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

IN THE MATTER OF APPLICATION FOR  
PERMIT NO. 67-15292 THROUGH 67-  
15298 AND 67-15300 IN THE NAME OF  
ECKHARDT FAMILY LLLP

**RESPONSE TO ECKHARDT FAMILY  
LLLP'S EXCEPTIONS TO AMENDED  
PRELIMINARY ORDERS DENYING  
APPLICATIONS AND ORDER  
GRANTING PETITIOSN FOR  
RECONSIDERATIO IN PART**

COMES NOW Double C & J Land Co., Inc. ("Double C&J"), by and through its attorneys of record, McHugh Bromley, PLLC, and responds to the Eckhart Family LLLP ("Eckhardt") *Exceptions to Amended Preliminary Orders Denying Applications and Order Granting Petitions for Reconsideration, In Part* ("Exceptions"). The Exceptions were filed to the Hearing Officer's: 1) *Amended Preliminary Order Denying Applications (In the Matter of Applications for Permit 67-15292 through 67-15297)* ("Amended Preliminary Order 1"); 2) *Amended Preliminary Order Denying Applications (In the Matter of Applications for Permit 67-*

**RESPONSE TO ECKHARDT FARMILY LLLP'S EXCEPTIONS TO AMENDED PRELIMINARY  
ORDERS DENYING APPLICATIONS AND ORDER GRANTING PETITIOSN FOR RECONSIDERATIO  
IN PART - 1**

15298 and 67-15300) (“Amended Preliminary Order 2”); and 3) *Order Granting Petitions for Reconsideration, In Part*. (“*Reconsideration Order*”).

Eckhardt raises three issues:

1. The Exceptions ask that Eckhardt’s stockwater storage diversions should approved and “conditioned” to prevent injury (Br. at 3);
2. Daily administration is not required if there is a firm cut-off date; (Br. at 6) and
3. Access to the ponds is manageable during the spring to enforce a shut off date; (Br. at 7).

The Hearing Officer’s’ orders denying the applications should be upheld because the hearing officer’s findings and conclusions are based on substantial evidence. *Maclay v. Idaho Real Estate Com’n.*, 154 Idaho 540, 544, 300 P.3d 616, 620 (2012) (inappropriate to re-weigh evidence in administrative hearings if based on substantial evidence). And, the issues raised by Eckhardt would require speculation as to what date would prevent injury as no credible nor reliable evidence was introduced to support a specific date, thereby preventing any conclusions as to what, if any date, would prevent injury to the senior water rights. Furthermore, the fact that daily administration is necessary in order to ensure compliance by Eckhardt is unquestioned and supported by the facts in the record. Finally, access to the ponds is necessary in order to prevent continued and further injury to Double C&J’s senior water rights. Hence, denying the applications is proper.

#### I. SUMMARY OF PERTINENT FACTS

The Applications were filed by Eckhardt in an attempt to legalize existing diversions and impoundments of water in the Jenkins Creek drainage. Ex. 366 (consent order in matter E2017-1235). The Applications seek year-round diversion and storage of water. Exs. 1-9. Ponds 1-9

are on-stream. *Amended Preliminary Order 1* at 2 (FF 8-10) and *Amended Preliminary Order 2* at 2 (FF 6). The Applications do not explain that water will be passed through the on-stream ponds or that they will mitigate for injury to existing water rights. Exs. 1-9. Ponds 1-9 are remote, in the upper reaches of Jenkins Creek, making them difficult or impossible to reach in the winter and early spring. *Amended Preliminary Order 1* at 2 (FF 12); *Amended Preliminary Order 2* at 2 (FF 7, 8). “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 1-6 (to route water through the ponds or around the ponds, as appropriate).” *Amended Preliminary Order 1* at 7; *Amended Preliminary Order 2* at 6. There is no water district or Watermaster in the Jenkins Creek drainage. *Id.*

As explained by Ron Shurtleff, Watermaster for Water District No. 65, who credibly testified as a public witness, the ponds have losses due to evaporation and seepage, which, in his experience, injure senior water rights. Test. of R. Shurtleff. This is consistent with the Amended Preliminary Orders 1 and 2: “Ponds 1-6 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.” *Amended Preliminary Order 1* at 7; *see also Amended Preliminary Order 2* at 6. Furthermore, Mr. Shurtleff’s testimony credibly explained how and why such ponds impact water supply in a drainage such as Jenkins Creek. Test. of R. Shurtleff.

