

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 77-14378)	INTERLOCUTORY ORDER
IN THE NAME OF PERPETUA)	DECIDING QUESTIONS OF LAW
<u>RESOURCES IDAHO, INC.</u>)	

On October 8, 2021, Perpetua Resources Idaho, Inc. (“Perpetua”) filed Application for Permit 77-14378 with the Idaho Department of Water Resources (“Department”), seeking a permit to divert 9.60 cfs from groundwater, runoff, and the East Fork of the South Fork of the Salmon River for industrial use and industrial storage at a proposed mine site. The application was protested by United States Department of Agriculture - Forest Service (“USFS”), Idaho Conservation League (“ICL”), Nez Perce Tribe, and Save the South Fork Salmon, Inc. (“Save the South Fork”). The hearing officer designated by Department conducted a pre-hearing conference on May 25, 2022. During the conference, the parties requested an opportunity to brief the legal question described below.

Pursuant to Rule 562 of the Department’s Rules of Procedure (IDAPA 37.01.01), a presiding officer may request briefs from the parties setting forth arguments and positions on any question of law in a contested case. On May 27, 2022, the hearing officer requested briefs addressing the following question of law:

Is a landowner required to obtain a water right prior to capturing or using water on the surface of the landowner’s property (from rainfall or melting snow) before the water enters a natural channel, if the water captured or used would eventually flow into a natural channel?

On July 1, 2022, Perpetua filed *Perpetua Resources’ Brief in Response to May 27, 2022, Request for Briefs* (“Perpetua Brief”), Protestant USFS filed *USDA Forest Service’s Response to Hearing Officers Request for Briefs* (“USFS Brief”), and Protestants ICL, Nez Perce Tribe and Save the South Fork (collectively “Non-Federal Protestants”) filed a joint brief titled *Protestants’ Initial Brief RE: Requirement to Obtain a Water Right for Surface Water Capture* (“Joint Brief”).

On July 15, 2022, Perpetua filed *Perpetua Resources’ Response to Protestants’ Briefs* (“Perpetua Response”), Protestant USFS filed *USDA Forest Service’s Response to Parties’ Initial Briefs* (“USFS Response”), and the Non-Federal Protestants filed a joint response brief titled *Protestants’ Response Brief Re: Requirement to Obtain a Water Right for Surface Water Capture* (“Joint Response”).

RELEVANT CONSTITUTIONAL PROVISION AND STATUTES

Article XV, Section 3 of the Idaho Constitution states, in pertinent part:

WATER OF NATURAL STREAM - RIGHT TO APPROPRIATE - STATE'S REGULATORY POWER - PRIORITIES. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

Idaho Code § 42-101 states, in pertinent part:

All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water.

Idaho Code § 42-201 states, in pertinent part:

(1) All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise. And after the passage of this title, all the waters of this state shall be controlled and administered in the manner herein provided. Such appropriation shall be perfected only by means of the application, permit and license procedure as provided in this title; provided, however, that in the event an appropriation has

been commenced by diversion and application to beneficial use prior to the effective date of this act, it may be perfected under such method of appropriation.

(2) No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists.

...

(7) This title delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

(8) Notwithstanding the provisions of subsection (2) of this section, a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment, storage or disposal, including land application, is employed in response to state or federal regulatory requirements.

Idaho Code § 42-202(1) states, in pertinent part:

For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

Idaho Code § 42-212 states:

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 highwater 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.

ARGUMENTS FROM THE PARTIES

Perpetua argues: “Under Idaho law, a water right is not required to capture or use surface water on the surface of the landowner’s property [from rain or melting snow] before the water enters a natural channel.” *Perpetua Brief* at 1, 7. Perpetua argues that this diffused surface water is not subject to appropriation by third parties or even by the landowner. *Perpetua Response* at 12-13.

The Non-Federal Protestants acknowledge that diffused surface water may be captured by a landowner without a water right before the water enters a natural stream or watercourse. *Joint Brief* at 4-5. The Non-Federal Protestants argue, however, that watercourses may exist in a “broad variety of topographical situations” and the determination of what constitutes a watercourse is a question of fact that can only be made after development of the administrative record at hearing. *Id.* at 6-11.

