

IN THE SUPREME COURT OF THE STATE OF IDAHO

ECKHARDT FAMILY, LLLP, an Idaho)
limited partnership,)
)
Petitioner/Appellant,)
) Supreme Ct. #48263
vs.) and #48264
)
IDAHO DEPARTMENT OF WATER)
RESOURCES and GARY SPACKMAN, in)
his capacity as Director of the)
Idaho Department of Water)
Resources,)
)
Respondents,)
)
and)
)
DOUBLE C&J LAND CO., INC.,)
)
Intervenor/Respondent.)
_____)

T R A N S C R I P T O N A P P E A L
Fifth Judicial District
State of Idaho
HON. ERIC J. WILDMAN
DISTRICT JUDGE

APPEARANCES:

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REPORTED BY: Sabrina Vasquez, CSR #377

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

ECKHARDT FAMILY, LLLP, an Idaho)
limited partnership,)
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Petitioner,)
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vs.) Supreme Ct. #48263
) and #48264
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IDAHO DEPARTMENT OF WATER)
RESOURCES and GARY SPACKMAN, in) Case Nos. CV44-20-38
his capacity as Director of the) CV44-20-39
Idaho Department of Water)
Resources,)
)
Respondents,)
)
and)
)
DOUBLE C&J LAND CO., INC.,)
)
Intervenor.)
_____)

ORAL ARGUMENT ON JUDICIAL REVIEW
June 18, 2020

HON. ERIC J. WILDMAN
District Judge

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I N D E X

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1 (Transcript of Hearing held via Zoom.)
2
3 THE COURT: So let's go ahead then and go on
4 the record in Washington County Case Numbers CV44-20-38
5 and CV44-20-39. Today's date is June 18, 2020. It is
6 1:30 P.M. Mountain time. Before the Court is oral
7 argument on two petitions for judicial review.
8 I'll start by identifying the parties.
9 Appearing on behalf of the petitioner, Eckhardt Family
10 LLLP, we have Norm Semanko and Aaron Worthen.
11 For the respondent, IDWR, we have Jennifer
12 Wendel and Garrick Baxter.
13 And intervenor-respondent Double C&J Land
14 Co., Inc., Chris Bromley.
15 So briefly I'll put on the record that in
16 CV44-20-38 a petition was filed seeking judicial review
17 of the director's amended final order entered on
18 December 20, 2019, in the matter of applications for
19 permit 67-15292 through 67-15297.
20 And then in CV44-20-39, a petition was filed
21 seeking judicial review of the director's amended final
22 order entered December 20, 2019, in the matter of the
23 applications for permit 67-15298 through 67-15300.
24 The petitioner filed opening briefs in both
25 matters on April 24, 2020. Response briefs were filed

4

1 you. Chris Bromley on behalf of Double C&J.
2 MS. WENDEL: With the Department as well, Your
3 Honor.
4 THE COURT: Okay. Very good, then.
5 All right. Then, Mr. Worthen, you're going
6 to be arguing on behalf of the petitioner so you may
7 proceed.
8 MR. WORTHEN: Thank you, Your Honor.
9 May it please the Court: As this Court is
10 well aware, a final order from the Department of Water
11 Rights may be reversed only in the rare case where the
12 appellant satisfies both of the requirements of Idaho
13 Code Section 76 -- sorry, 67-5279. But this is one of
14 those rare cases where the Department's decisions fall
15 short and should be remanded.
16 Here both of the requirements under Section
17 5279 are met as the final decisions were both unlawful
18 and violated Eckhardt's substantial rights. In the
19 decisions below, the director found that Eckhardt's
20 water right application satisfied nearly every condition
21 for approval.
22 Specifically, the director concluded that
23 the applications were filed in good faith. That
24 Eckhardt had sufficient financial resources to complete
25 the projects. That the projects are in the local

