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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

ECKHARDT FAMILY LLLP, an Idaho Limited Partnership, Appellant-Petitioner, vs. IDAHO DEPARTMENT OF WATER RESOURCES, Respondent, and DOUBLE C & J LAND CO., INC., Intervenor-Respondent.	Case No. CV-44-20-39 **NOTICE OF APPEAL**

IN THE MATTER OF APPLICATIONS FOR PERMIT 67-15298 AND 67-15300 IN THE NAME OF ECKHARDT FAMILY LLLP

NOTICE IS HEREBY GIVEN THAT AN APPEAL IS TAKEN AS FOLLOWS:

1. Designation of Judgment or Order Appealed From. The above-named Appellant-Petitioner hereby takes an appeal to the Idaho Supreme Court of the following attached decision, order and judgment entered in this matter by the Honorable Eric J. Wildman, affirming the Final Amended Order of the Respondent Idaho Department of Water Resources:

A. Memorandum Decision and Order, issued on July 20, 2020; and

B. Judgment, entered on July 20, 2020.

2. Jurisdictional Statement. Appellant-Petitioner has a right to appeal the above-listed decision, order and judgment to the Idaho Supreme Court under the Idaho Appellate Rules (I.A.R.), Rule 11, and Idaho Code § 1-204.

3. Preliminary Statement of Issues on Appeal. The issues on appeal include the following:

A. Whether the district court erred in concluding that the Idaho Department of Water Resources' Final Amended Order was supported by substantial evidence in the record;

B. Whether the district court erred in independently weighing evidence and making additional findings of fact to affirm the agency's arbitrary and capricious final decision;

C. Whether the district court erred in concluding that substantial rights of the Appellant-Petitioner were not injured; and

D. Whether the district court erred in determining that the Appellant-Petitioner is not entitled to an award of attorney fees under Idaho Code § 12-117.

Appellant-Petitioner reserves the right to submit additional issues on appeal as allowed by I.A.R. Rule 17(f).

4. Transcript. Appellant-Petitioner requests a standard transcript, in an electronic format, of the hearing held on June 18, 2020, regarding Appellant-Petitioner's petition for judicial review of an agency determination.

5. Record. Appellant-Petitioner requests that the administrative record and administrative hearing transcript filed with the district court be included in the clerk's record, in addition to those documents automatically included under Idaho Appellate Rule 28.

6. No Sealed Order. No protective order has been entered in this case.

7. Certification. I certify:

A. That a copy of this notice of appeal has been served on a reporter of the trial or proceeding.

B. That the court reporter for Judge Wildman has been paid the estimated fee for preparation of the reporter's transcript.

C. That the estimated fee for preparation of the clerk's record has been paid.

D. That the appellate filing fee has been paid.

E. That service has been made upon all parties as required to be served pursuant to I.A.R. Rule 20.

DATED THIS 28th day of August, 2020.

PARSONS BEHLE & LATIMER

By_____
Norman M. Semanko
Attorneys for Appellant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2020, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service.

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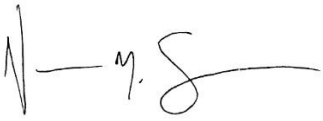

Norman M. Semanko

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho
JUL 2 0 2020
By _____ Clerk
_____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

ECKHARDT FAMILY LLLP, an Idaho Limited Partnership, Petitioner, vs. IDAHO DEPARTMENT OF WATER RESOURCES, Respondent, and DOUBLE C & J LAND CO., INC., Intervenor-Respondent. IN THE MATTER OF APPLICATIONS FOR PERMIT 67-15298 AND 67-15300 IN THE NAME OF ECKHARDT FAMILY LLLP	Case No. CV44-20-39 **MEMORANDUM DECISION AND ORDER**

I.
BACKGROUND

A. Nature of the case.

This case originated when Eckhardt Family LLLP ("Eckhardt") filed a *Petition* seeking judicial review of a final order of the Director of the Idaho Department of Water Resources ("Department"). The order under review is the Director's *Amended Final Order* dated December 20, 2019. The *Amended Final Order* denies application for permit numbers 67-15298 and 67-

15300 filed by Eckhardt. Eckhardt asserts the *Amended Final Order* is contrary to law and asks the Court to vacate the order and remand the matter to the Department for further proceedings.