Protestant USFS argues: “Barring a legislative exemption, a water right is required prior to the capture of rainfall and snowmelt which would eventually flow into a natural channel.” *USFS Brief* at 2. USFS sets forth four reasons that a water right is needed to capture diffused surface water that would flow into a natural stream or watercourse: 1) Capturing such water could result in injury to downstream water rights; 2) Idaho law requires most people to obtain a water right to capture stormwater; 3) The doctrine of private water only applies to water that does not flow off of a landowner’s property; and 4) the definition of “natural channel” is broad enough to include diffused surface water. *Id.* at 2-3.

ANALYSIS

I. A Water Right is Not Required to Capture or Use Diffused Surface Water as Long as the Water is Captured or Used Before it Enters a Natural Channel.

The primary question addressed by this order is whether a landowner must obtain a water right to capture or use rainfall or snowmelt on the surface of the landowner’s property before the water enters a stream channel. This surficial rainfall or snowmelt is often referred to as “diffused surface water” before it enters a natural stream or watercourse. A corollary question raised in the briefing and addressed in Section II below is whether a landowner may obtain a water right to capture or use diffused surface water.

The constitutional provisions and statutes governing the appropriation of water in Idaho specifically refer to water in natural streams, springs, lakes, or channels. Idaho Code § 42-101 (“All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment”); Idaho Const., Art. XV, § 3 (“The right to divert and appropriate the unappropriated waters of any natural

stream to beneficial uses, shall never be denied”); Idaho Code § 42-202(1) (“[A]ny person, association or corporation . . . intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall . . . make an application to the department of water resources for a permit to make such appropriation.”); Idaho Code § 42-201(2) (“No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so”) (emphasis added to all quoted passages).

Diffused surface water is not addressed in the Idaho Constitution or the Idaho Code. The Idaho Supreme Court has addressed the rights of landowners in relation to diffused surface water in a couple of cases. The court confirmed that “a land owner has a proprietary right in the storm or flood and surface waters, so long as diffused over his lands, and . . . may collect and impound such waters on his own lands and still retain his sole proprietary interest therein.” *King v. Chamberlin*, 20 Idaho 504, 510-511 (1911). The impoundment of “flood waters from rains and melting snow that runs off in the winter and spring and does not actually comprise or enter any natural stream or body of water” is the “unqualified private property” of the landowner. *Washington Cnty. Irrigation Dist. v. Talboy*, 55 Idaho 382, 389 (1935). A landowner cannot capture the water “if the water has arrived at and is flowing in some natural channel already formed.” *King*, 20 Idaho at 510-511 (quoting a treatise on water rights). “But he has a perfect right to appropriate it before it arrives.” *Id.*

Given the precise language used in the constitutional provisions and statutes governing appropriation, and the cited decisions from the Idaho Supreme Court related to diffused surface water, a landowner¹ holds a proprietary interest in the diffused surface water on their property and is not required to obtain a water right to capture or use the diffused surface water. Once the diffused surface water enters a stream channel or watercourse, however, the constitutional provisions and statutes governing appropriation apply and, under the current laws of the state, surface water flowing in a stream channel or watercourse can only be diverted and used under an approved water right.²

USFS argues: “If rainfall and snowmelt that would otherwise reach a natural channel can simply be withheld by an uphill landowner with no water right, then the statutorily required permitting process is rendered ineffective and thwarts legislative mandate.” *USFS Brief* at 4. As noted above, there is no legislative mandate regarding diffused surface water. Chapter 2, Title 42, Idaho Code, which governs the appropriation of water rights, is silent about diffused surface water, even though the chapter identifies several other water sources that are subject to appropriation (natural streams, springs, seepage waters, lakes, and groundwater). The statutes governing appropriation are limited to public water in natural streams and watercourses. If the

¹ A landowner’s inherent property rights, including the right to capture and use diffused surface water, could extend to a renter, lessee, or agent of the landowner. The proposed place of use in Application 77-14378 includes both private lands and public lands (held by USFS). Perpetua argues that its unpatented mining claims on USFS lands grant the right to use diffused surface water found on USFS lands. *Perpetua Brief* at 3. USFS argues that the scope and nature of Perpetua’s rights under the U.S. Mining Law of 1872 have not been decided. *USFS Brief* at 6. The scope and nature of Perpetua’s unpatented mining claims on USFS land was not briefed by the parties and is not necessary to decide the general question of law presented to the parties.

