


ADJUDICATION MEMORANDUM #11

TO: Adjudication Bureau Staff

FROM: Don Shaff, Adjudication Bureau Chief 

SUBJECT: Private and Diffused Waters

REVISED: August 31, 2009

This memo defines “private” and diffused surface waters and provides some advice to agents regarding what to say when a landowner considers filing a claim for such waters.

1. “Private” Springs and Lakes

Frequently, IDWR personnel have seen the word “private” in the statute, and assumed the word indicated that the spring or lake was the exclusive property of the owner of the land where the source is located, no one else can use it, and the landowner can use it without having to get a permit. This is not correct.

Section 42-101, Idaho Code, declares, “All the waters of the state, when flowing in their natural channels, including the water of all natural springs and lakes within the boundaries of the state are declared to be property of the state....” All natural springs and lakes are therefore public waters, subject to appropriation, subject to the laws that establish the procedures for making an appropriation, subject to the laws that govern the distribution of water, and subject to the laws that govern the adjudication of water rights. The only distinction expressed by Sections 42-212 and 42-213, Idaho Code, is that an applicant for a permit must have a written right of way from the owner of the land where the source is located, and the application must state whether the application is for private water and whether the applicant has a written right of way.

a. The Statute

Section 42-212, Idaho Code, provides:

Diversion of private waters. - The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at high water mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate.

Section 42-213, Idaho Code provides:

Diversion of private waters - Applicants must show right of way. - All

applicants to the department of water resources for permits to divert or appropriate the waters of any lake, pond, pool, or spring shall state whether such lake, pond, pool or spring is wholly or entirely located upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water.

b. When is a spring or lake “private” water?

A spring must sink on the landowner’s property to be “private” water. If it runs off the landowner’s property (whether or not in a natural channel), or enters a natural channel (whether or not on the landowner’s property), it is not “private.” A spring is probably not private if it intermittently but regularly runs off the landowner’s property or into a natural channel (see 2.b. below for discussion of natural channel). A lake must be circled entirely by the landowner’s property to be private. Presumably, if the lake is fed by a navigable stream, or drained by a navigable stream, it is not private, because the state owns the stream bank to the high water mark. The status of a spring or lake may change if the landowner sells a portion of the property so the spring or lake is no longer located entirely on the landowner’s property. Whether the spring or lake is “private” is a question of fact, and the answer may not always be clear.¹

c. Practical Considerations

A claimant might ask why they would want to file a claim for “private” water. In most instances it may not be important to obtain a permit, license, or a decree for a right to use water from a spring or lake on one’s own land, since no one else can appropriate it without permission. However, someone else could make an appropriation from another source that affects the supply from the spring or lake (for example, a ground water appropriation that affects the flow of a spring) or a prior appropriator could seek to enjoin the landowner’s use on the basis that the spring or lake is a significant source of water to the public source, and the landowner’s use deprives a prior appropriator of water. Also, as noted above, a spring or lake on private land may not always be “private” water. In those instances, the landowner would need a licensed or decreed water right to have an enforceable priority. Finally, in some cases a person with “private” water on their property has granted to others the right to use the spring or lake without specifying the relative rights of those using the spring or lake. In those instances, the relative rights of those using the spring or lake would be determined based upon prior appropriation, as long as it is consistent with the intent of the parties as expressed in the deeds.

¹ There exists a case which some have interpreted as contrary to this analysis. King v. Chamberlain 20 Idaho 504, 118 P. 1099 (1911). However, the department has distinguished this case. Please see a department attorney for further discussion.

Ultimately, the claimant chooses whether to claim the water use. The claimant, not the claims-taker, should assess the risk inherent in not filing a claim.

d. General Adjudications

The adjudication statute, at Section 42-1401A(12), Idaho Code, defines water system to include springs and lakes and does not exclude “private” water. The SRBA and CSRBA commencement orders require all rights to the use of water within the boundaries of the water system to be adjudicated, and does not exempt claimants of “private” water.

Neither the adjudication statutes or the adjudication rules require the claimant to submit proof of rights of way for the point of diversion or the rest of the water delivery system along with the notice of claim.

The department also does not investigate whether the claimant of an existing right to the use of water obtained such rights of way at the time the appropriation was established. Such an issue would be investigated in response to an objection to the director’s report raising such an issue. Such an investigation is not made for each water right because an adjudication deals with existing rights. The department generally assumes where an otherwise valid water right exists, the water user must have had a right of way for the water delivery system, or the landowners would have denied the water user access and thereby prevented the completion of the appropriation. Where a claimant has an established use, the issue of whether the claimant has a right of way is appropriately litigated by the claimant and the owner of the land.

2. Diffused Surface Water

a. 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 v. Chamberlain, 20 Idaho 504, 118 P 1099 (1911). A 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. Id.

However, it is well-settled 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 (1966).

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 the diffused surface water must be a significant source, so 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).

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.

b. What is not diffused surface water?

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.

Diffused water is not water in a natural channel. 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).

c. Should a person file a claim for diffused surface water in an adjudication?

If a landowner is in doubt, they may want to file a claim. Currently, there is no clear rule of law that diffused surface water is exempt from a general adjudication. IDWR will make the conservative assumption diffused surface water is included until it is determined otherwise. There may be difficult issues of fact as to whether the water is indeed diffused surface water. The only way to get a determination of a water right is to claim it in the adjudication. If the claimant does not file and there is a later ruling that diffused surface water is included in the adjudication, the claimant runs the risk of losing their priority date.