

MEMORANDUM

Date: May 09, 2011
To: Water Right File 72-7573
From: shemenway
Re: Surface Runoff and Ground Water Source

After a Hydrologic Analysis of Cyprus Thompson Creek Open Pit Mine was conducted by Mat Weaver, PE, and discussion with management, it was determined that Surface Runoff Water should be listed as the source along with Ground Water. This was due to the surface runoff water source being from snow melt and precipitation within the areal extent of the open pit. By using both ground water and surface runoff water source, this is not a change in source, but rather a clarification of what makes up the source.

From: Keen, Shelley
Sent: Thursday, January 03, 2008 6:02 PM
To: Franklin, Keith; Knoblock, Ken; Maxey, Shaun; Taylor, Greg; Davis, Eric; Goodwin, Chad
Cc: Skaggs, Pam; Edl, Michele; Marshall, Aaron; Van Dyke, Nick; Harris, Jeff
Subject: FW: Can IDWR issue a permit for the use of diffused surface water?
Guys,

Based on the email below from Gary Spackman and a discussion with John Homan, we should accept and process an application to appropriate diffused surface water. At this time we probably cannot make someone get a water right to capture and use diffused surface water, but we can accommodate them if they apply.

The next question is what to call the source. "Surface Runoff" seems to have been used successfully in the SRBA. Our data entry standards say to use "unnamed stream," but that doesn't make sense to me. Let's use "Surface Runoff."

Shelley

-----Original Message-----

From: Spackman, Gary
Sent: Thursday, January 03, 2008 12:19 PM
To: Keen, Shelley
Subject: RE: Can IDWR issue a permit for the use of diffused surface water?

Shelley,

I haven't analyzed the question in detail with all the facts of the proposal, but even if a water right may not be required, I don't think we are prohibited from approving a permit. I predict the exclusion of use of diffuse water from the filing requirements will be more and more limited or perhaps even disappear as the resource becomes more scarce and the science of hydraulic connection improves. A user can protect against future calls and curtailment by establishing a water right.

Gary

-----Original Message-----

From: Keen, Shelley
Sent: Thursday, January 03, 2008 8:14 AM
To: Peppersack, Jeff; Spackman, Gary; Homan, John
Cc: Franklin, Keith; Knoblock, Ken; Skaggs, Pam; Marshall, Aaron; Edl, Michele
Subject: Can IDWR issue a permit for the use of diffused surface water?

Jeff, Gary, John,

Northern Region is working with a person who wants a permit to appropriate diffused surface water. We'd like to know if IDWR can issue a permit to use diffused surface water. The text of Adjudication Memo #11 (see below) suggests that diffused surface water is private water not subject to the appropriation doctrine. Application Processing Memo #67 paraphrases Adjudication Memo #11.

Based on the guidance in these memos, we would not require a permit to capture and use diffused surface water. But, can someone get a permit to protect themselves against enjoinder by junior appropriators of the water once it has reached a stream channel?

The water rights database shows a few SRBA decrees to the United States for "surface runoff" or "runoff." I could find no similar permits or licenses.

Shelley

FROM ADJUDICATION MEMO #11

Diffused Surface Water

a. The General Rules

The landowner has the right to use diffused surface water occurring upon the landowner's property before it joins a natural stream, lake, or other public source. King v. Chamberlain, 20 Idaho 504, 118 P.2d (1099).

However, it is a well settled rule that a prior appropriator of water is entitled to enjoin the use of water by others that depletes the source of supply to the watercourse and thereby interferes with the appropriator's use. It has also been held that, in an action by a senior appropriator against a junior appropriator for interference with the senior appropriator's rights, the burden of proof is on the junior to show that the water in the junior's ditch is not tributary to the source of the senior's appropriation. Martiny v. Wells, 91 Idaho 215, 419 P.2d 470 (1970).

So, the landowner is entitled to use diffused surface water occurring on the landowner's property before it enters a natural channel, but the use may be enjoined if the diffused surface water is a source of supply to a natural watercourse. The big question is where exactly is the line drawn. The one clear rule is that the diffused surface water must be a significant source, so that interception results in substantial injury to a prior appropriator. "Significant" or "substantial" probably means "measurable". See Franklin Cub River Pumping Co. v. Le Fevre, 79 Idaho 107, 311 P.2d 763 (1957).

b. What is diffused surface water?

Diffused surface water is water on the surface of the land "from rains and melting snow, but is in no way fed from any natural stream or regular flow of water", before it enters a natural channel. King, above. Diffused surface water presumably would not include percolating water from springs, or flood flows, because such waters are fed by a regular (albeit intermittent) flow of water.

A natural channel is "a stream of water flowing in a definite channel, having a bed and sides or banks." Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P/ 1059 (1909). The flow of water need not be constant, so an intermittent stream that has a flow only in springtime is still a natural channel. Id. The channel must have some element of permanence, but proof of ancient age is not required. Scott v. Watkins, 63 Idaho 506, 122 P.2d 220 (1942). A stream does not lose its character as a natural channel just because it flows through a marsh that lacks definite sides. Bachman v. Reynolds Irrigation District, 56 Idaho 507, 55 P.2d 1314 (1936). Nor does a stream lose its character as a natural channel just because part of the channel has been artificially created. Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960).

Whether a particular source is diffused surface water is a question of fact, and the answer may involve difficult issues as to the source of water, when it enters a natural channel, and whether it is a significant source of water to a public water source.

Note that there may also be a question as to when there has been a "capture of diffused surface water". For example, terracing is a common practice of dryland farmers in eastern Idaho. The terracing enables the farmer to make better use of the rainfall, but it is doubtful that this is a "capture of diffused surface water" to which an appropriator might complain. On the other hand, the damming of natural swales to collect diffused surface water is a common practice in northern Idaho. This is a capture of diffused surface water, and a prior appropriator may have cause to complain if the water is a significant source of water to the prior appropriator's source.

c. Does the appropriation doctrine apply?

Neither the Idaho Constitution nor the Idaho Code provides that diffused surface water is public water subject to appropriation. As noted above, the state constitution only declares natural streams to be public waters. Earlier cases held that springs, lakes and ground water were private water owned by the landowner on the rationale that they were not made public waters by the state constitution. Springs, lakes, and ground water were later made public water by statute, but diffused surface water is not mentioned in the statute, so it remains private water. As private water, it would not be subject to the permit and license system and its use could not be enjoined, so long as it could not be shown that the diffused surface water was a measurable source of water to a public source.

d. The SRBA

Idaho Code §42-1401A(5) defines a general adjudication as the judicial determination of the rights of all persons to use water from the water system, except as provided in §42-1420.

§42-1420 excludes future claims to existing appropriations and recognizes the exclusion of domestic and stockwater uses by order of the court. Idaho Code §42-1401A(11) defines the water system as all rivers, streams, lakes, springs, groundwater, or other sources within the state. The SRBA Commencement order includes all rights to water within the boundaries described in the commencement order, and provides that no uses of water are to be excluded.

e. The bottom line

Absent a clear rule of law that diffused surface water is not subject to the adjudication, IDWR should probably make the conservative assumption that diffused surface water is included until it is determined otherwise. Again, there may be difficult issues of fact as to whether the water is indeed diffused surface water; the only way to get a determination that it is private water is to claim it in the adjudication; and if the claimant wants it decreed as private water, the claimant should so indicate on the notice of claim form. Note that if there is later a clear ruling that diffused surface water is included in the adjudication, and the claimant does not claim it in the adjudication, the claimant will lose his or her priority date. This may not result in any real harm since disputes as to use of diffused surface waters are rare, but there are some examples in the case books.