United States, and persons against whom relief is sought. The claimant shall also cause to be published a notice of the pendency and purpose of the motion once a week for not less than three (3) weeks in a newspaper of general circulation in the county in which the point of diversion is located or as otherwise required by the court. Service upon the United States shall be accomplished by sending a copy of the motion and claim form by certified

mail to the United States Attorney for the District of Idaho and United States Attorney General in Washington, D.C.

2. Any party who objects to the claim shall, within forty-five (45) days from the date of the first publication of the notice, file with the district court written notice of such objection stating the reasons for the objection. A copy of an objection shall be served on the State of Idaho, the Director, the United States, the person whose claim is being objected to, and all persons who have appeared in response to the motion.
3. The Director within thirty (30) days of the expiration of the time fixed to file an objection with the district court, shall file with the district court notification as to whether the Director will conduct an examination of the claim and whether the Director will prepare for submittal to the district court a report on the claim. The Director may commence an examination of the water system in accordance with the provisions of Idaho Code § 42-1410. Notification to the district court that a report will be prepared shall include an approximation of the time when the report will be completed, and an estimate of the Director's costs that will be incurred in conducting the examination and in preparing the report. A deferred de minimus claimant shall then be required to advance to the Director the estimated costs of conducting the examination and of preparing the report. Prior to the filing of the report with the district court, the deferred de minimus claimant shall pay the balance of the Director's verified costs or be refunded any unused estimated costs advanced to the Director. In the event the deferred de minimus claimant shall contest the Director's costs,

the district court shall then determine a reasonable cost to be paid by the deferred de minimus claimant.

4. The deferred de minimus claimants shall be required to pay the following additional costs and expenses of the proceeding: Any filing fees of the claimant, and costs of publication. Pursuant to 43 U.S.C. § 666 no judgment for costs shall be assessed against the United States.
5. The Director shall file the report with the district court upon completion and shall send a copy of the report to the United States, to all parties who filed objections, and to all persons against whom relief is sought. Objections to the report of the Director, responses to the objections, and hearing upon the objections shall be in accordance with the provisions of Idaho Code § 42-1412.
6. For those cases in which the Director notifies the district court that the Director does not intend to prepare a report, the district court will proceed with a hearing, and any party having filed a timely objection with the district court may appear and challenge the claim. The district court may order the Director to prepare a report following a hearing on the deferred de minimus claimant's motion.
7. The district court clerk shall not accept for filing any motion under this procedure unless the claimant certifies on the original document the date and the manner of service of the motion on the State of Idaho, the Director, the United States, and the persons against whom relief is sought.
8. The deferred de minimus claimant shall have the burdens of proof and of persuasion in establishing each and every element of his or her claim.

9. Venue for hearings on deferred domestic and stock water claims shall be in the county in which the point of diversion is located unless otherwise ordered by this district court.

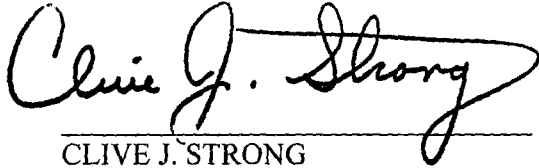
E. Appeals of any orders or decrees entered under this summary procedure shall be governed by the rules applicable to appeals of orders entered in the Coeur d'Alene-Spokane River Basin Water System.

F. The district court retains continuing jurisdiction of the subject matter in this proceeding, and the parties to this proceeding, for the purpose of adjudicating deferred de minimus domestic or stock water claims. The district court on the motion of any party hereto, including a successor-in-interest, may adjudicate a deferred de minimus domestic or stock water claim under the alternative procedure set forth in this stipulation.

4. 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 the 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 the procedures set forth in this 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.

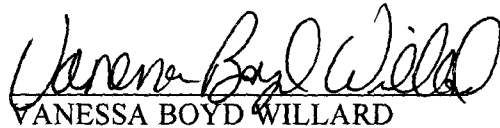
DATED this 3rd day of July, 2008.