B. Course of proceedings and statement of facts.

This matter concerns applications to appropriate water filed by Eckhardt. R., 54-59. The applications seek to divert water from unnamed streams tributary to Jenkins Creek to fill two stockwater ponds on Eckhardt's property as follows:

Application Number	Source	Quantity	Place of Use	Purpose	Period
67-15298	Unnamed Stream	0.4 afy	Pond 9 (Washington County)	Stockwater Storage Stockwater from Storage	01/01-12/31 01/01-12/31
67-15293	Unnamed Stream	0.9 afy	Pond 11 (Washington County)	Stockwater Storage Stockwater from Storage	01/01-12/31 01/01-12/31

Id.[1] Eckhardt's applications were protested by John Hoff. *Id.* at 145-148. Hoff conducts business under the name Double C&J Land Co., Inc. ("Double C&J"), which holds senior water rights on Jenkins Creek. Ex. 302, 303, & 308. The protests assert Eckhardt's applications will injure those senior rights. *Id.* at 145-148.

An administrative hearing was held before the Department on May 23, 2019. Tr., 6. Department employee James Cefalo acted as hearing officer. *Id.* At the hearing, Eckhardt proposed to restrict diversions under its applications from November 16 to May 15, to address concerns regarding senior water rights. *Id.* at 37-38, 56-58, 70. On July 8, 2019, the hearing officer issued his *Preliminary Order* denying the applications. R., 219. The hearing officer based his denial on two grounds. *Id.* First, he found Eckhardt failed to demonstrate its proposed water use would not reduce the quantity of water under existing water rights. *Id.* Second, he found Eckhardt failed to demonstrate the water supply is sufficient for the proposed water use. *Id.*

Eckhardt petitioned the hearing officer to reconsider whether injury will occur to senior rights if diversions under its applications were restricted to November 15 to April 15. *Id.* at 232. It further asked that he reconsider whether there is a sufficient water supply. *Id.* The hearing officer granted reconsideration in part. *Id.* at 307. He agreed Eckhardt demonstrated the water supply is sufficient for the proposed use. *Id.* He disagreed, however, that Eckhardt

[1] Eckhardt filed its original applications for permit on September 12, 2018. Eckhardt filed amended applications on November 9, 2018, changing the proposed beneficial uses on all applications from "stockwater" to "stockwater storage" and "stockwater from storage." The amended applications are those represented herein.

demonstrated the proposed water use would not injure existing water rights. *Id.* Therefore, on August 9, 2019, the hearing officer issued an *Amended Preliminary Order* denying the applications on that sole basis. *Id.* at 281.

Eckhardt filed exceptions to the *Amended Preliminary Order*, challenging the hearing officer's injury analysis. *Id.* at 315. It argued the Director could condition its applications with diversion restrictions to protect senior water rights. *Id.* On November 14, 2019, the Director issued his *Final Order*. *Id.* at 358. Like the hearing officer, the Director found Eckhardt failed to carry its burden of establishing its proposed use will not reduce the quantity of water under existing water rights. *Id.* He therefore ordered that Eckhardt's applications be denied. *Id.* Eckhardt sought reconsideration of the Director's *Final Order*. *Id.* at 374. On December 20, 2019, the Director issued his *Amended Final Order* denying reconsideration and Eckhardt's applications. *Id.* at 403.

On January 17, 2020, Eckhardt filed the instant *Petition*. The case was reassigned by the clerk of the court to this Court on January 21, 2020. The Court subsequently entered an *Order* permitting Double C&J to appear as an intervenor-respondent. The parties submitted briefing on the issues raised on judicial review and a hearing on the *Petition* was held before the Court on June 18, 2020. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day or June 19, 2020.

II.
STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277. The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279(1). The court shall affirm the agency decision unless it finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). Further, the

petitioner must show that one of its substantial rights has been prejudiced. I.C. § 67-5279(4). Even if the evidence in the record is conflicting, the Court shall not overturn an agency's decision that is based on substantial competent evidence in the record. *Barron v. IDWR,* 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The Petitioner bears the burden of documenting and proving that there was not substantial evidence in the record to support the agency's decision. *Payette River Property Owners Assn. v. Board of Comm'rs.*, 132 Idaho 552, 976 P.2d 477 (1999).