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1 by the Department and Double C&J Land Co. on May 21st,
2 2020, and the reply briefs were subsequently filed by
3 the petitioner. Court has reviewed same, as well as
4 the file in both appeals.
5 I would ask -- it looks like we also have
6 Candice McHugh that's connecting on behalf of Double
7 C&J Land Co. Again, the Court has reviewed the files
8 in both cases.
9 I will just make the inquiry, is it
10 counsels' intent to take up both of these matters
11 separately or argue them both concurrently as was
12 before the director?
13 MR. SEMANKO: Good afternoon, Your Honor. Norm
14 Semanko appearing with Aaron Worthen.
15 I did want to note for the record before we
16 get too far down the road here for those looking on the
17 screen, Cheri Moore, who is a general partner with
18 Eckhardt Family LLLP, the petitioner, is also observing
19 present today.
20 Mr. Worthen will be handling the argument,
21 and it is our intent to argue both of the appeals
22 together.
23 THE COURT: Okay. Is that good with the
24 Department and with you, Mr. Bromley?
25 MR. BROMLEY: It is with me, Your Honor. Thank

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1 public interest. That the projects are consistent with
2 the conservation of water resources in the state of
3 Idaho, and significantly that there's sufficient
4 unappropriated water in the Jenkins Creek system for
5 the proposed uses.
6 Despite all of these findings, the director
7 nevertheless denied all of Eckhardt's applications based
8 on his ultimate conclusion that Eckhardt failed to
9 demonstrate that his proposed use of water would not
10 injure any other water rights.
11 Specifically, the director was concerned
12 that Eckhardt's proposed water rights, water use might
13 injure water rights belonging to Double C&J Land
14 Company.
15 As John Hoff is the president of Double C&J,
16 I shall refer to Hoff and Double C&J interchangeably as
17 was done in the briefs.
18 At issue in the director's decisions were
19 three types of water rights belonging to Hoff. First,
20 there was year-round storage water rights. Second,
21 there was a singular year-round stockwater right for
22 .03 cfs or 1.4 acre-feet. And, third, there were water
23 rights for irrigation from March 1st to November 15th.
24 As the Court is well aware, I'm sure, the
25 March 1st to November 15th timeframe is referred to as

7

1 the irrigation season.
2 The director properly concluded that none
3 of Hoff's year-round storage water rights would be
4 injured by Eckhardt's proposed water use. This
5 conclusion was based on two facts. First, the storage
6 rights were diverted into Jenkins Reservoir, which is
7 upstream from the water source for some of Eckhardt's
8 ponds. And, second, and more importantly for purposes
9 of this appeal, Hoff had been unlawfully storing a
10 significantly larger amount of Jenkins Creek water in
11 the Monroe Reservoir every year than what was needed to
12 fill the Jenkins Reservoir several miles below.
13 The director properly concluded that if the
14 water had been allowed to continue flowing down Jenkins
15 Creek rather than being unlawfully captured in the
16 Monroe Reservoir, Jenkins Reservoir would fill every
17 year. However, the director reached an inconsistent
18 conclusion as to Hoff's stockwater rights.
19 As to that water right, the director
20 overruled the hearing officer's determination that
21 there would be no injury during the non-irrigation
22 season. In so ruling, the director looked solely at
23 evidence supplied by David Shaw, Eckhardt's expert
24 witness.
25 Shaw had observed that approximately 1 cfs,

1 factors in making that determination. He said, first,
2 that Eckhardt's ponds are remote and difficult to
3 access. Second, that there was no water district
4 watermaster or rental pool to help alleviate the
5 administrative concerns. Third, losses caused -- that
6 there would be additional losses if there was not a
7 February 28th shutoff. And, fourth, that Hoff and
8 Eckhardt cannot reasonably communicate.
9 Although the director acknowledged
10 Eckhardt's representation that it would implement a
11 February 28th shutoff, the director deemed that
12 evidence as insufficient based on those four factors.
13 Eckhardt now argues before this Court that
14 the director's decisions related to potential injury to
15 Hoff's lone stockwater rights and his irrigation water
16 rights were not supported by substantial evidence, were
17 arbitrary and capricious, and violated Eckhardt's due
18 process rights. Though I will discuss each of these
19 issues, the Court needs to only rule in Eckhardt favor
20 on any one of them to justify remanding this case.
21 The Department's decision regarding Hoff's
22 stockwater rights was not supported by substantial
23 evidence because it ignored the record evidence to
24 merely give credit to hypothetical future scenarios.
25 The following evidence in support of