² There are a few statutory exceptions to the water right requirement. See, e.g., Idaho Code §§ 42-113 and 42-201(3).

Idaho Legislature intended to assert jurisdiction over the use of diffused surface water, which has been considered private property through caselaw since at least 1911, it would do so explicitly.

USFS argues that recognizing a landowner's right to capture and use diffused surface water is "akin to a system administered under the riparian doctrine" which is not recognized in Idaho. *USFS Brief* at 6. While it is true that the Idaho Supreme Court has rejected the doctrine of riparian rights,³ the court does not characterize the use of diffused surface water as a riparian use. A riparian system of water rights is based on reasonable use and proximity to a stream. The Idaho Supreme Court, in contrast, holds that diffused surface water is the "unqualified private property" of the landowner. *Talboy*, 55 Idaho at 389.

USFS cites Idaho Code § 42-201(8), which exempts certain public entities from needing a water right to capture and dispose of sewage or stormwater, and argues that the exemption for the listed public entities means that all other capture of stormwater in the state can only occur under a recorded water right. This argument is not persuasive. Municipalities or other public entities do not own all the properties where the stormwater (rainfall or snowmelt) is generated and, therefore, do not meet the requirements of the private waters doctrine set forth in *King* and *Talboy*. In the absence of Section 42-201(8), municipalities or other public entities would likely be required to obtain a water right to capture and dispose of stormwater. In other words, Section 42-201(8) does not represent a codification of the private waters doctrine set forth in *King* or *Talboy*. Nor does it constitute a restriction of the doctrine as it relates to landowners. It is simply an exception to the requirement to obtain a water right prior to the diversion and use of public waters.

II. The Department does not have the Authority to Issue Water Rights for the Diversion and Use of Diffused Surface Water.

The statutes and caselaw cited in the previous section confirm that a landowner is not required to obtain a water right to capture or use diffused surface water on their property. That raises a corollary question of whether a landowner may nonetheless obtain a recorded water right for the diversion and use of diffused surface water. *Perpetua* argues that surface water is not subject to appropriation by anyone, even the landowner where the surface water is located, until the water enters a natural stream or watercourse. *Perpetua Brief* at 8-10.

Chapter 2, Title 42 of the Idaho Code contains the statutory provisions governing appropriation of water in the state of Idaho. The Department's authority over water right appropriation is limited to the "public waters"⁴ of the state of Idaho. Idaho Code § 42-201(7) ("[Chapter 2, Title 42] delegates to the department of water resources exclusive authority over

³ "As we have before seen, the common-law doctrine of riparian proprietorship, whenever it comes in conflict with a water right acquired by appropriation, is at once in conflict with and repugnant to both the constitution and the statutes of this state." *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 493 (1909).

⁴ Idaho Code § 42-212 classifies "the waters of any lake not exceeding five (5) acres in surface area at highwater mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation" as "private waters." This use of the term "private waters" is misleading because the identified water sources are already a subset of the public waters of the state, which include "all natural springs and lakes within the boundaries of the state." Idaho Code § 42-101. Diffused surface water, in contrast, falls outside of the statutory definition of "public waters" and has been identified as private property by the Idaho Supreme Court.

the appropriation of the public surface and ground waters of the state.”); Idaho Code § 42-202(1) (“[A]ny person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall . . . make an application to the department of water resources for a permit to make such appropriation.”). There are no provisions within Chapter 2, Title 42, governing the appropriation of diffused surface water.

Title 42 of the Idaho Code does not grant the Department the authority to process applications to appropriate diffused surface water. In cases addressing diffused surface water, the Idaho Supreme Court notes that a property owner has a right to “appropriate” the water before it reaches a natural channel. In *King*, for example, the court held that diffused surface water that would eventually flow into a natural stream may be appropriated by the owner of the property where the diffused surface water is located:

No doubt, all the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please, and appropriating it. He cannot, it is true, do so if the water has arrived at and is flowing in some natural channel already formed. But he has a perfect right to appropriate it before it arrives at such channel.

