

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

IN THE MATTER OF APPLICATIONS)	
FOR PERMIT 67-15298 AND)	AMENDED PRELIMINARY ORDER
67-15300 IN THE NAME OF)	DENYING APPLICATIONS
<u>ECKHARDT FAMILY LLLP)</u>	

PROCEDURAL HISTORY

On September 12, 2018, Eckhardt Family LLLP (“Eckhardt”) filed Applications for Permit 67-15298 and 67-15300 with the Idaho Department of Water Resources (“Department”). The Department published notice of the applications on December 6 and 13, 2018. John D. Hoff (“Hoff”) filed protests against both of the applications.

The Department conducted an administrative hearing on May 23, 2019. Eckhardt was represented by attorney Norm Semanko. Hoff was represented by attorneys Candice McHugh and Chris Bromley.

Exhibits 1-17, 19 and 21 offered by Eckhardt and Exhibits 301-303, a portion of 305, 306-308, 314, a portion of 316, 321-323, 325-327, 330, 333, 355 for limited purposes, 359, 360, 362 and 366-368 offered by Hoff were admitted into the administrative record. Exhibits 304, 324 and 328 offered by Hoff were excluded from the record. The remaining exhibits identified by the parties in their pre-hearing disclosures were not offered for admission. Dave Shaw (“Shaw”) testified as an expert witness for Eckhardt at the hearing and Hoff testified on his own behalf. Ron Shurtleff (“Shurtleff”), watermaster for Water District 65 (Payette River), testified as a public witness.

After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Eckhardt filed Applications 67-15298 and 67-15300 on September 12, 2018. Eckhardt amended both applications on November 9, 2018, changing the proposed beneficial uses for the applications from stockwater to stockwater storage and stockwater from storage. Exs. 7-8.

2. Application 67-15298 proposes to impound 0.4 acre-feet on an unnamed stream tributary to Jenkins Creek for stockwater storage. Ex. 7. The proposed stockwater pond is identified as Pond 9. *Id.*

3. Application 67-15300 proposes to impound 0.9 acre-feet on an unnamed stream tributary to Jenkins Creek for stockwater storage. Ex. 8. The proposed stockwater pond is identified as Pond 11. *Id.*

4. Ponds 9 and 11 were constructed prior to the time Eckhardt filed Applications 67-15298 and 67-15300. *See* maps attached to Exs. 7 and 8 (excavated ponds are visible in 2017 aerial photography).

5. From the time Ponds 9 and 11 were first constructed, Eckhardt has captured and stored water in the ponds without authorization. Ex. 366. Ponds 9 and 11, in addition to other unauthorized ponds constructed by Eckhardt in the area, were the subject of an enforcement action initiated by the Department in 2017. *Id.*

6. Ponds 9 and 11 are on-stream ponds. Ex. 11 at Exhibit 3. The losses associated with Ponds 9 and 11 include water used by stock, evaporation from the surface of the ponds and seepage from the ponds. Testimony of Shaw.

7. Ponds 9 and 11 are remote and difficult to access during certain times of the year. Testimony of Shaw (unable to access any of Eckhardt's ponds during the run-off period in early March 2019 because of snow and mud); Ex. 11 at Exhibit 3 (Department employee, Eric Boe, could only access Ponds 9 and 11 by hiking at least two miles round trip on March 19, 2018).

8. Ponds 9 and 11 are located in the upper reaches of the Jenkins Creek drainage. Ex. 11 at Exhibit 1. Constructing stockwater ponds in the upper parts of the drainage allows livestock to access the upland forage areas in the basin and reduces the stream bank erosion in the lower portions of Jenkins Creek. Ex. 17.

9. An unnamed stream tributary to Jenkins Creek flows through Ponds 9 and 11. Ex. 11 at Exhibit 1.

10. Jenkins Creek is a low-elevation drainage with little or no forested areas. Ex. 11 at 1 and Ex. 11 at Exhibit 4 (map). The snow melt run-off period lasts for only a few days. Ex. 5 at Preliminary Order (Findings of Fact, ¶ 7). After the run-off period, flow in Jenkins Creek remains high during the early spring, but diminishes to little or no flow during the summer months. *Id.*

11. On March 19, 2018, Department employee Erik Boe, conducted a field exam for Ponds 9 and 11. Ex. 11 at Exhibit 3. Boe observed that the ponds were completely full and the unnamed stream was flowing through the ponds. *Id.*

12. 2018 was a below average water year. Ex. 11 at Exhibit 6 (between October 2017 and March 2018, the Jenkins Creek area only received approximately 13.5 inches of cumulative precipitation compared to the 30-year average of 17 inches).

