



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

August 11, 2008

Honorable Gary J. Schroeder
Idaho State Senator, District 6
1289 Highland
Moscow, ID 83843

Re: Capture and Collection of Rainwater under Idaho Law

Dear Senator Schroeder:

Your letter of August 1, 2008 asked for a clarification of Idaho law concerning the capture and collection of rainwater. Generally, 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.

Rainwater, melting snow, and flood waters that do not enter into a watercourse can be captured and used by a landowner. A watercourse is “a stream of water flowing in a definite channel . . . and discharging itself into some other stream or body of water. The flow of water . . . must be more than mere surface drainage occasioned by extraordinary causes.” *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 482, 101 P. 1059, 1061 (1909).

As long as the water is diffused over the land, and not flowing in some natural channel that is already formed, it can be collected, and the landowner has an unqualified private property right in it. *Wash. Co. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P. 2d 943, 945-946 (1935). Diffused surface water that is artificially impounded on private land is private water and it cannot be subject to appropriation by others without the consent of the landowner. *King v. Chamberlin*, 20 Idaho 504, 118 P. 1099, 1100 (1911). A landowner may impound diffused surface water as long as doing so does not injure another water user. *King*, 118 P. 1099 at 1100.

A subsequent case states that a landowner is “entitled to recapture the natural precipitation falling on his own land *so long as he applie[s] it to beneficial use.*” *Franklin Cub River Pumping Co. v. Le Fevre*, 79 Idaho 107, 311 P. 2d 763, 766 (1957) (emphasis added). The holding in *Franklin* was based on a finding of no injury. *Id.* at

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766-767. As such, it is consistent with the holding in *King* which states that diffused water can be collected so long as injury to another water user does not occur. The statement in *Franklin* concerning the necessity of applying the water to beneficial use is consistent with state prohibitions against the wasting of water. A landowner is unlikely to impound diffused surface water without intending to put it to some beneficial use.

The case law discussed does not conflict with the constitutional provision providing that “the right to divert and appropriate the unappropriated *waters of any natural stream* to beneficial uses, shall never be denied” *Idaho Const.* Art. 15, § 3 (emphasis added). It is also does not conflict with state statute providing, “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 purposes” I.C. § 42-101(emphasis added).

In conclusion, a landowner has the right to collect diffused surface water on his or her property so long as there is no injury caused to the water rights of others. Diffused surface water that is artificially impounded on private land is private water and cannot be appropriated by others without the consent of the landowner.

Sincerely,



Phillip J. Rassier
Deputy Attorney General
Department of Water Resources

cc: Clive J. Strong