

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

IN THE MATTER OF APPLICATIONS) FOR PERMIT 67-15292 THROUGH) 67-15297 IN THE NAME OF) <u>ECKHARDT FAMILY LLLP</u>)	ORDER ON RECONSIDERATION; AMENDED FINAL ORDER
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PROCEDURAL HISTORY

On September 12, 2018, Eckhardt Family LLLP (“Eckhardt”) filed six applications for permit with the Idaho Department of Water Resources (“Department”). The applications were assigned numbers 67-15292 through 67-15297, respectively. The Department published notice of the applications on December 6 and 13, 2018. John D. Hoff (“Hoff”) filed protests against all six of the applications.

The Department conducted a consolidated administrative hearing on May 23, 2019.¹ 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.

On July 8, 2019, hearing officer, James Cefalo (“hearing officer”), issued a *Preliminary Order Denying Applications 67-15292 through 67-15297* (“Preliminary Order 1”). Also on July 8, 2019, the hearing officer issued a *Preliminary Order Denying Applications 67-15298 and 67-67-15300* (“Preliminary Order 2”). The hearing officer issued two separate orders due to important factual distinctions related to the ponds.

On July 22, 2019, Eckhardt filed a *Petition for Reconsideration* related to both Preliminary Order 1 and Preliminary Order 2, in one document.² In his *Order Granting*

¹ Consolidated with *In the Matter of Applications for Permit 67-15298 and 67-15300 in the Name of Eckhardt Family LLLP*.

² On August 2, 2019, Hoff filed a *Response to Petition for Reconsideration* related to Preliminary Order 1 and a *Response to Petition for Reconsideration* related to Preliminary Order 2. Hoff’s reconsideration responses were not considered, as responses to petitions for reconsideration are not recognized under the Department’s rules of procedure. See IDAPA 37.01.01.730.

Petitions for Reconsideration, in Part, the hearing officer concluded:

Eckhardt and Hoff have not agreed to a firm shut-off date for the proposed ponds. The Department cannot force Hoff to assume any risk that the shut-off date will be too late. In order to fully protect Hoff's senior water rights from injury, there must either be daily administration during the irrigation season (March 1 – November 15) after Hoff starts irrigating or the shut-off dates needs to occur prior to the irrigation season.

Order Granting Petitions for Reconsideration, in Part at 3.

On August 8, 2019, the hearing officer issued *Amended Preliminary Order Denying Applications (In the Matter of Applications for Permit 67-15292 through 67-15297)* ("Amended Preliminary Order 1") and *Amended Preliminary Order Denying Applications (In the Matter of Applications for Permit 67-15298 and 67-15300)* ("Amended Preliminary Order 2").

The hearing officer concluded Eckhardt's Applications 67-15292 through 67-15297 showed: (a) sufficient water supply for the proposed uses; (b) good faith; (c) sufficient financial resources to complete the projects; (d) the projects are in the local public interest; and (e) the projects are consistent with the conservation of water resources in the state of Idaho. *Amended Preliminary Order 1* at 11. However, he denied Applications 67-15292 through 67-15297 because "Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing water rights." *Id.*; see Idaho Code § 42-203A(5)(a) and IDAPA 37.03.08.45.01.a.i. and iv.³

In response to the Amended Preliminary Orders, on August 23, 2019, Eckhardt timely filed the *Eckhardt Family LLLP's Exceptions to Amended Preliminary Orders Denying Applications and Order Granting Petitions for Reconsideration In Part* ("Eckhardt Exceptions"). In response to the Eckhardt Exceptions, on September 5, 2019, Double C & J Land Co., Inc. ("Hoff"), timely filed *Double C & J Land Co., Inc.'s Response to Eckhardt's Exceptions to Amended Preliminary Order* ("Hoff Response"). The Eckhardt Exceptions and the Hoff Response addressed both Amended Preliminary Orders 1 and 2 in one filing.

On November 14, 2019, the Director issued his *Order on Exceptions; Final Order (In the Matter of Applications for Permit 67-15292 through 67-15297)* ("Final Order 1") and *Order on Exceptions; Final Order (In the Matter of Applications for Permit 67-15298 and 67-15300)* ("Final Order 2"). The Director's Final Order 1 and Final Order 2 largely adopted, with certain modifications, the hearing officer's findings of fact and conclusions of law made in the Amended Preliminary Order 1 and Amended Preliminary Order 2.