13. Hoff purchased his property on Jenkins Creek in 1999. Testimony of Hoff. Hoff conducts business under the name Double C & J Land Co., the listed owner of record for the following water rights on Jenkins Creek:

Water Right 67-2097A

Quantity: 6.54 cubic feet per second (cfs)
345 acre-feet per year (afy)
Priority Date: 6/29/1914

Beneficial Uses:	Irrigation	3/1 to 11/15	6.54 cfs
	Irrigation Storage	1/1 to 12/31	345 afy
	Irrigation from Storage	3/1 to 11/15	345 afy
	Diversion to Storage	1/1 to 12/31	14.5 afy

Water Right 67-2097B

Quantity: 9.06 cfs
Priority Date: 5/11/1918
Beneficial Uses: Irrigation 3/1 to 11/15 9.06 cfs

Water Right 67-14251

Quantity: 23.38 cfs
345 afy
Priority Date: 4/12/1881
Beneficial Uses: Irrigation 3/1 to 11/15 9.06 cfs
Irrigation Storage 1/1 to 12/31 345 afy
Irrigation from Storage 3/1 to 11/15 345 afy
Stockwater 1/1 to 12/31 0.03 cfs
Stockwater Storage 1/1 to 12/31 1.4 afy
Stockwater from Storage 1/1 to 12/31 1.4 afy
Diversion to Storage 1/1 to 12/31 14.5 cfs

Exs. 302, 303, 308.

14. Water rights 67-2097A, 67-2097B and 67-14251, when combined, are limited to a diversion rate of 9.06 cfs for irrigation purposes.

15. Water rights 67-2097A, 67-2097B and 67-14251, in combination, authorize the irrigation of 453 acres. These water rights describe three common points of diversion:

NENE, Section 24, T12N, R06W ("Jenkins Reservoir Diversion")
SENW, Section 6, T11N, R05W
Lot 2 (NWNW), Section 18, T11N, R05W ("Pump Station")

Exs. 302, 303, 308.

16. Water rights 67-2097A, 67-2097B and 67-14251 contain an error in the legal description for one of the three common points of diversion. The Pump Station described in Lot 2 (NWNW) of Section 18 is actually located in Lot 1 (NWNW) of Section 18. Ex. 11 at Exhibit 1.

17. Water rights 67-2097B and 67-14251 describe another common point of diversion in the SENW, Section 7, T11N, R05W (“Lower Reservoir Diversion”). Water right 67-2097A describes a fourth point of diversion in the SENW, Section 6, T11N R05W. It appears this Section 6 reference is incorrect and should have been in Section 7 to match water rights 67-2097B and 67-14251, consistent with the physical location of the Lower Reservoir Diversion. Ex. 11 at Exhibit 1.

18. The Jenkins Reservoir Diversion is located upstream of the confluence of Jenkins Creek and the unnamed stream flowing through Ponds 9 and 11. All of Hoff’s authorized points of diversion on Jenkins Creek, except for Jenkins Reservoir Diversion, are located downstream of Ponds 9 and 11. *Id.*

19. Hoff maintains a small reservoir (referred to as the Lower Reservoir in this order) with a capacity of less than 50 acre-feet, in the area of his irrigated acreage. Ex. 11 at Exhibit 1. The Lower Reservoir fills every year with water available in the lower Jenkins Creek drainage.

20. In the Jenkins Creek drainage, the irrigation season is March 1 to November 15. The non-irrigation season is November 16 to February 28.

21. In most years, the flow in Jenkins Creek exceeds the demand under Hoff’s water rights for a period of time. Testimony of Hoff.

22. According to data from Idaho Power Company, over the last six years Hoff commenced irrigation (pumped water from the Lower Reservoir) on the following days:

Year	Irrigation Start Date
2013	April 3
2014	April 10
2015	March 11
2016	April 7
2017	May 25
2018	April 6

Exs. 321 and 322.