King, 20 Idaho 504 (Idaho 1911) (citation omitted, emphasis added). The term “appropriate” is a broad term and, in the context of *King*, likely means to capture and use the diffused surface water rather than to seek a water right to cover such use. Black’s Law Dictionary (online edition) defines the term “appropriate” as follows:

To make a thing one’s own; to make a thing the subject of property; to exercise dominion over an object to the extent, and for the purpose, of making it subserve one’s own proper use or pleasure. The term is properly used in this sense to denote the acquisition of property and a right of exclusive enjoyment in those things which before were without an owner or were *publici juris*.

This definition of “appropriate” is consistent with the Idaho Supreme Court decisions in *King* and *Talboy*, where the court declared that a landowner has a proprietary interest in diffused surface water and that such water is the private property of the landowner. Presently, with limited exceptions⁵, the only way to appropriate surface water in the state of Idaho is by filing an application for permit pursuant to Idaho Code § 42-202. According to the terms of Section 42-202, the statute only applies to applications to appropriate “natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho.” There is no clear authority for a landowner to file or for the Department to process an application for permit for diffused surface water.

⁵ Idaho Code § 42-113 (“A permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock.”).

III. A Landowner's Use of Diffused Surface Water is not Subject to Curtailment by Downstream Water Rights.

Another important question raised by the parties is whether a downstream water user can seek curtailment of the use of diffused surface water if such use would cause injury to downstream water rights. While the previous sections establish a landowner's right to capture diffused surface water before it enters a natural channel, it is a separate question whether that right is absolute.

Perpetua and USFS disagree about whether a landowner's use of diffused surface water is subject to curtailment by downstream water rights. Perpetua argues that diffused surface water is private water and is never subject to curtailment, even if the use of the diffused surface water would diminish the water supply for downstream water rights. *Perpetua Response* at 5-12. According to Perpetua, "[a]ll diffused surface water on private land will eventually enter a natural channel or become groundwater and become subject to appropriation." *Id.* at 12. Perpetua contends that if diffused surface water that is hydraulically connected to a stream (which would encompass almost all diffused surface water) is subject to curtailment by downstream water rights, then the historical distinction between private and public water is rendered meaningless. *Id.* USFS, on the other hand, argues that rainfall and snowmelt that would flow into a natural stream is not private water and can only be captured and used through an appropriation of water and is subject to the prior appropriation doctrine. *USFS Brief* at 3-4.

In the past, the Department and the Idaho Office of the Attorney General have taken the position that a landowner can capture and use diffused surface water without a recorded water right, as long as the use does not injure existing water rights. Letter from Deputy Attorney General Phillip J. Rassier to Idaho Senator Gary J. Schroeder (Aug. 11, 2008) ("a person in Idaho has the right to collect diffused surface waters, which include rainwater, on his or her property so long as it does not cause injury to the existing water rights of others"); Department Adjudication Memorandum #11, Private and Diffused Waters (Aug. 31, 2009) ("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"). The Rassier Letter and the Department's Adjudication Memo #11 cite three Idaho Supreme Court decisions, *King v. Chamberlin*, *Franklin Cub River Pumping Co. v. Le Fevre*, and *Martiny v. Wells*, to support the proposition that the use of diffused surface water is subject to curtailment by downstream water rights. These three cases deserve a closer examination.

In *King*, the defendant, Chamberlin, attempted to obtain a right to divert water from Avondale Lake, a lake entirely contained within the boundaries of property owned by the plaintiff, King. *King*, 20 Idaho at 506-508. Avondale Lake "is not and never has been fed or supplied with water by any stream, natural or other-wise, and contains no springs, but . . . is supplied with water from the spring and fall rains, and from the snows that melt in the spring and flow over the lands of plaintiff into said Avondale Lake." *Id.* The Idaho Supreme Court was asked, among other things, to decide whether "the waters of Avondale Lake [are] public waters, . . . subject to appropriation and diversion for irrigation purposes under the laws of the state of Idaho." *Id.* The court was not asked to address questions of injury to downstream water rights, but, nonetheless, held:

In the first place, a land owner may use the surface of his land for any lawful purpose without let or hinderance from anyone. There is nothing unlawful in collecting and impounding surface and waste water; if he sees fit to turn his farm into a lake, he may lawfully do so, so long as he does not injure someone else in the process. Here the question of cutting off the flow of a natural stream or in any manner obstructing a watercourse or stream of water is in no manner involved. The waters collected by respondents were wholly surface and flood waters.