On November 29, 2019, Eckhardt timely filed his *Petition for Reconsideration of Orders on Exceptions; Final Orders (In the Matter of Applications for Permit 67-15292 through 67-15298 and*

³ The hearing officer reached the same conclusions in relation to Applications for Permit 67-15298 and 67-15300 in Amended Preliminary Order 2.

67-15300 in the Name of Eckhardt's Family LLLP)(“Petition for Reconsideration of Final Orders”), responding to both Final Order 1 and Final Order 2 in one document.

Eckhardt’s Petition for Reconsideration of Final Orders “does not request reconsideration of Final Order 1 as it applies to Application for Permit No. 67-15294 (Pond 3) and requests that said application be denied.” *Petition for Reconsideration of the Final Order* at 1 and 6 (“[a]fter initially breaching Pond 3 [as per the E2017-1235 Consent Order] the Applicant has since destroyed Pond 3 and does not intend to use it . . .”). The Petition for Reconsideration of Final Orders raises two substantive issues: (1) “The Director should reconsider whether injury will occur to Jenkins Creek water rights during the non-irrigation season;” and (2) “The Director should reconsider whether a condition requiring a complete diversion shutoff during the irrigation season would eliminate potential injury to water rights on Jenkins Creek during the irrigation season.” *Id.* at 2.

Having thoroughly reviewed the evidence cited to by Eckhardt on reconsideration—including live testimony—the Director remains unpersuaded. A description and analysis of the Petition for Reconsideration of Final Orders is included below. However, the evidence cited to in the Petition for Reconsideration of Final Orders is insufficient to alter any other findings or conclusions in Final Order 1.

FINDINGS OF FACT

1. Eckhardt filed Applications 67-15292 through 67-15297 on September 12, 2018. Eckhardt amended all six applications on November 9, 2018, changing the proposed beneficial uses for all applications from stockwater to stockwater storage and stockwater from storage. Exs. 1-6.
2. Application 67-15292 proposes to impound 0.4 acre-feet on Jenkins Creek for stockwater storage. Ex. 1. The proposed stockwater pond is identified as Pond 1. *Id.*
3. Application 67-15293 proposes to impound 0.4 acre-feet on Jenkins Creek for stockwater storage. Ex. 2. The proposed stockwater pond is identified as Pond 2. *Id.*
4. Application 67-15294 proposes to impound 0.5 acre-feet on an unnamed stream tributary to Jenkins Creek for stockwater storage. Ex. 3. The proposed stockwater pond is identified as Pond 3. *Id.*
5. Application 67-15295 proposes to impound 1.5 acre-feet on an unnamed stream tributary to Jenkins Creek for stockwater storage. Ex. 4. The proposed stockwater pond is identified as Pond 4. *Id.*
6. Application 67-15296 proposes to impound 0.4 acre-feet on an unnamed stream tributary to Jenkins Creek for stockwater storage. Ex. 5. The proposed stockwater pond is identified as Pond 5. *Id.*
7. Application 67-15297 proposes to impound 0.4 acre-feet on an unnamed stream tributary to Jenkins Creek for stockwater storage. Ex. 6. The proposed stockwater pond is identified as Pond 6. *Id.*

8. Ponds 1-6 were constructed prior to the time Eckhardt filed Applications 67-15292 through 67-15297. *See* maps attached to Exs. 1-6 (excavated ponds are visible in 2017 aerial photography).

9. From the time Ponds 1-6 were first constructed, Eckhardt has captured and stored water in the ponds without authorization. Ex. 366. Ponds 1-6, 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.*

10. Ponds 1-6 are on-stream ponds. Ex. 11 at Exhibit 1. The losses associated with Ponds 1-6 include water used by stock, evaporation from the surface of the ponds and seepage from the ponds. Testimony of Shaw.

11. Ponds 1-6 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, unable to access Ponds 1-4 on March 19, 2018 because of muddy road conditions).

12. Ponds 1-6 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.

13. Jenkins Creek flows through Ponds 1 and 2. Ex. 11 at Exhibit 4. An unnamed stream tributary to Jenkins Creek flows through Pond 3. *Id.* A different unnamed stream tributary to Jenkins Creek flows through Pond 4. *Id.* A different unnamed stream tributary to Jenkins Creek flows through Ponds 5 and 6. Ex. 11 at Exhibit 1.

14. 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.*

15. On March 19, 2018, Department employee, Erik Boe, conducted a field exam for two ponds in the upper reaches of the Jenkins Creek drainage. Ex. 11 at Exhibit 3. The Department refers to these ponds as Ponds 9 and 11. *Id.* Boe observed that the ponds were completely full and the unnamed stream was flowing through the ponds. *Id.*

16. 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).