III.
ANALYSIS

An application for permit to appropriate water is evaluated against the criteria set forth in Idaho Code § 42-203A. One criterion is whether the proposed appropriation "will reduce the quantity of water under existing water rights." I.C. § 42-203A(5). It is the applicant's burden to prove his proposed appropriation will not injure existing water rights. IDAPA 37.03.08.40.04. If the applicant fails to carry his burden, the Department may reject the application. I.C. § 42-203A(5).

In this case, the Director found Eckhardt failed to prove its applications would not injure senior water rights held by Double C&J on Jenkins Creek. R., 393-394; 399. The senior rights at issue were decreed in the Snake River Basin Adjudication as follows:

Water Right	Owner	Priority	Source	Quantity	Purpose	Period
67-2097A	Double C&J Land Co., Inc.	06/26/1914	Jenkins Creek	6.54 cfs 345 afy	Irrigation (6.45 cfs) Irrigation Storage (345 afy) Irrigation from Storage (345 afy) Diversion to Storage (14.50 afy)	03/01-11/15 01/01-12/31 03/01-11/15 01/01-12/31
67-2097B	Double C&J Land Co., Inc.	05/11/1918	Jenkins Creek	9.06 cfs	Irrigation (9.06 cfs)	03/01-11/15
67-14251	Double C&J Land Co., Inc.	04/12/1881	Jenkins Creek	23.38 cfs 345 afy	Irrigation (9.06 cfs) Irrigation Storage (345 afy) Irrigation from Storage (345 afy) Stockwater (.03 cfs) Stockwater Storage (1.40 afy) Stockwater from Storage (1.40 afy) Diversion to Storage (14.50 cfs)	03/01-11/15 01/01-12/31 03/01-11/15 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31

Ex. 302, 303, & 308. The rights allow Double C&J to store water year-round for irrigation and stockwater purposes, allow irrigation to begin as early as March 1, and allow Double C&J's livestock to drink year-round. *Id.* Jenkins Creek generally dries up completely by mid-summer. Tr., 236; 243. As a result, Double C&J relies first on the natural flow components of the rights for irrigation and stockwatering and then turns to storage water when the season turns dry. Tr.,

165. All three of Double C&J's senior rights are located downstream of Eckhardt's proposed diversions. R., 387.

The Director's injury analysis focused on the natural flow components of Double C&J's rights.[2] Specifically, the Director found Eckhardt failed to prove its applications would not injure the year-round stockwater component of water right 67-14251. R., 393. He further found Eckhardt failed to prove its applications would not injure the irrigation component of the senior rights. *Id.* at 394. Eckhardt asserts the Director's determinations are not supported by substantial evidence, are arbitrary and capricious, and were made upon unlawful procedure. Each will be addressed.

A. The Director's determination that Eckhardt failed to prove its applications would not injure the year-round stockwater component of water right 67-14251 is affirmed.

The natural flow stockwater component of water right 67-14251 authorizes Double C&J to exercise it on a year-round basis. Ex. 308. As a result, Eckhardt's proposal to limit its diversions does not address potential injury to Double C&J's stockwater use during the non-irrigation season. The only testimony in support of Eckhardt's applications came through engineer David Shaw. Shaw's testimony regarding injury was based largely on two site visits to the Eckhardt property. Tr., 103. The first visit occurred in October 2017 and the second in March 2019. *Id.* Shaw testified that during his site visit on March 9, 2019, he observed excess flows in Jenkins Creek available for appropriation. Tr., 143. Although he did not take any flow measurements, he estimated the amount of excess water available on that date to be approximately 1 cfs. *Id.* Based on his observation, Shaw concluded there was enough water available during the non-irrigation season to fill both Double C&J's stockwater right and the water use proposed by Eckhardt in its applications.

The Director found Shaw's testimony on this issue to be wanting. R., 413. The Court agrees. The record establishes Shaw presented little concrete data in support of his conclusion. Despite conducting two site visits, Shaw took no water or flow measurements to support his opinion. Tr., 16; 137. He took no measurements of streamflow in any location along Jenkins Creek. *Id.* Nor did he take any measurements of the stockwater ponds, which are the subject of

[2] For reasons to be addressed below, the Director found that Eckhardt established its applications would not injure the storage components of Double C&J's water rights.

Eckhardt's applications. *Id.* As a result, the record contains no significant water measurement data from which the Director could evaluate how Eckhardt's applications would affect Double C&J's senior stockwater right during the non-irrigation season.