Double C&J’s water rights are senior to the Applications at issue. *Amended Preliminary Order 1* at 3-4 (FF 19); *Amended Preliminary Order 2* at 3 (FF 13). Double C&J’s most senior most senior right, no. 67-14251, bears an 1881 priority date, authorizes year-round irrigation

storage and stockwater storage, with year-round stockwater from storage, and irrigation and irrigation from storage from March 1 through November 15. *Id.* Double C&J's water rights were decreed in the Snake River Basin Adjudication ("SRBA"). Exs. 301-303, 306-308. Double C&J's points of diversion are located downstream of the applications. *Amended Preliminary Order 1* at 4 (FF 21-24); *Amended Preliminary Order 2* at 4 (FF 18). In some years, Jenkins Creek reservoir does not fill. *Amended Preliminary Order 1* at 6; *Amended Preliminary Order 2* at 5. Because of this, the Applications could impact the fill during the non-irrigation season. *Id.* In addition, the Applications can impact the year-round stockwater right of Double C&J. *Amended Preliminary Order 1* at 7 and *Amended Preliminary Order 2* at 6.

John Hoff, the president of Double C&J, was the only person with actual on-the-ground experience to testify at the hearing. Mr. Hoff is 72 years old with over 60 years of experience irrigating, having been raised on his family's eastern Idaho farm. Test. of J. Hoff. Mr. Hoff also grew up raising livestock. *Id.* The Hoff's bought the Jenkins Creek Ranch in 1999 in order to work a farm with their own water supply. *Id.* Every drop of water is precious for Double C&J, as it gets by on less than 1 acre-foot of water per acre. *Id.* Because of this, any losses of water in the drainage acutely impact Double C&J's water rights, supply, and livestock. *Id.* As explained through the testimony of Mr. Hoff, and because of the water supply, Double C&J has fewer alfalfa cuttings than its immediate neighbors and cannot raise potatoes. *Id.*

Double C&J has year-round stock water use as evidenced by water right no. 67-14251. As explained at the hearing by Mr. Hoff, Double C&J has had cattle die due to lack of water supply in the Jenkins Creek drainage. *Id.*

Mr. Hoff has fought for his right to water against Eckhardt for nearly twenty years. *Amended Preliminary Order 1* at 5 (FF 35) *Amended Preliminary Order 2* at 4 (FF23). Mr. Hoff

testified credibly, with nothing to hide. Despite being present at the hearing, none of the Eckhardt principles chose to testify, making it impossible to know their experience with water, livestock, or to gauge their credibility and sincerity. The only testimony on behalf of Eckhardt Family LLLP came through its engineer, Dave Shaw. Mr. Shaw visited Jenkins Creek on March 11, 2019. Ex. 11 at 2.

## **II. A MARCH 1 SHUT OFF DATE WOULD NOT PREVENT INJURY**

Eckhardt asks the Director to condition the water rights “to include a fixed shut-off date” as doing so “would indeed alleviate all injury concerns.” (Br. at 3). However, this ignores the fact that Double C&J has year-round stockwater rights and stockwater storage rights. “As filed, the above-captioned applications all proposed year-round diversions to storage for stockwater use.” Exhibits 7-8. During direct testimony, the Applicant’s representative and expert witness Dave Shaw proposed a reduced storage diversion season from November 15 to May 15. Testimony of Shaw.” *Id.* at 3. He then altered his undisclosed opinion at the hearing to an April 15 shut-off date. Eckhardt now asks the Director to re-weigh evidence already considered and alter the Hearing Officer’s findings and conclusions.

In addition, testimony by John Hoff and evidence presented at the hearing makes it clear that Mr. Eckhardt has not complied with IDWR orders and requirements in the past as he had not breached ponds 3, 4 and 11, nor honored Idaho law when it comes to using and diverting water. Exs. 366 and 368.

In an administrative hearing in front of then-hearing officer Gary Spackman, it was decided there was no water available for appropriation by Eckhardt during the irrigation season. Ex. 305. The decision reached in that hearing is supported by the absolute lack of measurements in the record to show anything is different today. Eckhardt has known for years that a decision