17. Ponds 9 and 11 are at roughly the same elevation as Ponds 1-6. Ex. 11 at Exhibits 3 and 4 (maps prepared by Boe include topographic contour lines). The snowmelt run-off around Ponds 9 and 11 would occur at roughly the same time as the snowmelt run-off around Ponds 1-6.

18. Ponds 9 and 11 are roughly the same size as Ponds 1-6. Exs. 1-8 (each of the ponds will hold less than 2 acre-feet of water). The drainage area above the ponds is roughly the same size. Ex. 11 at Exhibits 3 and 4 (maps prepared by Boe depict the drainage areas above the ponds).

19. 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.

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

21. 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.

22. 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.

23. 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.

24. All of Hoff’s authorized points of diversion on Jenkins Creek are located downstream of Ponds 1-6. *Id.*

25. Hoff is currently authorized to divert water from Jenkins Creek for storage at two locations on Jenkins Creek. Ex. 11 at Exhibit 1. The upper reservoir, known as Jenkins Reservoir, is an off-stream reservoir located upstream of Hoff’s irrigated acres. *Id.* The other reservoir (referred to as the Lower Reservoir in this order) is a small off-stream reservoir with a capacity less than 50 acre-feet located adjacent to Hoff’s irrigated farm ground. *Id.*

26. Hoff conveys water from Jenkins Creek to Jenkins Reservoir through a 15-inch diameter pipeline, which can become clogged with debris. Testimony of Hoff. Jenkins Reservoir, which has an estimated capacity of 175 acre-feet, fills most years but not every year. *Id.*; Ex. 16.

27. Hoff also stores water in Monroe Reservoir, an on-stream reservoir located approximately 2.5 miles upstream of the Jenkins Reservoir Diversion. Ex. 11 at Exhibit 1. Monroe Reservoir has an estimated capacity of 260 acre-feet. Testimony of Hoff.

28. Hoff owns water right 67-2044, which bears a priority date of May 3, 1914 and authorizes the diversion of 6.40 cfs from Monroe Creek to fill Monroe Reservoir. Ex. 301. Monroe Creek is a separate drainage located to the east of the Jenkins Creek drainage. Ex. 11 at Exhibit 1.

29. The ditch used to convey water from Monroe Creek into the Jenkins Creek drainage is in poor repair. Testimony of Hoff. Because of the condition of the Monroe Creek ditch, Hoff has diverted very little water from Monroe Creek in the last twenty years. *Id.*

30. Hoff has historically used Jenkins Creek water to fill Monroe Reservoir. Testimony of Hoff. Monroe Reservoir fills every year. *Id.*

31. Hoff has filed a transfer application to add Monroe Reservoir as an authorized point of diversion under Jenkins Creek water right 67-2097A. Ex. 333. Currently, Hoff is not authorized to capture Jenkins Creek water in Monroe Reservoir. Ex. 15.

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

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

34. 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.

35. 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.

36. Eckhardt's Petition for Reconsideration of the Final Orders did "not request reconsideration of Final Order 1 as it applies to Application for Permit No. 67-15294 (Pond 3) and requests that said application be denied." *Petition for Reconsideration of Orders on Exceptions; Final Orders* at 1 and 6 ("[a]fter initially breaching Pond 3 [as per the E2017-1235 Consent Order] the Application has since destroyed Pond 3 and does not intend to use it . . .").

RELEVANT LEGAL PROVISIONS AND 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). *See* IDAPA 37.03.08.40.04.

Reduction to Existing Water Rights (Injury)

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria 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 testified that Jenkins Reservoir fills most years, but not every year. According to Hoff, there have been two or three years out of the last twenty years where Jenkins Reservoir has not filled. This would suggest that storage in Eckhardt's proposed ponds could impact the fill of Jenkins Reservoir in certain years. Hoff also testified, however, that Monroe Reservoir fills every year. Monroe Reservoir is authorized to store water diverted from Monroe Creek. The ditch conveying water from Monroe Creek into the Jenkins Creek drainage is in disrepair and has rarely been used in the last twenty years. Consequently, Hoff has filled Monroe Reservoir with water from the Jenkins Creek drainage.

Hoff's water rights do not currently authorize any diversion of Jenkins Creek at Monroe Reservoir. Ex. 15. Hoff has filed an Application for Transfer to add Monroe Reservoir dam as an authorized point of diversion for water right 67-2097A from Jenkins Creek. Hoff's transfer application has not been approved. The Director must evaluate injury based on the existing elements of relevant water rights, not based on elements that may exist in the future. 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 Hoff's water rights.