Along with the lack of measurements, Shaw's expert report contains no analysis on whether Eckhardt's applications will reduce the quantity of water under Double C&J's stockwater right. Ex., 11; Tr., 110. In fact, his report does not contain analysis on any of Double C&J's senior rights. *Id.* Thus, while Shaw observed approximately 1 cfs in excess flow in Jenkins Creek on a single day in March 2019, neither his testimony nor his report addressed the entire non-irrigation season. Given the lack of data presented, the Director found Shaw's testimony of no injury to be speculative and unsupported by the record:

> While Shaw observed approximately one cfs in excess flow on a single day in March . . . the testimony does not address the entire non-irrigation season. It is unreasonably speculative to assume that every season will produce flows high enough to avoid injury to [Double C&J's] senior right. While March of 2019 produced flows sufficient to fill [Double C&J's] senior year-round stock water right, observation of spring runoff flows do not establish that the right will fill consistently during the entire year.
>
> Shaw's broad conclusions about injury over the entire non-irrigation season are based mostly on speculation. There is insufficient evidence in the record to support a conclusion that Eckhardt's proposed appropriations will not injure [Double C&J's] senior, year-round stockwater right component of Water Right No. 67-14251. . . . Eckhardt bore the burden of showing that senior water right holders would not be injured by the proposed appropriation and failed to do so in relation to the non-irrigation season.

R., 413. The Court finds the Director's conclusion that Eckhardt failed to demonstrate its applications would not reduce the quantity of water available under Double C&J's senior stockwater right to be supported by substantial evidence in the record.

The fact that Eckhardt failed to carry its burden alone is enough to justify the Director's denial of its applications. I.C. § 42-203A (providing the Director must evaluate all applications for permit against the statutory criteria "whether protested or not protested"). However, the Court notes the Director's determination is supported by additional evidence in the record. Ron Shurtleff is the longtime watermaster for Water District 65.[3] Shurtleff is familiar with

[3] This matter covers applications for permit in Water District 67. Water District 65 covers the basin adjacent to the Jenkins Creek drainage. Tr., 20. Shurtleff testified he lives within 15 miles from Jenkins Creek, is familiar with the area, and had occasion to evaluate Double C&J's senior water rights. *Id.* at 17-18, 20.

stockwater ponds located on drainages like Jenkins Creek. He testified concerning injuries junior stockwater ponds may have on senior rights, concluding that without daily administration he has "not witnessed a pond yet in my basin that was not detrimental to the system." Tr., 21. Additionally, Hoff testified concerning injury to his cattle due to lack of stockwater resulting from Eckhardt's stockwater ponds. *Id.* at 181-184. He stated he has faced health issues in his cattle and has had cattle die due to lack of water supply. *Id.* Therefore, the Court finds the Director's denial of Eckhardt's applications to be supported by substantial evidence in the record. It follows his *Amended Final Order* must be affirmed.

B. The Director's determination that Eckhardt failed to prove its applications would not injure the natural flow irrigation components of Double C&J's senior water right is affirmed.

The natural flow irrigation components of Double C&J's water rights authorize it to divert water from Jenkins Creek from March 1 to November 15. Ex. 302, 303, & 308. Thus, Eckhardt's proposal to limit its diversions to the non-irrigation season could theoretically address injury concerns to these irrigation components if properly implemented. The ponds that are the subject of Eckhardt's applications are on-stream ponds subject to evaporation and seepage losses. Ex. 11 at Ex. 1; R. 409. During times when water is flowing through the ponds and reaching Double C&J's diversions, "the losses associated with evaporation and seepage from the ponds could diminish the quantity of water available to [Double C&J]." R., 409. As a result, Eckhardt proposed to bypass stream flows around its ponds to avoid injury to Double C&J.

The Court notes Eckhardt's bypass proposal changed forms numerous times during the proceedings, presenting a moving target to both the Department and Double C&J. Eckhardt's applications themselves contained no proposal to bypass water or to limit diversions. R., 54-59. They seek the unmitigated right to divert water under a year-round season of use. *Id.* Eckhardt did not present any proposal to limit diversions until the hearing before the hearing officer. Tr., 37-38, 56, 70. There, Eckhardt asserted that bypassing water around its ponds beginning on May 15 would protect senior rights. *Id.* When the hearing officer disagreed, Eckhardt then asserted on reconsideration that a bypass date of April 15 would protect senior rights. R., 232. When the hearing officer again disagreed, Eckhardt filed exceptions with the Director asserting that a bypass date of February 28 would protect senior rights. *Id.* at 318-319.