STATE OF IDAHO



CLIVE J. STRONG
Deputy Attorney General
Idaho Attorney General's Office

UNITED STATES



VANESSA BOYD WILLARD
Trial Attorney
United States Department of Justice

SECOND AMENDED PLAN FOR SECOND ROUND SERVICE IN THE SNAKE RIVER BASIN ADJUDICATION

I. INTRODUCTION

This document sets forth the Idaho Department of Water Resources' (IDWR's) plan for second round service of the commencement notice in the Snake River Basin Adjudication (SRBA), which is required pursuant to Idaho Code § 42-1408(4). This plan shall be implemented effective January 12, 1999.

II. DEFINITIONS

- A. Adjudication database: IDWR's computerized records of adjudication claims.
- B. Adjudication claim: A notice of claim to a water right filed with IDWR in the SRBA.
- C. GIS (Geographic Information System): Software which relates database records to spatially-referenced graphics.
- D. Round 1 Service (or first round service): Service of the commencement notice as described at Idaho Code § 42-1408A(2)(now amended and redesignated in Idaho Code § 42-1408).
- E. Round 2 Service (or second round service): Service of the commencement notice as described in part I above.
- F. Small domestic and stockwater rights or claims: water rights or notices of claims to water rights that are subject to the special procedure for adjudication of small domestic and stockwater rights adopted by order of the Snake River Basin Adjudication Court on January 17, 1989, also referred to as the "deferral procedure".
- G. Split claim: A notice of claim for a portion of a water right record contained in IDWR's water right database.
- H. Statutory claim: A claim to a water right filed with IDWR pursuant to Idaho Code §§ 42-243 to 42-247.
- I. Water delivery organization: An irrigation district, a water utility, a municipality, or any similar owner of a water right which diverts water pursuant to the water right and delivers the water to others who make beneficial use of the water diverted.
- J. Water right database: IDWR's computerized records of water right records. These include computerized records of water right decrees, which are filed with IDWR pursuant to Idaho Code

§ 42-1403; applications filed with IDWR for permits to appropriate water, and permits to appropriate water, water right transfers, and water right licenses issued by IDWR; and statutory claims.

III. IDENTIFYING UNCLAIMED WATER RIGHTS AND DETERMINING POTENTIAL CLAIMANTS.

A. Water Right Data Base

1. Unclaimed water rights

Data in the adjudication database will be compared with data in the water right database to identify water right records for which a notice of claim was not filed. Unclaimed water right records will be identified by a computer-generated report that identifies water right numbers that have not been claimed.

When IDWR finds an unclaimed water right record, IDWR will attempt to identify from the record:

(a) Whether the record is for a water right established after November 19, 1987. If so, second round service will not be performed.

(b) Whether the owner of the water right evidenced by the record received has filed claims in the SRBA. If so, second round service will not be performed.

(c) Whether the water right evidenced by the record is a small domestic or stock water right. If so, second round service will not be performed.

If IDWR cannot remove an unclaimed water right record from the report for second round service by making the determinations in (a) - (c) above, the place of use of the unclaimed water right will be determined from the water right record and added to the list described in part IV.A.

A problem arises because places of use are identified in IDWR's water right records only by quarter-quarter section. IDWR may attempt to determine which portion of the quarter-quarter section is the place of use for the unclaimed water right where this can readily be done. If the unclaimed portion of the quarter-quarter cannot be identified, then the entire quarter-quarter will be added to the list described in part IV.A.

2. Unclaimed portions of water rights

Unclaimed portions of water rights will be identified by comparing split claims with the water right record to determine if all of the water right record was claimed. If IDWR determines that the owner of the unclaimed portion of the water right record has filed claims in the SRBA,

the claimant will not receive second round service. To make this determination IDWR will identify the place of use for the unclaimed portion of the water right record and add it to the list described in part IV.A.

As with wholly unclaimed water right records, discussed in the preceding subsection, a problem arises from the fact that places of use in IDWR's water right records are identified only by quarter-quarter section. IDWR's response to this problem for unclaimed portions of water right records will be the same as for wholly unclaimed water right records.

B. GIS Evaluation and Second Round Service.

The first step of IDWR's investigation of water rights in a reporting area ordinarily will be to digitize the water right claims. This claim layer will be overlaid in the GIS with digital National Aerial Photography Program (NAPP) photography generally taken in 1987. A visual comparison of the digitized claim layer and the NAPP photography will reveal those irrigated acres where a claim has not been filed and second round service should be conducted. For counties where IDWR has a digital parcel layer, ownership information may be collected directly from the GIS.