23. Hoff and Eckhardt have been engaged in disputes over water in the Jenkins Creek drainage since at least 2001. *See* Exs. 304, 305, 316, 323, 325, 327, 362 and 366.

RELEVANT LEGAL PROVISIONS / ANALYSIS

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the burden of proof for the elements set forth in Idaho Code § 42-203A(5). IDAPA 37.03.08.40.04.

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

...

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

Injury to Storage Rights

Hoff's Lower Reservoir is comparatively small and fills every year from water available in the lower Jenkins Creek drainage. The Jenkins Reservoir Diversion is upstream of the point where

the unnamed stream, described in Applications 67-15298 and 67-15300, flows into Jenkins Creek. Therefore, the impoundment of water in Ponds 9 and 11 will not injure the storage elements of Hoff's water rights.

Injury to Irrigation and Stockwater Rights

Ponds 9 and 11 are on-stream ponds. The evaporation and seepage losses associated with the ponds occur continuously when the ponds are impounding water. During times when water is flowing through the ponds and reaching Hoff's diversions, the losses associated with the ponds could diminish the quantity of water available to Hoff. In order to prevent injury to Hoff's senior water rights, water cannot flow through Ponds 9 and 11 during times when the streams are flowing (are connected) throughout the basin and Hoff's demand for water on Jenkins Creek downstream of the unnamed stream (within the authorized limits of water rights 67-2097A, 67-2097B and 67-14251) is not fully satisfied. Testimony of Shaw (water is only available for storage in the proposed ponds prior to the "day of allocation"¹). Protecting Hoff's water rights from injury would require daily administration of water rights (to determine whether Hoff's demand for water is fully satisfied by flows in Jenkins Creek) and access to Ponds 9 and 11 (to route water through the ponds or around the ponds, as appropriate).

Daily Administration of Rights

Preventing injury to Hoff's water rights would require daily administration of water rights during certain times of the year. Each day during the run-off period, a watermaster would need to determine whether Jenkins Creek (or its tributaries) was connected from above each pond to Hoff's diversions, whether Hoff's diversions were within the amounts authorized on his water rights, and whether there was excess water flowing past Hoff's diversions. If the watermaster determines that there are excess flows, then water could be routed through Ponds 9 and 11, to fill the ponds or offset losses in the ponds. If, on the other hand, there are no excess flows, then water would be routed around the ponds.

There is no water district in the Jenkins Creek drainage at this time. Because Hoff's senior water rights exceed the total flow in Jenkins Creek for much of the year, there has been little need for water right administration within the basin. Until the time a water district is created, each water user is responsible for regulation of his or her own diversions. To properly administer the proposed water rights, there would need to be daily communication and coordination between Hoff and Eckhardt, which is not possible. Hoff and Eckhardt have been engaged in disputes over water on multiple fronts for nearly twenty years.

¹ During the hearing, both Shurtleff and Shaw referred to the moment when Hoff's demand under existing water rights exceeds the water supply on Jenkins Creek as the "day of allocation." The term "day of allocation" is used in other basins to denote the day each year that the junior reservoir rights are curtailed in order to supply river water to senior irrigation rights.

Access to Ponds

Ponds 9 and 11 are remote and difficult to access during certain times of the year. Testimony of Shaw (unable to access any of Eckhardt's ponds during the run-off period in early March 2019 because of snow and mud); Ex. 11 at Exhibit 3 (Department employee, Eric Boe, could only access Ponds 9 and 11 by hiking at least two miles round trip on March 19, 2018). It is highly unlikely that Eckhardt, Hoff or a watermaster could easily access Ponds 9 and 11 during the critical regulation time period.

Proposed Mitigation

To protect Hoff's water rights from injury, Eckhardt proposes to restrict the time period when Ponds 9 and 11 could capture water from November 16 to May 15.² Testimony of Shaw. After May 15, Eckhardt proposes to bypass the entire flow of Jenkins Creek or its tributaries around the ponds.

The proposal to convey stream flows around the ponds after May 15 is not sufficient to prevent injury to existing water rights. There could be times, prior to May 15, when the impoundment of water in the ponds would reduce the quantity of water available to satisfy Hoff's water rights. Given Hoff's irrigation start dates from recent years, it is likely that injury could occur prior to May 15. Stated differently, if Hoff starts irrigating prior to May 15, his demand could exceed the available flow in Jenkins Creek prior to May 15. In order to fully protect Hoff's water rights, the bypass around the ponds must be initiated at the time Hoff's demand for Jenkins Creek water, within the limits of his authorized water rights, exceeds the water supply. This critical time period varies from year to year and may occur prior to May 15.