Id. 20 Idaho at 509 (emphasis added).

Outside of this one pronouncement, *King* does not address injury to existing water rights. *King* primarily addresses the question of whether a person can appropriate private water captured and stored on another person's property. Perpetua argues that the statement about injury in *King* is dicta and is not controlling. *Perpetua Response* at 5 (FN2). The paragraph quoted above might be addressing injury to property resulting from flooding (civil trespass liability) and might not be related to water right injury at all. The court acknowledges that the facts presented in the case did not include "cutting off the flow of a natural stream" and did not address that scenario further. *King*, therefore, does not contain a clear statement that a landowner's use of diffused surface water is subject to curtailment by downstream water rights.

In *Franklin*, the defendant, Le Fevre, built a dam across a draw known locally as Doney Hollow. *Franklin Cub River Pumping Co. v. Le Fevre*, 70 Idaho 107, 108 (1957). The plaintiff, Franklin Cub River Pumping Company ("FCR"), brought a lawsuit against Le Fevre arguing that the dam was impounding water that would be used to supply FCR's senior water rights. *Id.* The complaint filed by FCR alleged that the dam captured spring water, seepage and wastewater from nearby ditches and natural precipitation falling on Le Fevre's property, which would all flow into Cub River, the source of FCR's water rights. *Id.* The Idaho Supreme Court noted: "It . . . appears that the reservoir was filled with water during the surplus periods of the spring and at times when it would not be needed or used by [FCR] if not impounded as done." *Id.* 79 Idaho at 111. This appears to be a brief injury analysis, where the court concludes that the water was captured by Le Fevre at a time of the year when it was not needed by FCR. The court also summarized testimony from five individuals stating that water from Doney Hollow never reached Cub River. The *Franklin* decision also includes a paragraph addressing questions of natural precipitation (diffused surface water) on Le Fevre's property:

It was not established what amount of water plaintiff claims from natural precipitation falling on defendant's land. If any ever escaped to the river the quantity [sic] was insignificant. However defendant would own and be entitled to recapture the natural precipitation falling on his own land so long as he applied it to a beneficial use.

Id. 79 Idaho at 112 (citation omitted).

Like *King*, *Franklin* does not squarely address the question of injury to downstream water rights resulting from the diversion and use of diffused surface water. In one part of the decision,

the court conducts what appears to be an injury analysis. The court also emphasizes the fact that water in Doney Hollow did not connect with Cub River. On the other hand, the court states that Le Fevre “would own and be entitled to recapture the natural precipitation falling on his own land.”

The third case cited in the Department’s Adjudication Memo #11, *Martiny v. Wells*, provides perhaps the clearest statement regarding injury to downstream water rights. In *Martiny*, the defendant, Wells, had constructed a ditch perpendicular to a series of springs. *Martiny*, 91 Idaho 215, 216-217 (1966). The ditch captured the flow of the springs that would have otherwise flowed through natural swales into Spring Creek. *Id.* “In the absence of the Wells ditch, water from the springs above the ditch would follow the natural swales and, except for the part thereof lost by evaporation or percolation in the swampy areas, would flow into Spring Creek.” *Id.* Ultimately, the court held: “So long as the water from the springs and swamps, flowing in its natural channels, would reach Spring Creek in usable quantities, plaintiffs are entitled to enjoin defendant's interference therewith. *Id.* 91 Idaho at 219.

While *Martiny* provides a clear statement about injury, the *Martiny* case dealt with springs and water “flowing in its natural channels,” not diffused surface water. Pursuant to Idaho Code § 42-101, the public water supply, which is subject to appropriation and governed by the prior appropriation doctrine, includes natural springs and water flowing in natural channels. It is not clear that the prohibition on injury set forth in *Martiny* should be extended to diffused surface water.