When IDWR discovers an unclaimed water use (other than small domestic and stockwater uses), IDWR will compare the place of use with IDWR's water right records as provided in part III.A. If second round service is necessary, IDWR will place the legal descriptions of unclaimed potential irrigated acreage on the list described in part IV.A.

C. Potentially Unclaimed Water Rights Discover During the Investigation of Claims.

If potentially unclaimed water rights are discovered during the course of the investigation of the claims and the water system, a reasonably diligent effort will be made to determine the place of use of the potentially unclaimed water right. The place of use will be put on the list for identification of the last known owner and last known address as described in Parts IV.A and IV.B, and a commencement notice will be served as described in Part V.

IV. DETERMINATION OF OWNER AND ADDRESS OF OWNER OF LAND TO WHICH POTENTIALLY UNCLAIMED WATER RIGHT IS APPURTENANT

A. Place of Use List

IDWR will compile the places of use identified in part III. The records of the county recorder's office will then be checked to determine the name and address of each person with a current record interest in the land shown in the compiled list. A list of owners will be developed which will show all persons with a record interest in the places of use shown on the compiled list.

The list will then be checked to eliminate those owners or other record interest holders who have already filed claims in the SRBA. The list will also be checked to eliminate those to whom first or second round service was already made.

If the records of the county recorder's office disclose that all or a portion of the place of use consists of a residential subdivision with lots of 1/2 acre or less, then that portion of the quarter-quarter section will be deleted from the place of use list. Small domestic uses are not required to be claimed in the SRBA pursuant to the deferral procedure. If the domestic uses are served by a water delivery organization that organization should have been served previously.

B. Name and Address List

If the name yielded from the county record search indicates that the owner is a corporation or limited partnership, the records of the Secretary of State will be checked to determine the name and address of the agent for service of process, which will be used for service of the commencement notice on the corporation or limited partnership. If the records of the Secretary of State's office indicate that the corporation has been dissolved or that the corporate status has been forfeited, then the name and address obtained from the county records will be used.

If the name yielded from the county record search is not an individual, and the name does not indicate that the owner is a corporation or limited partnership, then the county fictitious name registration will be checked to determine the name and address of all true names and addresses listed as doing business under the fictitious name, which will be added to the name and address list. The county fictitious name registry checked will be the registry for the county in which the property is located, and the county where the mailing address is located if the mailing address is in Idaho. If a claim has been filed by the person listed as a true name doing business under the fictitious name, then that true name and address will be deleted from the service list. If there is no document purporting to register a fictitious name and listing the names and addresses of the person doing business under the fictitious name, then the name and address obtained from the county ownership records will be used for second round service.

V. SERVICE OF THE COMMENCEMENT NOTICE ON PERSONS AND ADDRESSES IDENTIFIED IN PARTS II THROUGH IV

A. Manner of Service

A commencement notice will be mailed by certified mail to each name and address on the list described in part IV.

B. Staging of Service

Service will be made periodically, and will continue as the examination of the claims and the water system discloses unclaimed uses or potential claims. Potential claimants identified as a result of the analysis described in part III.A will be notified together at the beginning of second round service in an area, and will be given 90 days following service to file a

notice of claim. Potential claimants identified as result of the investigation of claims described in parts III.B and C will be mailed periodically during the detailed investigation of the claims, and will allow 90 days following service to file a notice of claim.

State of Idaho
County of Twin Falls ss.
I hereby certify the foregoing to be a
full, true and correct copy of the
original on file in the above entitled
action.

KRISTINA GLASCOCK
CLERK OF THE DISTRICT
COURT

By

Julie Murphy
Deputy Clerk



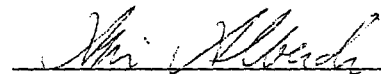
CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **SECOND AMENDED SECOND ROUND SERVICE ORDER** were mailed on January 14, 2000, with sufficient first-class postage to the following:

IDWR Document Depository
PO Box 83720
Boise, ID 83270-0098

Chief, Natural Resources Div
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724


Deputy Clerk of the Court