1 there was approximately 1 cfs in excess flow in 2019,
2 and the director found that this was insufficient,
3 stating that it was unreasonably speculative to assume
4 that every season would produce flows high enough to
5 avoid injury to the stockwater right, and that it was
6 speculative that there would be sufficient flow
7 throughout the non-irrigation season based only on that
8 single day of observation.
9 Significantly, however, the director did
10 not analyze the additional evidence that Eckhardt had
11 provided, including that Hoff was unlawfully diverting a
12 substantial amount of water into the Monroe Reservoir
13 during the same non-irrigation season. That if that
14 water, if not unlawfully captured, would provide
15 additional flow to Jenkins Creek throughout the
16 non-irrigation season.
17 As to the irrigation season rights, the
18 director concluded that Eckhardt's proposed water use
19 would not injure Hoff's water rights, so he agreed with
20 Eckhardt basically that if there could be a shut-off
21 date by February 28th, no injury. There would be no
22 injury to Hoff's irrigation season water rights.
23 The director concluded, however, that he
24 lacked confidence that Eckhardt could turn off the
25 water by February 28th. The director looked at four

1 Eckhardt's claim that no injury would occur during the
2 non-irrigation system -- sorry -- non-irrigation season,
3 is as follows:
4 First, Department employee Erik Boe
5 personally observed that even in a below average water
6 year in 2018 there was sufficient water to fill two of
7 Eckhardt's ponds. And because those ponds are at the
8 same elevation and are of the same size as the other
9 ponds, there would also be sufficient water to fill all
10 of the other ponds prior to the commencement of
11 irrigation.
12 Second, David Shaw observed that there was
13 1.0 cfs of excess flow in March of 2019.
14 Third, there was a negative implication
15 from Hoff's actions in testimony because he never
16 indicated that he had any water shortages during the
17 non-irrigation season, even when Eckhardt's ponds were
18 filling up.
19 And, fourth, Hoff had unlawfully captured
20 260 acre-feet of water during the non-irrigation season
21 every year. Based on the Monroe Creek water right that
22 Hoff referenced in an attempt to justify his own
23 unlawful capture of the Jenkins Creek water, Hoff was
24 diverting up to 6.4 cfs of Jenkins Creek water; hence,
25 the Monroe Reservoir during the non-irrigation season,

1 which is significantly more than the .03 cfs that Hoff
2 needs to satisfy his stockwater right.
3 On the other hand, there's no evidence in
4 the record that even suggests there would be injury
5 during the non-irrigation season other than the mere
6 fact that Eckhardt would be using less than 5 acre-feet
7 of water during that time.
8 So the director essentially found or
9 didn't make any findings on this issue, but had the
10 260 acre-feet that had been unlawfully captured above
11 been allowed to go down, it would have covered both
12 Eckhardt's 5 acre-feet and the stockwater right that
13 belonged to Hoff. So there's no substantial evidence
14 supporting the director's decision that there might be
15 an injury during the non-irrigation season.
16 The Department's decision regarding the
17 irrigation right -- sorry -- the irrigation season water
18 rights was also not supported by substantial evidence.
19 On this note, on this issue Eckhardt provided the
20 following evidence:
21 First, Hoff did not take irrigation water
22 prior to March 1st, and he was not authorized to do so
23 under his water rights.
24 Second, Eckhardt represented through David
25 Shaw that it would abide by any conditions placed on

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1 In any event, the director should have
2 simply put the condition on and allowed Eckhardt to
3 comply. If Eckhardt failed to comply, the director
4 could have -- there's remedies in place for any failed
5 year to satisfy a condition, but the director was not
6 in a place where he could simply assume that conditions
7 would not be met.
8 The other three issues that the director
9 looked at related to the irrigation season water rights
10 are simply inapplicable if the water is shut off to
11 Eckhardt's ponds by February 28th.
12 It does not matter that there is no water
13 district watermaster. It does not matter that if the
14 water is not turned off it might injure Hoff, and it
15 doesn't matter that Hoff and Eckhardt could not
16 reasonably communicate. As long as the water was
17 turned away from the pond by February 28th, there would
18 be no injury. That's consistent with what the director
19 found.
20 So for those reasons, the decisions were
21 not supported by substantial evidence. The decisions
22 were also arbitrary and capricious.
23 As to the stockwater rights, the director
24 provided no reasoning of any kind for why the stockwater
25 right would not be satisfied if the unlawfully captured