The Director held that a properly administered bypass date of February 28 could protect Double C&J's water rights during the irrigation season. R., 413. However, the Director lacked confidence that a February 28 bypass date could properly be implemented or would reasonably occur based on a variety of factors:

> As to Eckhardt's argument that injury could be avoided during the irrigation season by requiring a shutoff date of February 28, Eckhardt is correct if a system is developed that would ensure that the shutoff would reasonably and consistently occur. However, the record shows that: (1) ponds 1-6 are remote and difficult to access; (2) there is no water district, watermaster or rental pool to help alleviate administrative concerns; (3) losses caused by impoundment, seepage, and evaporation may still accrue if the applications were approved but Eckhardt could not access the requisite diversion components; and (4) Hoff and Eckhardt are incapable of reasonable communication in relation to administration. The Director lacks confidence that implementing and maintaining the cutoff date condition would reasonably occur.

R., 413. As a result, it found Eckhardt failed to carry its burden of proving no injury. *Id.* The Court finds the Director's determination to be supported by the record.

i. Access.

Administering water to bypass Eckhardt's ponds can only occur if the ponds are accessible. Access would need to occur on a yearly basis prior to the irrigation season. The Director's concerns with the ability to timely access the ponds for purposes of administration is supported by the record. The record shows the ponds are located in a remote part of the upper Jenkins Creek Basin. Ex. 11 at Ex. 1. The record also shows difficulty in accessing those ponds in the early spring. *See e.g.*, Tr., 138 (Shaw testifying ponds were inaccessible on March 9, 2019). Eckhardt bore the burden of showing its ponds would be accessible on February 28 in order to support its bypass proposal. It failed to do so in this matter and the Director's determination must be affirmed as a result.

ii. Cooperation.

Even if the ponds could be accessed, the Director found proper administration of the bypass proposal would require communication and cooperation between the parties. There is no watermaster for the Jenkins Creek drainage, so Double C&J and Eckhardt would be responsible for communication regarding administration of the ponds between themselves. The Director

found such cooperation unlikely to occur. His determination is supported by the record. The Director is well acquainted with Eckhardt and Double C&J/Hoff as they have a history of animosity over water use in the Basin going back at least 20 years. *See* Ex., 305, 316, 323, 325, 327, 362 and 366. The Court will briefly cover that history here as it is contained in the record and supports the Director's determination.

Disputes between the parties appear to begin in 2000, when Eckhardt filed an application to appropriate water out of an unnamed stream tributary to Jenkins Creek. Ex. 305. Hoff protested the application on behalf of Double C&J. Ex. 305. Following a contested hearing, the Director ultimately denied Eckhardt's application on the basis it failed to prove its proposed use would not injure Double C&J's senior rights. *Id.* Then, in 2014, Hoff filed a complaint with the Department asserting Eckhardt is illegally diverting water into ponds on its property without a water right. Ex. 316, p.1; Ex. 323. Following a field inspection, the Department instructed Eckhardt to file applications for permit with the Department to cover its unauthorized storage of water in those ponds. *Id.* Eckhardt complied and Hoff protested the applications. *Id.* However, Eckhardt withdrew its applications prior to hearing. *Id.*

In 2017, Hoff again filed a complaint with the Department concerning Eckhardt's ponds. Following a second field exam, the Department again concluded the ponds require water rights. *Id.* On November 3, 2017, the Department informed Eckhardt that "[n]o water may be stored or diverted [in the ponds] until a valid water right is secured for the diversion." Ex. 362. In August 2018, the Department issued a *Notice of Violation* to Eckhardt for continuing to divert and store water in its ponds without valid water rights. Ex. 366, p.2. In October 2018, Eckhardt and the Department entered into an agreement concerning the *Notice of Violation.* Ex. 366. In that agreement, Eckhardt agreed to breach or modify its ponds "such that no water can be captured or stored and water is allowed to freely flow downstream without obstruction" until such time as "authorization is granted from the Department for the diversion and storage of water." *Id.* However, there is evidence in the record in the form of Hoff testimony and photographs showing Eckhardt is in violation of that agreement. Tr., 206-208; Ex. 368. Hoff testified he flew over the ponds in May 2019, and as shown through photographic evidence, three of the ponds were not breached, but rather continue to impound water in contravention of the agreement. *Id.*

Meanwhile, in 2018 Eckhardt filed a complaint with the Department asserting Hoff is diverting and storing water from Jenkins Creek in Monroe Reservoir without a water right. Ex.