was already made that water was unavailable for appropriation, and that the illegal on-stream ponds require water rights. Ex. 324 (letter from IDWR to Eckhardt dated 11/25/2014: “None of these ponds are authorized by water rights but should be to legally store water.”). Yet, Eckhardt continued (and still continues) to develop stockwater storage intercepting tributary springs and streams to the detriment of the Double C&J senior water rights. Curiously, and without the principles choosing to testify, Eckhardt did not take a single measurement of water. Eckhardt had every opportunity to measure water, yet did not. Mr. Shaw was employed by Eckhardt for three years and took no measurements of the source, no measurements of the ponds, and testified that he had no real way of knowing how much water supply was available in the drainage. Test. of D. Shaw. His sudden and undisclosed proposal to limit the season of use in testimony at the hearing, over Double C&J’s objections, as found by the hearing officer, is vague. However, it was not only vague, but was entirely unsubstantiated and based purely on conjecture, evidenced by the fact that Mr. Shaw’s first proposal was to limit the season to end in May, but then changed later in the hearing to end April 15. *Id.* His only apparent basis for changing the season of use was that Mr. Eckhardt secured a “Stipulation” with other water users in a different basin with such a date. *Petition* at 3. Yet, Mr. Shaw admitted that he had done no analysis in Jenkins Creek regarding whether or not a limited season would, in fact, prevent injury to Double C&J, nor whether or how much water would be available. Test. of D. Shaw. While there were some minor observations by Mr. Boe that there was some water available in two of the ponds when he did his field exam on March 19, 2018, does not alter the Hearing Officer’s conclusion that “water cannot flow through [the Ponds] during times when the streams are flowing ... throughout the basin and Hoff’s demand for water on Jenkins Creek downstream of the unnamed stream ... is not fully satisfied.” *Amended Preliminary Order 1* at 7; *Amended Preliminary Order 2* at 6.

Thus, the Hearing Officer concluded that the applications should be denied because “Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing water rights” is supported by substantial competent evidence. *Amended Preliminary Order 1* at 11 and *Amended Preliminary Order 2* at 9.

Thus, the proposed March 1 shut off date which is based on no evidence in the record, does not eliminate injury to the Double C&J year-round water rights nor does it eliminate injury to their irrigation season water rights in light of the fact that compliance with such date would be unlikely and enforcement unattainable given the terrain.

### **III. DAILY ADMINISTRATION IS REQUIRED TO PREVENT INJURY YET IS UNTENABLE**

“Preventing injury to Hoff’s water rights would require daily administration of water rights during certain times of the year.” *Amended Preliminary Order 1* at 7 and *Amended Preliminary Order 2* at 6. The Hearing Officer concluded that while a March 1 shut-off date may not injure Hoff’s water rights in the irrigation season, the “record suggests that the proposed ponds would likely be inaccessible on March 1 because of snow or mud.” *Reconsideration Order* at 3. Thus, the Hearing Officer properly concluded that “[i]t is not clear from the record, however, that the Department or watermaster would be able to administer a March 1 shut-off date ... Therefore, the arguments raised ... do not warrant a change to Preliminary Order 1 or Preliminary Order 2.” *Id.* at 4. The Orders then go on in detail why this is needed but cannot occur given the nature of the drainage and the relationship between the parties. (i.e. “Hoff and Eckhardt have been in engaged in disputes over water on multiple fronts for nearly twenty years.” *Amended Preliminary Order 1* at 8 and *Amended Preliminary Order 2* at 6.)

As explained by Ron Shurtleff, and recognized by the hearing officer, evaporation and seepage can diminish the quantity of water available under Double C&J's senior water rights. In order to prevent injury to Double C&J's water rights, diversion of water would require daily administration. With no water district, no watermaster, no design documents in the record to show how the existing ponds would be retrofitted to pass water, no testimony from any Eckhardt principle to allow the hearing officer to gauge credibility and sincerity, and the inability for the parties to communicate, daily administration cannot take place. With no rental pool or other means to provide water to Double C&J if water diverted out-of-priority causes injury to Double C&J, there is no ability for Eckhardt to mitigate. IDAPA 37.03.08.045.01.a.iv ("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"). Eckhardt's unsupported assertion to the contrary are not supported by any competent evidence and are actually contradicted by the evidence presented at hearing. If the ponds were so accessible as to be easily administered, then Mr. Shaw would have surely had plenty of time and opportunity to actually take measurements and design documents.

Because the ponds have been illegally intercepting water for years, it is not at all surprising that they have been observed to have water in them, possibly built on springs, carrying water over from year-to-year that should have otherwise flowed to Double C&J for beneficial use under its senior water rights.

#### IV. CONCLUSION

Based on the foregoing, the Amended Preliminary Orders should be affirmed and the Applications denied.

DATED this 5th day of September, 2019.



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*Attorneys for Double C & J Land Co., Inc.*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2019, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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