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1 the water rights by the Department.
2 And, third, Eckhardt provided evidence that
3 it had staff in charge of running and caring for the
4 property. Specifically mentioned was Rocky Stone.
5 Based on that evidence, the director needed
6 to find that Eckhardt would turn off the water by
7 February 28th. Eckhardt would have the entire
8 non-irrigation season to prepare to shut it off, and it
9 could do so any time before February 28th. If there
10 were conditions that were better before the 28th,
11 certainly Eckhardt could go and turn it off prior to
12 that time.
13 The only evidence to the contrary suggesting
14 that there might be injury during the irrigation season
15 was the testimony of two individuals who said that in
16 March of 2018 and March of 2019 they chose not to go to
17 the ponds because of muddy road conditions, but
18 Eckhardt would not be required to go in March.
19 He would be required to go in February and
20 any time before February 28th. If there was a good day,
21 he could go on that day, or one of the employees could
22 go on that day before February 28th. There is no
23 evidence that Eckhardt cannot turn the water off by
24 February 28th, and there is all that evidence suggesting
25 that he could.

13

1 Monroe Reservoir water was allowed to flow through
2 Jenkins Creek throughout the non-irrigation season.
3 There is constantly water being stored in the Monroe
4 Reservoir that could have clearly satisfied the much,
5 much, much smaller stockwater right throughout the
6 non-irrigation season.
7 To make matters more confusing, the director
8 had explicitly found that Hoff's significantly larger
9 water storage rights relative to -- they were much
10 larger than the stockwater right. The director found
11 that those would not be injured by Eckhardt's proposed
12 use on this exact ground.
13 There is no reason that the director's
14 analysis regarding the storage rights should not be
15 extended to the significantly smaller stockwater
16 rights, and that renders the director's decision
17 arbitrary and capricious.
18 As to the irrigation season injury, the
19 director determined that it was unlikely that Eckhardt
20 could access the ponds in time to prevent injury to
21 Hoff's water rights. But again, that analysis was
22 based solely on testimony regarding access in March.
23 It was arbitrary for the director to make
24 this determination when Eckhardt represented that it
25 would ensure that any conditions set by the Department

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1 would be fulfilled, and there was no evidence that
2 Eckhardt could not access the pond sometime in February.
3 Based on those facts, the Department could
4 set the conditions to prevent injury with which Eckhardt
5 would be required to comply and then punish Eckhardt if
6 he did not satisfy that condition. There are remedies
7 set up in the law to do so.
8 Finally, the decisions also violated
9 Eckhardt's due process rights. In this case Eckhardt
10 had no meaningful notice or meaningful opportunity to
11 be heard regarding Hoff's last minute arguments
12 regarding potential injury to his water rights during
13 the non-irrigation season.
14 At the hearing for this case, Eckhardt
15 provided evidence regarding the lack of injury to Hoff's
16 water rights. This included and was not in all of the
17 water rights and was not limited to injuries during the
18 irrigation season. In response Hoff failed to produce
19 any evidence of injury during the non-irrigation season
20 or even raise the potential issue.
21 After the hearing officer expressly
22 determined that if the diversions to Eckhardt's ponds
23 were shut off by February 28th there would be no injury
24 to Hoff's water rights, Eckhardt had no reason to argue
25 or feel the need to present more evidence or do anything