15. The Department has not issued a *Notice of Violation* to Hoff at this time, but did send him a letter giving him notice of its intent to investigate the allegations. Ex. 15. The record thus establishes that Eckhardt and Double C&J/Hoff have had a series of disputes regarding water use in the Upper Jenkins Creek Basin spanning 20 years. The parties have been unable to resolve these disputes amicably and many are actively pending before the Department in various stages of administrative proceedings. Given this history, the Court finds the Director's finding that Hoff and Eckhardt are incapable of the cooperation necessary to implement Eckhardt's bypass proposal without injury to Double C&J to be supported by substantial evidence in the record. It follows his *Amended Final Order* must be affirmed.

C. The *Amended Final Order* is not arbitrary or capricious.

Eckhardt argues the Director's finding it failed to prove no injury to Double C&J's year-round stockwater right is arbitrary in light of his finding it demonstrated no injury to Double C&J's year-round storage rights. Evaluation of this issue requires the introduction of Monroe Reservoir. Monroe Reservoir is an on-stream reservoir located 2.5 miles upstream of the Jenkins Reservoir diversion. R., 387. It has an estimated capacity of 260 acre-feet. Tr., 231. Hoff has used Jenkins Creek water to fill Monroe Reservoir for some time. Tr., 229-231; Ex. 15. While Hoff is authorized to divert water from Monroe Creek to fill Monroe Reservoir under another water right he owns (i.e., 67-2044), he is not authorized to divert water from Jenkins Creek to fill Monroe Reservoir.[4] Ex. 15.

In the *Amended Final Order*, the Director found Eckhardt had shown no injury to Double C&J's year-round storage rights based on Hoff's use of Jenkins Creek water to fill Monroe Reservoir:

> Monroe Reservoir fills every year and has a greater capacity than Jenkins Reservoir. If the Jenkins Creek water that has been captured in Monroe Reservoir were allowed to flow down Jenkins Creek, Jenkins Reservoir would fill every year. Therefore, the impoundment of water in Ponds 1-6 will not injure the storage elements of [Double C&J's] water rights.

[4] Double C&J has filed a transfer application with the Department to add Monroe Reservoir as an authorized point of diversion under Jenkins Creek Water right 67-2097A. Ex. 333. That application is presently pending before the Department. R., 389.

R., 389. It is Eckhardt's position that the same finding must be made with respect to Double C&J's year-round stockwater right, and that the Director reached an arbitrarily inconsistent conclusion by failing to so find. The Court disagrees.

Eckhardt's argument fails to take into account the distinctions between natural flow water rights and storage water rights. The two are not analogous. Storage water rights are generally limited to a fixed volume of water, expressed in terms of acre-feet per year. Once a storage water holder has diverted the fixed volume of water authorized under his storage right, the ability to divert further water under the right ceases. Therefore, although a storage right may have a year-round period of use, that does not mean it may be exercised by the water user year-round. It may only be exercised in any given year until the fixed volume of water authorized by the right is filled. By contrast, a natural flow water right entitles a water user to divert a constant flow of water on a continuous basis during the authorized period of use. If the period of use is year-round, then the water user may continuously divert the authorized flow at all times without ceasing. As such, natural flow water rights are typically expressed in terms of a flow rate measured in cubic feet per second, as opposed a fixed volume measured in acre-feet per year.

The record establishes Hoff diverted a fixed volume of water, approximately 260 acre-feet, from Jenkins Creek into Monroe Reservoir without a water right. Jenkins Creek is a low-elevation drainage with little or no forested areas. R.385. The snow melt run-off period in the basin "lasts for only a few days" in the early spring. *Id.* It is during that time Double C&J captures run-off water from Jenkins Creek to fill its reservoirs and satisfy its year-round storage rights. Tr., 225. If Hoff were to cease his unauthorized diversion, it would result in a fixed quantity of water (i.e., approximately 260 acre-feet) being available during a fixed period of time (i.e., the run-off period). It would not result in a continuous flow rate of water being available year-round, so as to satisfy a year-round natural flow stockwater right. Therefore, it is not arbitrary to conclude that if Hoff were to cease his diversion of Jenkins Creek water into Monroe Reservoir, that water would be available to satisfy Double C&J's year-round storage rights, but not its year-round natural flow stockwater right.[5] It follows the Director's *Amended Final Order* is not arbitrary or capricious and must be affirmed.