Injury to Irrigation and Stockwater Rights

Ponds 1-6 are on-stream ponds. Because the ponds are located on-stream, the ponds capture all the flow of the stream on which the ponds are located. The capture of water in each pond is limited to the volume proposed by each water right application. When each of the ponds reaches its volume capacity, all incoming water must be passed downstream.

The evaporation and seepage losses associated with the on-stream ponds occur continuously. After the volume of a water right is met, additional water cannot be stored for evaporation or seepage. During times when water is flowing through the ponds and reaching Hoff's diversions, the losses associated with evaporation and seepage from the ponds could diminish the quantity of water available to Hoff. In other words, approving Eckhardt's Applications will potentially injure Hoff's established senior water rights.

To prevent injury to Hoff's senior water rights, water cannot flow through Ponds 1-6 during times when the streams are flowing (are connected) throughout the basin and Hoff's demand for water on Jenkins Creek (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"⁴). Protecting Hoff's water rights from injury related to Eckhardt's on-stream ponds 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).

Proposed Mitigation

To mitigate injury, Eckhardt initially proposed to restrict the time period when Ponds 1-6 could capture water from November 16 to May 15.⁵ Testimony of Shaw. After May 15, Eckhardt proposed to bypass the entire flow of Jenkins Creek or its tributaries around the ponds.

The hearing officer concluded the proposal to convey stream flows around the ponds after May 15 was not sufficient to prevent injury to existing water rights. He concluded 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, the hearing officer concluded that if Hoff were to start irrigating prior to May 15, his demand could exceed the available flow in Jenkins Creek prior to May 15. Therefore, 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, which may occur prior to May 15.

The Exceptions

In his Exceptions, Eckhardt argued the proposed stockwater storage diversions can still be conditioned to prevent injury. *Eckhardt Exceptions* at 3. Eckhardt contended the Director must inquire into the "historical amount beneficially used" by Hoff when conducting an injury analysis. *Id.* at 4. Eckhardt stated that since 1999 Hoff has historically started irrigating his

⁴ 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.

⁵ 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 not supported by evidence in the record and appeared to be conjecture.

property in April, with the exception of one year. *Id.* Therefore, to prevent injury to Hoff's senior downstream water rights, Eckhardt argued the appropriate shut-off date can be sometime in the beginning of April because March 1 "is not reflective of Hoff's historical use." *Id.*⁶

In the alternative, Eckhardt argued that if the Director determines the "historical amount beneficially used" by Hoff is not the appropriate marker for determining injury, the shut-off date could be set as early as March 1. *Id.* at 4. Eckhardt included a proposed condition that was taken "directly from the Department's proposed permits for three additional ponds on the Eckhardt property, which are applications 67-15299, 67-15301 and 67-15302." *Id.* at 5. The proposed condition reads:

Water may be diverted into storage under this right from November 16 through [March 31] each year. No water may be diverted into storage under this right from [April 1] through November 15 each year. The right holder shall operate and maintain the diversion works to prevent diversion to storage from [April 1] through November 15 each year. Water stored under this right may be used for stock watering purposes year round.

Id.

Eckhardt emphasized the ponds now before the Director are an integral part of the Eckhardt ranch. *Id.* Specifically, the ponds supply water for cattle and reduce stream bank erosion. *Id.* Eckhardt stated that the Director has the authority to substitute the bracketed dates in the above condition with February 28 and March 1 to prevent injury, or any dates that he determines appropriate to prevent injury. *Id.* at 6.

In response, Hoff argued that a March 1 shut-off date would not prevent injury because Hoff has year-round stockwater rights and stockwater storage units which could still be injured with a March 1 cutoff date. *Hoff Response* at 5. Hoff further claimed his own testimony established Eckhardt has historically failed to comply with IDWR orders and requirements. *Id.* In a previous administrative hearing, the Director, then acting as a hearing officer, concluded that there was no water available for appropriation by Eckhardt during the irrigation season. *Id.* Despite this finding, Eckhardt continually developed stockwater storage which intercepted tributary springs and streams, causing injury. *Id.* at 6.