Summary of Injury Analysis

As proposed, stockwater storage in Ponds 9 and 11 will reduce the quantity of water under Hoff's water rights in certain years and in certain circumstances. Eckhardt's proposal to cease diverting water through the ponds on May 15 of each year does not adequately protect Hoff's water rights from injury prior to May 15. Complete protection against injury would require daily administration of water rights on Jenkins Creek. Until a water district is created in the basin, the water users in the Jenkins Creek drainage would be responsible for management of their own water rights. This would require communication and coordination between Hoff and Eckhardt. The record is clear that such communication and coordination is impossible. Further, daily administration would require access to Ponds 9 and 11 throughout the run-off period. The record is clear that the ponds are not accessible during at least a portion of the run-off period. Eckhardt has not satisfied its burden of proof for the non-injury criteria described in Idaho Code § 42-203A(5)(a).

² Shaw testified that in dry years a more appropriate cut-off date may be April 15. Shaw's testimony about this revised cut-off date was vague. In the absence of a clearly defined proposal to stop diverting water to the ponds on April 15, the hearing officer will complete the injury analysis using the May 15 cut-off date, as described in Shaw's direct testimony.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible . . ." IDAPA 37.03.08.45.01.b.

On March 19, 2018, Department employee, Erik Boe conducted a field exam for Ponds 9 and 11. *Id.* Boe was forced to hike to the ponds because of muddy road conditions. *Id.* Boe observed that Ponds 9 and 11 were completely full and water was flowing through the ponds. *Id.* In 2018, Hoff did not commence irrigation from Jenkins Creek until April 6. Exs. 321 and 322. The 2018 water year was a below average water year. Ex. 11 at Exhibit 6.

Boe's direct observations of Ponds 9 and 11 confirm that the unnamed stream described in Applications 67-15298 and 67-15300 is sufficient to fill Ponds 9 and 11 prior to the commencement of irrigation by Hoff. The fact that 2018 was a below-average water year further supports the conclusion that the unnamed stream is sufficient to fill Ponds 9 and 11 prior to Hoff's irrigation demand.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An applicant must have "legal access to the property necessary to construct and operate the proposed project." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

Ponds 9 and 11 are located on property owned by Eckhardt. Therefore, Eckhardt has legal access to the property necessary to construct, maintain and operate the proposed ponds. There are no other permits required to complete the project.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii.

Ponds 9 and 11 have already been constructed. Eckhardt proposes to construct bypass structures for each of the ponds, which would route the full flow of the respective streams around the ponds during certain times of the year. Shaw estimated that these bypass structures would cost

\$1000 per pond. Testimony of Shaw. This amount is negligible. Eckhardt has sufficient financial resources to construct the proposed bypass structures.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3).

It is in the local public interest to distribute livestock use of a stream throughout a watershed rather than concentrate the use in a small area of a stream, which can lead to loss of riparian vegetation, erosion and degradation of the stream. Ex. 17.

Conservation of Water Resources

Providing stockwater to animals through on-stream ponds is a common practice in Idaho and is consistent with the conservation of water resources within the state of Idaho.

CONCLUSIONS OF LAW

Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing water rights. Therefore, Applications 67-15298 and 67-15300 should be denied. Eckhardt has shown that the water supply is sufficient for the proposed uses, that the applications were filed in good faith, that Eckhardt has sufficient financial resources to complete the projects, that the projects are in the local public interest and that the projects are consistent with the conservation of water resources in the state of Idaho.

ORDER

IT IS HEREBY ORDERED that Applications for Permit 67-15298 and 67-15300 in the name of Eckhardt Family LLLP are DENIED.

Dated this 8th day of August, 2019.



James Cefalo
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of August 2019, I mailed a true and correct copy of the foregoing AMENDED PRELIMINARY ORDER DENYING APPLICATIONS, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL - CERTIFIED

RE: APPLICATIONS FOR PERMIT 67-15298 AND 67-15300

**Norman M. Semanko
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Courtesy copy sent via email to:

**Ron Shurtleff
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Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.