16

1 Accordingly, if the Court agrees with
2 Eckhardt that the decisions were unlawful for any
3 reason, for any of the reasons articulated, the second
4 Section 5279 requirement was also satisfied.
5 For these reasons, Eckhardt requests the
6 Court reverse and remand this case to the Department to
7 re-examine the injury portion of Eckhardt's
8 applications.
9 Unless the Court has any questions, I defer
10 the rest of my time to rebuttal.
11 THE COURT: I don't. Thank you.
12 Ms. Wendel.
13 MS. WENDEL: Thank you.
14 Good afternoon. May it please the Court:
15 My name is Jennifer Wendel, and I'm the deputy attorney
16 general here to represent the Idaho Department of Water
17 Resources.
18 This case is about the statutory burden
19 that all applicants for water rights must overcome, the
20 burden to show their application will not reduce the
21 quantity of water available under existing water rights.
22 Here, it is a burden that Eckhardt bore and did not
23 meet.
24 The director of IDWR denied these
25 applications because Eckhardt did not meet his burden

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1 as far as Hoff's non-irrigation season rights.
2 The lack of injuries during the
3 non-irrigation season was, prior to that time,
4 undisputed, and it would have been a waste of precious
5 time to provide additional analysis on that issue.
6 The dispute was raised the first time in an
7 authorized document only after Eckhardt had submitted
8 his acceptance to the Department's preliminary orders,
9 which is the last meaningful chance Eckhardt had to
10 craft his arguments and proposals to the Department.
11 By latching on to that argument, that last minute
12 argument without giving Eckhardt any meaningful
13 opportunity to respond, the Department violated
14 Eckhardt's due process rights.
15 So for those three reasons, Section 5279's
16 first requirement is satisfied in this case.
17 As to the second requirement, there is no
18 dispute before the Court that if the director's decision
19 was unlawful for any of the reasons I just described,
20 the decisions also violated Eckhardt's substantial
21 rights. After all, if the decisions were unlawful,
22 then Eckhardt was denied his right to appropriate water
23 under Idaho law. And if the decisions violate
24 Eckhardt's due process rights, then that obviously would
25 also be a separate violation of substantial rights.

17

1 to prove the stockponds will not injure Hoff's water
2 rights.
3 Idaho Code 42-203A and Rule 45 of the Water
4 Appropriation Rules state that an application which
5 reduces the quantity of water available under existing
6 rights should be denied.
7 When an application for permit has been
8 contested, Rule 40 states that the applicant bears both
9 the initial burden of proof and the ultimate burden of
10 persuasion to prove no injury to senior water rights,
11 among other elements. Eckhardt did not meet this
12 burden.
13 The director did not find that the
14 stockponds did injure Hoff's water rights, but instead
15 that there is not enough evidence in the record to
16 conclude that the stockponds would not injure Hoff's
17 water rights.
18 That distinction is more than semantics
19 because it's really the crux of this case. Because
20 when the Court looks back at the record, it does not
21 need to come to the same conclusion as the director,
22 but it must consider whether there's substantial
23 evidence in the record to support the finding that
24 Eckhardt failed to demonstrate that the applications
25 will not injure Hoff's water rights.

19

1 The director denied the application due to
 2 injury to Hoff's irrigation rights and year-round
 3 in-stream stockwater right.
 4 Injury to Hoff's rights during the
 5 irrigation season is clear. Shaw, Hoff, and Ron
 6 Shurtleff all testified that Jenkins Creek drainage
 7 goes dry for part of the year during the summer.
 8 Shaw stated that a shut-off date could
 9 prevent injury in the irrigation season, but the details
 10 of the shut-off date were unclear for most of this case.
 11 Eckhardt proposed three different shut-off dates for the
 12 stockponds at the hearing and in subsequent briefs.
 13 The last shut-off date the director
 14 considered was February 28th. That date cannot work
 15 because three different parties, including Eckhardt's
 16 expert witness and a department employee, have noted
 17 that the ponds are inaccessible in May and possibly late
 18 April, in March and into April. So the ponds definitely
 19 cannot be accessed in February.
 20 If the ponds can't be accessed, they cannot
 21 be administered properly with a shut-off date,
 22 especially when the parties have a 20-plus year ongoing
 23 dispute over these stockponds and have demonstrated that
 24 reasonable communication over water rights between them
 25 is impossible.