⁶ Eckhardt also proposed an April 15 cutoff date in his *Petition for Reconsideration*, and the hearing officer denied to adopt his proposal. In his *Order Granting Petitions for Reconsideration, in Part*, the hearing officer concluded:

Eckhardt and Hoff have not agreed to a firm shut-off date for the proposed ponds. The Department cannot force Hoff to assume any risk that the shut-off date will be too late. In order to fully protect Hoff's senior water rights from injury, there must either be daily administration during the irrigation season (March 1 – November 15) after Hoff starts irrigating or the shut-off dates needs to occur prior to the irrigation season.

Order Granting Petitions for Reconsideration, in Part at 3. The hearing officer went on to conclude that "[i]mplementing a March 1 shut-off date for the proposed ponds would alleviate all injury concerns." For the reasons described in this Order, the Director disagrees with the hearing officer's conclusion. Hoff's senior year-round stockwater water right may not be protected, even from a March 1 cutoff date.

Furthermore, Hoff claimed Eckhardt took no water measurements despite many opportunities to do so. *Id.* As a result, Shaw stated that it was impossible to know how much water supply was available in the drainage. *Id.*

In conclusion, Hoff reiterated that a March 1 shut-off date is not supported by any evidence and does not eliminate injury as to either the Hoff year-round water rights or to his irrigation season water rights. *Id.* at 7. Moreover, because none of the Eckhardt principals testified, Hoff argued it remains impossible to know Eckhardt's experience with water, livestock, or to gauge their credibility and sincerity. *Id.* at 5.

The Petition for Reconsideration of the Final Orders

The Petition for Reconsideration of the Final Orders presented two issues: "(1) Whether injury will occur to Jenkins Creek water rights during the non-irrigation season; and (2) whether injury that might otherwise occur during the irrigation season could be eliminated by conditioning the use to require a diversion shutoff date of February 28 (i.e., no diversion of water during the irrigation season of March 1 to November 15)." *Petition for Reconsideration of Final Orders* at 2.

Eckhardt argued Water Right No. 67-14251, Hoff's year-round (non-storage) water right on Jenkins Creek was addressed by Shaw, Eckhardt's expert witness. *Id.* at 3. Eckhardt argues Shaw's blanket conclusion "that there is water available for appropriation and that the proposed use would not injury existing water rights," includes injury to Eckhardt's year-round water rights. *Id.* Eckhardt argued Shaw's no-injury conclusion included the fact that Hoff diverted all available Jenkins Creek water in March 2019 while additional water spilled past Hoff's diversion into the Snake River. *Id.* According to Shaw, the excess flow was one cfs, with Hoff offering no testimony to the contrary. *Id.*

Eckhardt argued Shaw testified that water in Jenkins Creek is low in the summer for cattle but that no stockwater shortage exists during the non-irrigation season. *Id.* Eckhardt argued that for the 20 years Hoff has owned his property, stockwater shortages have occurred in the summer and fall during the irrigation season of March 1- November 15, implying there is not a shortage during the off-season of November 16 to February 28 because Jenkins Creek annually dries up in July or August, and water starts running again in the fall. *Id.* Eckhardt argued Hoff testified to excess flows during the non-irrigation season and has offered no testimony or evidence suggesting any impact to stockwater rights over the past 20 years in the non-irrigation season, in spite of the construction and use of Eckhardt's Jenkins Creek ponds during that period. *Id.* at 4.

Eckhardt continued by reiterating his argument that Hoff has been illegally storing Jenkins Creek water in Monroe Reservoir during the non-irrigation season (up to 260 acre feet of unauthorized storage that, according to Hoff, fills every year) and had that water "been allowed to flow down Jenkins Creek during this time period, it would have satisfied Protestant's stock water right." *Id.* at 4. Therefore, Eckhardt argued "[b]ecause there is no injury during the non-irrigation season, no mitigation is required during that period." *Id.*

Eckhardt argued the only injury concern is the potential of injury during the irrigation season:

In bypassing all water past the ponds beginning on February 28 of each year and continuing that practice until November 16 of the following the year, [Eckhardt's] practices ensure that there can be no injury to water rights (irrigation or stock water) during the irrigation season This condition, if properly implemented, would alleviate all injury concerns during the irrigation season.

Id. Eckhardt argued his alleged compliance in the breaching or modifying of Ponds 1-6, and 9 and 11, shows: (1) the bypass devices will allow Eckhardt to implement seasonal shut-off by February 28; (2) only one visit to the pond each fall and spring is necessary and Eckhardt has adequate manpower for this task; and (3) if a shutoff date must occur after February 28 due to conditions, no injury would result “given the high flow conditions that would exist in such a circumstance.” *Id.* at 6.