One other Idaho Supreme Court decision should be included in this analysis. In *Public Utilities Commission v. Natatorium Co.*, Justice Rice prepared a lengthy dissent wherein he argued that the prior appropriation doctrine should govern the use of all private waters. *Public Utilities Commission v. Natatorium Co.*, 36 Idaho 287, 312-318 (1922). He asserted that it would be unjust to allow a landowner to capture and use percolating water (which at that time was considered private water) if such use would reduce the water supply for a downstream senior water right. *Id.* According to Justice Rice, a downstream water right holder should be protected against diminishment of their water rights by later in time uses of private water. *Id.* Justice Rice’s approach was not adopted in the majority opinion. Instead, the majority opinion restated the principles of the private waters doctrine set forth in *King* and held that “[t]he constitutional right to divert and appropriate water does not extend to private water.” *Id.* at 302-306. The ownership of property gives the owner “the exclusive right of appropriation or use” of private waters. *Id.* Further, the majority opinion restates that language from *King* that surface and flood waters are considered private property before they reach a natural stream or natural channel. *Id.*

In summary, the Department and the Idaho Attorney General's Office have previously taken a position that a landowner may capture and use diffused surface water, but such use of water can be enjoined to protect downstream senior water rights. The cases cited by the Department and the Idaho Attorney General’s Office (*King*, *Franklin*, *Martiny*) do not support that position. The hearing officer could not find any other statute or caselaw to support the proposition that the use of diffused surface water can be curtailed by downstream water rights.

The question of whether a landowner's use of diffused surface water is subject to curtailment by downstream senior water rights highlights an area of tension between private property rights and the prior appropriation doctrine. On one hand, one of the fundamental rights of property ownership is the right to capture and use any precipitation falling on a property before it enters a natural channel and becomes part of the public water supply. On the other hand, a water user who diverts water from a creek or stream, and invests time and money in infrastructure, has an expectation under the prior appropriation doctrine that the hydrologic conditions will remain the same as those in existence at the time of appropriation. *See Crockett v. Jones*, 47 Idaho 497, 502 (1929). Ultimately, it falls to the legislature and courts to balance these competing interests. The hearing officer will not attempt to re-evaluate the existing balance between the two competing doctrines and will simply apply the law as it set forth in statute and caselaw.

In *King* and *Talboy*, the Idaho Supreme Court clearly states that diffused surface water is private water and is not subject to appropriation by the public. Although the Idaho Supreme Court has narrowed its definition of private water in other settings⁶, it has never reversed or narrowed *King* or *Talboy* and has never identified diffused surface water as part of the public water supply. Although the Idaho Legislature has identified a subset of the public water supply as private waters,⁷ it has never established a definition for or limits on a landowner's use of diffused surface water. In fact, the Idaho Legislature has tried to maintain a line of separation between water rights and diffused surface water.⁸ In the absence of a clear statement from the Idaho Legislature or the Idaho Supreme Court that the prior appropriation doctrine trumps the private waters doctrine, the hearing officer will apply the principles set forth in *King* and *Talboy*. Diffused surface water is the unqualified private property of the landowner and is not subject to curtailment by downstream water rights.

IV. The Question of Whether Water is Flowing in a Natural Channel or is Diffused Surface Water is a Question of Fact.

The critical question in any proposal to capture or use diffused surface water is whether the water to be captured has already entered a natural stream or watercourse and, therefore, has

⁶ In *Hinton v. Little*, the Idaho Supreme Court eliminated the distinction between percolating waters, which were previously considered private water, and subterranean waters, which were subject to appropriation. *Hinton v. Little*, 50 Idaho 371 (1931). The court recognized that there is no practical way to distinguish between percolating waters and subterranean waters and confirmed that all ground water is public water subject to appropriation. *Id.* This decision is now codified in Idaho Code § 42-226. *Hinton* did not address diffused surface water.

⁷ Idaho Code § 42-212 identifies certain lakes, ponds, and springs as "private waters."