1 Eckhardt's expert witness, stated that the stockponds
 2 intended only to capture early season runoff and did
 3 not provide measurements of that runoff or any
 4 streamflow measurements.
 5 Eckhardt argued in his opening brief that
 6 the Water Appropriation Rules do not require
 7 measurements of water to determine sufficient legal
 8 proposed application, but Eckhardt cited as authority
 9 Rule 35, which applies only to the initial filing of
 10 applications and does not apply to an application under
 11 a contested case.
 12 Under Rule 40, Eckhardt bears both the
 13 initial burden of proof and the ultimate burden of
 14 persuasion to prove that there is no injury to Hoff's
 15 senior water rights. And in this case where confidence
 16 and proper administration of the rights is lacking,
 17 measurements of actual streamflows became important to
 18 prove no injury to Hoff's water rights.
 19 The only facts in the record that focus on
 20 flows in Jenkins Creek Basin are the precipitation
 21 graphs that appear in Shaw's expert report. These
 22 graphs show that six of the last eight fully charted
 23 years had below average precipitation. It is not a
 24 good sign for water rights in a basin that dries up
 25 every year, but more so, it's unclear what those graphs

1 I would note here too that counsel for
 2 Eckhardt noted that Shaw stated that Eckhardt will
 3 comply with any conditions that the Department puts on
 4 these water rights, but that assurance alone is not
 5 enough to overcome all of the evidence in the record of
 6 the inaccessibility of these eight stockponds.
 7 Further, there is no watermaster for
 8 Jenkins Creek drainage so it would be up to the two
 9 parties to communicate with each other about
 10 administration.
 11 Because the ponds are inaccessible and
 12 communication between the parties impossible, the
 13 director determined that a February 28th shut-off date
 14 would not protect Hoff's water rights during the
 15 irrigation season, and that daily administration would
 16 be required and that daily administration was impossible
 17 under the present circumstances.
 18 The record also does not contain sufficient
 19 information on the non-irrigation season to find no
 20 injury to Hoff's year-round in-stream stockwater rights.
 21 The record lacks basic data about streamflows in the
 22 non-irrigation season, which means that daily
 23 administration of the rights is required, and as
 24 discussed, daily administration is impossible.
 25 At the administrative hearing, Shaw,

1 even mean quantity-wise for flows on the ground.
 2 Eckhardt never attempted to measure runoff
 3 and only broadly guesstimated that 1 cfs was flowing at
 4 one point below Jenkins Creek Reservoir on one day of
 5 one year. Neither the graphs nor the estimated 1 cfs
 6 provide conclusive evidence that absent proper daily
 7 administration there's sufficient flows in Jenkins Creek
 8 such that the stockponds would not harm Hoff's water
 9 rights.
 10 Counsel for Eckhardt also noted that Erik
 11 Boe, a department employee, did look at some of the
 12 stockponds at one point, but Boe took no measurements.
 13 Again, the date that Boe was there was just one day at
 14 one point on one year and that does lack conclusive
 15 evidence.
 16 Hoff even stated that he had attempted to
 17 measure the runoff rate and couldn't because it changed
 18 too rapidly for him to track.
 19 So generally, runoff in the basin seems
 20 difficult to quantify even when someone is attempting
 21 to measure it. That fact is important because with an
 22 unknown quantity of water available, administration of
 23 any right to that water becomes essential. That is why
 24 the director determined that the stockponds required
 25 daily administration to prevent injury to Hoff.

1 Daily administration between the parties
2 cannot occur under the present circumstances for two
3 reasons: because the ponds are inaccessible, and
4 because the parties have a track record of being
5 incapable of communicating about water rights.
6 Eckhardt contends that all of the previously
7 mentioned points are moot because there could be no
8 injury if Hoff were not unlawfully diverting water from
9 Jenkins Creek into Monroe Reservoir. That is wrong
10 because Eckhardt is equating rights to fixed volumes
11 with water rights to flow rates.
12 Here, the acre-foot storage rights and the
13 cubic feet per second irrigation in in-stream stockwater
14 rights are not analogous.
15 The director did consider the unlawful
16 diversions in denying the applications. The Department
17 considered the fact that Monroe Reservoir filled every
18 year with some unlawfully diverted water. That Jenkins
19 Creek Reservoir below fills most but not all years.
20 So the Department acknowledged that
21 Eckhardt's stockponds would not harm the storage portion
22 of Hoff's water rights because the acre-feet of water
23 unlawfully stored in Monroe Reservoir can translate into
24 acre-feet of water that should be stored in Jenkins
25 Creek Reservoir to fill the storage rights. But those