Finally, Eckhardt argued his willingness to comply with these conditions and avoid injury to existing water rights is “self-evident,” as well as being consistent with the public witness testimony provided by Water District 65 Watermaster, Ron Shurtleff, who “indicated that there are methods to avoid being a detriment to downstream water rights, including bypassing the ponds.” *Id.* Eckhardt argued this is the proposal he has made, and can successfully implement, to avoid injury to existing water rights. *Id.*

The Director's Conclusion

The Director concludes there could be times during the non-irrigation season when the impoundment of water in the ponds would reduce the quantity of water available to satisfy Hoff's year-round stockwater water right thereby causing injury. The evidence in the record does not support Shaw's conclusion that there would not be injury. Shaw suggested a shortage of water during the irrigation season (late summer) and not during the non-irrigation season. *Id.* at 3-4. Shaw also testified that Hoff was diverting all available water on March 9, 2019, while additional water was spilling past his diversion and into the Snake River. *Id.* at 3. Eckhardt also cited Hoff's testimony about spring flows as support for the assertion of no injury during the non-irrigation season. *Id.* at 4. While Shaw observed approximately one cfs in excess flow on a single day in March and Hoff testified generally about excess flows in the spring, 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 Hoff's senior right. While March of 2019 produced flows sufficient to fill Hoff's senior year-round stockwater 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 Eckhart's proposed appropriations will not injure Hoff's senior, year-round stockwater water right component of Water Right No. 67-14251. The fact that the *protestant* in this matter offered no testimony or other evidence related to injury during the non-irrigation season is irrelevant to

Eckhardt's burden. 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.

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.

Therefore, Eckhardt has failed to satisfy his burden of proving no injury as required by Idaho Code § 42-203A(5) and IDAPA 37.03.08.45.01.a. *See also Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001).⁷ While the Applications must be denied as a result of the injury analysis, the Director will also address and reiterate issues of administration and access, which compound Eckhardt's failed mitigation proposal.

Daily Administration of Rights

Preventing injury to Hoff's stockwater water right during the non-irrigation season would require daily administration of water rights during certain times of the year. Someone 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. Eckhardt argued if there were excess flows, water could be routed through Ponds 1-6 to fill the ponds or offset losses in the ponds. Eckhardt also argued if there were no excess flows, water would be routed around the ponds.

There is not yet a water district in the Jenkins Creek drainage, as 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.⁸ Therefore, the efficient distribution of water resources has not necessitated creation of an administrative water district because Hoff's senior water rights are for more water than is available in the basin for much of the year.

⁷ Eckhardt argues he was able to negotiate mitigation measures with other senior water right holders through a cutoff period condition on certain water rights. He proposes the Director adopt a similar mitigation condition. However, again, there is evidence that Eckhardt and Hoff cannot reasonably communicate or negotiate, or even simply work together as neighboring water users to implement such a condition.

⁸ The Director maintains discretion in determining how water districts are structured, including "allowing the Director to create new districts, revise existing districts, or even abolish districts, as the director finds necessary for the efficient distribution of water resources." *In re Idaho Dept. of Water Resources Amended Final Order Creating Water District No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009).

As a result, until the time a water district is created, each water user and right holder is responsible for the regulation of his or her own diversions. If Eckhardt's Applications were granted and his mitigation condition approved, proper administration of the proposed water rights would require daily communication and coordination between Hoff and Eckhardt during critical times of the year. This is not possible because Eckhardt and Hoff have demonstrated, by their intractable disagreements over water for nearly twenty years, an inability to cooperate and resolve issues. *See* Exs. 304, 305, 316, 323, 325, 327, 362, 366.

The Exceptions Regarding Daily Administration

Eckhardt's Exceptions argued daily administration would not be required if a fixed cut-off date for diversions to storage is established. *Eckhardt Exceptions* at 6. In his *Order Granting Petitions for Reconsideration, in Part* the hearing officer found that "there must **either** be daily administration during the irrigation season, **or** the shut-off date needs to occur prior to the irrigation season." *Id.* Eckhardt contended that with a fixed shut-off date there is no need for daily administration. *Id.*

The Petition for Reconsideration of the Final Orders Regarding Daily Administration

In the Petition for Reconsideration of the Final Orders Eckhardt argued the Director should reconsider his prior conclusion that injury to senior year-round water rights may not be mitigated by a certain seasonal "cutoff" date. *Petition for Reconsideration of the Final Order* at 5. Eckhardt argues

[i]n bypassing all water past the ponds beginning on February 28 of each year and continuing that practice until November 16 of the following year, the Applicant's practices ensure that there can be no injury to water rights (irrigation or stock water) during the irrigation season (March 1 to November 15). This condition, if properly implemented, would alleviate all injury concerns during the irrigation season.