⁸ In 2004, the Idaho Legislature amended the definition of "consumptive use" found in Idaho Code § 42-202B. Previously, the definition included the following language about precipitation:

Consumptive use does not include any water that falls as precipitation directly on the place of use, unless the precipitation is captured, controlled and used under an appurtenant water right.

The definition was changed in 2004 to include the following language about precipitation:

Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right.

become part of the public water supply and subject to appropriation. The question of whether water has already entered a stream channel or watercourse at the location it is proposed to be captured is a question of fact. The Idaho Supreme Court has provided some guidance to assist triers of fact in making this determination. For example, the court has established a definition of for the term “watercourse”:

[A] watercourse is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water.

Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 488 (1909). This definition of “watercourse” has primarily been applied to cases related to drainage and might not be applicable in all circumstances.⁹ The definition from *Hutchinson*, however, in combination with other guidance from the Idaho Supreme Court, still provides a useful framework for understanding the nature and extent of watercourses. “Surface water becomes a natural watercourse at the point where it begins to form a reasonably well defined channel, with bed and banks or sides and current, although the stream itself may be very small, and the water may not flow continuously.” *Scott v. Watkins*, 63 Idaho 506, 517 (1942) (citation omitted); see also *Smith v. King Creek Grazing Ass’n*, 105 Idaho 644, 648 (Idaho App. 1983) (“regular seasonal flow, together with storm flows, is sufficient to establish a ‘watercourse’”).

Although Perpetua provides information about specific topographic features at the proposed mine site (*Perpetua Brief* at 3-7; *Perpetua Response* at 14), specific information about the proposed project was not requested by the hearing officer and is not needed to answer the question of law posed to the parties. Questions of whether water at the proposed mine site is diffused surface water or whether the water has entered a watercourse or stream channel are questions of fact to be determined from the record created in an administrative hearing.

As noted in the previous sections, the Department does not have the statutory authority to issue water rights for the capture or use of diffused surface water. Applications to divert diffused surface water should not be accepted or processed by the Department. If applications to divert diffused surface water are not accepted, there will be no means for downstream water users to protest the proposed use. In most instances, the question of whether certain water qualifies as diffused surface water will not be decided in the context of a contested water right application, because no application will be filed. Instead, any allegation that a landowner is capturing water, that has already entered a natural stream or watercourse, without a water right would be handled under the Department’s enforcement authority. Idaho Code §§ 42-351, 42-1701B.

In this case, Application 77-14378 proposes to divert water from multiple sources (groundwater, runoff, and the East Fork of the South Fork of the Salmon River). The

⁹ *Smith v. King Creek Grazing Ass’n*, 105 Idaho 644, 648 (Idaho App. 1983) (noting that a more-restrictive definition of stream channel has been adopted in the Stream Channel Protection Act); see also *Rabido v. Furey*, 33 Idaho 56, 62 (1920) (“A general definition of the term ‘natural channel,’ applicable to all cases, is a difficult matter [and] depends upon the circumstances of each individual case.”)

Department does not have the statutory authority to process applications proposing to use diffused surface water. Application 77-14378 could be amended to remove diffused surface water from the proposal. Even if the diffused surface water portion of Application 77-14378 were removed through an amendment, there would still be a contested case pending before the Department related to the other sources of water described in the application. This contested case, therefore, continues to provide a forum for the protestants to challenge the scope of the application and the nature of the water proposed to be captured at the proposed mine site.

CONCLUSIONS OF LAW

The public waters of the state, when flowing in a natural stream or watercourse, are subject to appropriation. Diffused surface water, resulting from rainfall or snowmelt, may be captured or used by a landowner without a recorded water right before the water enters a natural stream or watercourse. The Department does not have the authority to process or approve applications to appropriate diffused surface water. The use of diffused surface water is not subject to curtailment by downstream water rights, even if the water captured would eventually flow into a natural channel. Whether certain water constitutes diffused surface water or water flowing in a natural stream or watercourse is a question of fact.

ORDER

The conclusions of law set forth above are hereby adopted by the hearing officer in this contested case.

Dated this 19th day of August 2022.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August 2022, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Interlocutory Order Deciding Questions of Law

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