D. The *Amended Final Order* was not made upon unlawful procedure.

[5] As set forth in Section III.A of this *Order*, the record contains no significant water measurement data from which the Director could evaluate how Eckhardt's applications would affect Double C&J's senior stockwater right during the non-irrigation season.

Eckhardt complains its due process rights were violated on the basis it had no meaningful notice or opportunity to be heard regarding potential injuries to Double C&J's senior rights during the non-irrigation season. The Court disagrees. With respect to notice, Idaho Code § 42-203A(5) appraises all applicants seeking to appropriate water that they must prove their proposed water use will not injure existing water rights. This burden of proof is borne by the applicant whether its applications are protested or not. I.C. § 42-203A. Eckhardt's applications seek to divert water from Jenkins Creek and unnamed tributaries thereto pursuant to a year-round season of use. The proposed year-round season of use places Eckhardt's applications squarely against all of Double C&J's senior water rights on Jenkins Creek.[6] Therefore, Eckhardt had notice under the plain language of Idaho Code § 42-203A(5) that it bore the burden of proving its applications will not injure Double C&J's existing water rights, including those components which may be exercised by Double C&J during the non-irrigation season.

With respect to the opportunity to be heard, the Department held a hearing on Eckhardt's applications on May 23, 2019. At that hearing, Eckhardt was permitted to present witnesses, expert reports, exhibits, and oral argument to the Department in support of its applications. The Court finds Eckhardt had ample opportunity to present evidence concerning the effects its applications would have on Double C&J's senior rights, including what effects they would have during the non-irrigation season. In fact, it was incumbent on Eckhardt to submit such evidence under the plain language of Idaho Code § 42-203A(5). Therefore, the Court finds that Eckhardt's due process argument lacks merit and must be denied.

E. Substantial right.

Eckhardt argues its substantial rights were prejudiced by the *Amended Final Order*. Since Eckhardt failed to establish its applications would not injure Double C&J's senior water rights, the Director is within his authority to reject the applications under Idaho Code § 42-203A(5). Moreover, since the *Amended Final Order* was not made upon unlawful procedure for the reasons stated herein, Eckhardt has failed to establish its substantial rights were prejudiced. It follows the *Amended Final Order* must be affirmed.

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[6] All of Double C&J's senior water rights are of public record, were produced to Eckhardt in discovery, and were admitted as exhibits in the hearing before the Department. Furthermore, the record establishes Eckhardt was served with Hoff's protests to the applications.

F. Attorney fees.

In its *Petition*, Eckhardt seeks an award of attorney fees under Idaho Code § 12-117. Since Eckhardt is not a prevailing party it is not entitled to an award of fees under that statute. In its briefing, Double C&J seeks an award of fees under Idaho Code § 12-121. Double C&J withdrew its request for fees at the hearing. Therefore, the Court need not reach the issue of whether fees are warranted under that statute.

IV.

ORDER

Therefore, based on the foregoing, IT IS ORDERED that the Director's *Amended Final Order* dated December 20, 2019, **is hereby affirmed.**

Dated July 20, 2020

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER was mailed on July 20, 2020, with sufficient first-class postage to the following:

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Janet Connell
Deputy Clerk

District Court - SRBA
Fifth Judicial District
In Re: Administrative Appeals
County of Twin Falls - State of Idaho
JUL 20 2020
By _____ Clerk
_____ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

ECKHARDT FAMILY LLLP, an Idaho Limited Partnership, Petitioner, vs. IDAHO DEPARTMENT OF WATER RESOURCES, Respondent, and DOUBLE C & J LAND CO., INC., Intervenor-Respondent. IN THE MATTER OF APPLICATIONS FOR PERMIT 67-15298 AND 67-15300 IN THE NAME OF ECKHARDT FAMILY LLLP	Case No. CV44-20-39 **JUDGMENT**

JUDGMENT IS ENTERED AS FOLLOWS:

The Respondent's *Amended Final Order* dated December 20, 2019, **is affirmed**.

Dated July 20, 2020

ERIC J. WILDMAN
District Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the JUDGMENT was mailed on July 20, 2020, with sufficient first-class postage to the following:

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