Id. Eckhardt continued by arguing that based on his alleged compliance with a pending enforcement action (E2017-1235) "[o]nly one visit to each pond is necessary to accomplish this . . . and [t]he Applicant has demonstrated that he has adequate manpower for this work." *Id.* Eckhardt argued that if inaccessibility is an issue in any given year, he would shut off diversion "as soon as possible [after February 28, which] would not result in injury given the high flow conditions that would exist in such a circumstance." *Id.* at 6.

Finally, Eckhardt argued this outcome would be consistent with testimony provided by Water District 65 Watermaster Rob Shurtleff, who testified that a cut-off mechanism "might come at a cost financially and would shorten the season of use but could still be of value to the Applicant." *Id.*

The Director's Conclusion Regarding Daily Administration

The Director disagrees for the reasons already stated above. The evidence Eckhardt references in his Petition for Reconsideration of the Final Orders is unpersuasive. Eckhardt did

not satisfy his burden of proving non-injury to Hoff's non-irrigation season water right, nor has he shown that a system can be developed that would protect Hoff's senior water right during the irrigation season.

Access to Ponds

There is evidence in the record that Ponds 1-6 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, unable to access Ponds 1-4 on March 19, 2018 because of muddy road conditions). The hearing officer concluded that it would be highly unlikely for Eckhardt, Hoff, or a watermaster to access Ponds 1-6 during critical regulatory time periods.

The Exceptions Regarding Access

Eckhardt argued that access to the ponds is a manageable implementation issue. *Eckhardt Exceptions* at 6. Eckhardt disagreed with the hearing officer's conclusion that even with a fixed shut-off date, the proposed ponds would likely be inaccessible. *Id.* Eckhardt acknowledged that accessing the ponds may be difficult, but, he argues, if an IDWR agent with limited familiarity of the property could hike to some of the ponds, then Eckhardt's employees (who are familiar with the property) could certainly access the ponds and shut-off the diversions by a set cutoff date. *Id.* Eckhardt reiterated that the hearing officer incorrectly found that the ponds are inaccessible and therefore inaccessibility is not an appropriate basis for concluding that injury will occur. *Id.* at 7.

Hoff responded to Eckhardt's second and third arguments by stating that ponds one (1) through nine (9) are in a remote area of upper Jenkins Creek, making it difficult or impossible to reach them in the winter and early spring. *Hoff Response* at 3. Furthermore, Hoff argued the Jenkins Creek drainage area does not have a Watermaster or water district to help alleviate some of these concerns. *Id.* at 8.

To illustrate, Hoff emphasized the testimony of Ron Shurtleff, Water District No. 65 Watermaster, where Shurtleff testified the ponds suffer losses due to evaporation and seepage, which has previously resulted in injury to Hoff. *Id.* at 3. Therefore, Hoff asserted diversion of water, under this set of facts, would require daily administration to prevent injury. *Id.* at 8. This is especially true considering there is no rental pool or other means to provide replacement water to Hoff. *Id.*

Finally, Hoff argued that if the ponds were as accessible as Eckhardt claims, then Shaw would have had various opportunities to take measurements and come up with a design feature where existing ponds could be retrofitted to pass water through. *Id.*

The Petition for Reconsideration of the Final Orders Regarding Access

Eckhardt argued he has modified seven (7) of the remaining ponds with bypass devices which would allow an irrigation season cutoff of February 28. *Petition for Reconsideration of the Final Orders* at 6. Eckhardt argued he has the manpower and ability to allow the ponds to be

seasonally shut-off with only one visit prior to February 28 and one visit at the end of the irrigation season. *Id.*

The Director's Conclusion Regarding Access

The Director concludes it is unlikely that Eckhardt, Hoff, a department employee or a watermaster could, or should, access Ponds 1-6 during potential critical periods of administration. Therefore, again, Eckhardt's proposed mitigation strategy fails for a lack of evidence in the record showing access is reasonable for daily administration in order to practically mitigate injury to Hoff's senior water rights.

Further, there is no relevant evidence in the record that Eckhardt is "compliant" with the *Consent Order and Agreement* in IDWR enforcement action file E2017-1235 (the emails Eckhardt cites to do not indicate IDWR has found Eckhardt to be in compliance with the COA). Nor is there evidence in the record that shows Eckhardt's bypass mechanism will prevent injury by allowing water to flow unimpeded down Jenkins Creek. Nor is there evidence in the record that Eckhardt can successfully implement this scheme due to conditions such as weather, access, and communication and cooperation with neighboring water users.

Summary of Injury Analysis

As proposed, stockwater storage in Ponds 1-6 will reduce the quantity of water under Hoff's water rights in certain years and under certain circumstances. Eckhardt's mitigation proposals do not adequately protect Hoff's water rights from injury. The Director will not impose a cutoff date that may cause injury to senior water rights. In addition, there is evidence in the record showing that Eckhardt and Hoff would be incapable of administration of water rights, if approved, due to longstanding disagreement and conflict. Further still, conditioning a water right on being able to access these particular ponds in order to properly administer the rights, if approved, is unreasonable, regardless of Eckhardt's beliefs about accessibility and ease of operating the cut-off mechanism(s).

Eckhardt has not satisfied his burden of proof for the non-injury criteria described in Idaho Code § 42-203A(5)(a) and IDAPA 37.03.08.045.01.a. Eckhardt satisfied the remaining requisite elements in the Applications, and the Director incorporates the hearing officer's findings and conclusions related to those elements.

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.

The record does not contain any direct measurement data for Jenkins Creek or its tributaries in the area of Ponds 1-6. Even though the proposed points of diversion are located on Eckhardt's property, Eckhardt has not conducted any measurements of Jenkins Creek or its tributaries in the

area of Ponds 1-6. The only evidence in the record about flow rates on Jenkins Creek or its tributaries in the area of Ponds 1-6 is found in a report prepared by Department employee Erik Boe, describing a field exam of Ponds 1-4 conducted on April 27, 2018. Boe's observations on April 27, 2018 are of limited value, however, because Hoff had already commenced irrigation three weeks prior to the field exam (on April 6). Without additional evidence, it would be unclear whether the water observed in Ponds 1-4 was impounded before or after April 6.

On March 19, 2018, Boe attempted to conduct a field exam for Ponds 1-4, but was unable to access the ponds due to muddy road conditions. Ex. 11 at Exhibit 3. Instead, Boe parked his vehicle on the main road and hiked to Ponds 9 and 11. *Id.* Boe observed that Ponds 9 and 11 were completely full and water was flowing through the ponds. *Id.* Photos included in the field exam show that most of the snow was already melted in the area around Ponds 9 and 11. *Id.* In 2018, Hoff did not commence irrigation from Jenkins Creek until April 6. Exs. 321 and 322.

Boe's direct observations of Ponds 9 and 11 confirm that the unnamed stream flowing through the ponds is sufficient to fill the ponds 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.

Although Boe was not able to inspect Ponds 1-4 (or Ponds 5 and 6) on March 19, 2018, his observations of Ponds 9 and 11 constitutes persuasive evidence that the water supply in the Jenkins Creek drainage is also sufficient to fill Ponds 1-6. Ponds 9 and 11 are at roughly the same elevation as Ponds 1-6. Therefore, the snow-melt run-off would occur at roughly the same time. Ponds 9 and 11 are roughly the same size as Ponds 1-6. The drainage area above the ponds is roughly the same size. Therefore, just as the unnamed stream is sufficient to fill Ponds 9 and 11 prior to Hoff's irrigation demand, the streams flowing through Ponds 1-6 would also be sufficient to fill those ponds 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 1-6 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 1-6 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 and 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 requested Application 67-15294 (Pond 3) be denied as result of its destruction. The Director now denies Permit for Application 67-165294 (Pond 3).

Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing senior water rights. Therefore, Applications 67-15292, 67-15293, 67-15295, 67-15296 and 67-15297 are also 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 67-15292 through 67-15297 in the name of Eckhardt Family LLLP are DENIED.

Dated this 20th day of December 2019.



Gary Spackman
Director

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of December 2019, I mailed a true and correct copy of the foregoing **ORDER ON EXCEPTIONS; AMENDED FINAL ORDER**, by email where noted and with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:

RE: APPLICATIONS FOR PERMIT 67-15292 THROUGH 67-15297

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Courtesy copy sent via email to:
Ron Shurtleff
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Kimberle English
Paralegal

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER ON RECONSIDERATION; AMENDED FINAL ORDER

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

The accompanying order is an **Order on Reconsideration; Amended Final Order** issued by the Idaho Department of Water Resources ("Department") pursuant to section 67-5246, Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.