24

1 Department cannot grant a permit because the Department
2 is not authorized to protect senior water rights most
3 but not every year. Eckhardt failed to provide facts
4 for the record to show no injury.
5 Third, the drainage goes dry every year.
6 That includes the reservoirs. At the hearing Hoff
7 described how he first uses runoff water and then lets
8 out Monroe Reservoir and then lets out Jenkins Creek
9 Reservoir.
10 Taking Hoff's unlawfully diverted water
11 into account shifts the water use, but there still
12 needs to be proper daily administration. The parties
13 could communicate at which point the drainage is going
14 dry.
15 A shut-off date would not work because the
16 current proposed shut-off date is at a time of the year
17 when three different parties have said that the
18 stockponds are inaccessible, and daily administration
19 with a bypass system would not work because the parties
20 cannot reasonably communicate, and because Eckhardt's
21 own expert witness at the hearing testified that the
22 ponds could still harm Hoff's water rights because
23 there's no proposal to drain the ponds if the capture
24 water they shouldn't.
25 Likewise, during the non-irrigation season,

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1 acre-feet of water cannot also be translated into cubic
2 feet per second needed for Hoff's irrigation and
3 in-stream stockwater rights.
4 Storage rights receive a volume limit and
5 irrigation of in-stream stockwater rights receive a pump
6 rate limit. 260 acre-feet of water unlawfully diverted
7 in Jenkins Creek does not translate into a steady
8 year-round flow of .03 cfs for Hoff's in-stream
9 stockwater right, nor a steady stream of 15.6 cfs needed
10 for Hoff's irrigation rights.
11 All three parties at the hearing testified
12 that the flow levels in this basin vacillate quickly,
13 and with the variable weather and geography in the
14 basin, it's impossible to say that 260 acre-feet of
15 water would translate, for example, into 15.63 cfs of a
16 steady flow in Jenkins Creek during the entire
17 irrigation season. And, again, without that assurance,
18 administration of the stockponds is essential.
19 Second, Jenkins Creek Reservoir fills most
20 but not every year. There's no data in the record of
21 how many acre-feet of water is needed to fill Jenkins
22 Creek Reservoir. No data on whether Hoff's irrigation
23 and in-stream stockwater rights also do not fill during
24 dry years.
25 If there's a possibility of injury, the

25

1 there is not adequate data in the record to show that
2 absent proper daily administration, the unlawfully
3 diverted 260 acre-feet of water, along with the regular
4 flows in Jenkins Creek, is sufficient to fill all of
5 Hoff's water rights on every day of the non-irrigation
6 season. Again, the Department has a duty to go beyond
7 speculation to protect senior water rights.
8 Finally, I'll briefly address Eckhardt's
9 procedural arguments. The director's determination to
10 deny the application was not arbitrary and capricious.
11 The director considered all of the facts in the record
12 and the facts lacking from the record to make his
13 determination.
14 The record does not show that the stockponds
15 will not injure Hoff's water rights absent proper daily
16 administration, and the record does not show that proper
17 daily administration can occur. Eckhardt bore the
18 burden to provide evidence to the record to show no
19 injury, and it did not meet that burden.
20 Further, Eckhardt had a meaningful
21 opportunity to be heard. Eckhardt argued that the
22 distinction between irrigation and non-irrigation season
23 became an issue too late for it to submit evidence on
24 the record, but that distinction was created by Eckhardt
25 itself in its exceptions when it proposed a March 1st

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1 shut-off date.
2 Eckhardt knew the drainage went dry every
3 summer and could have raised the issue of the shut-off
4 date at an earlier point in the process if it wanted
5 additional time to discuss the proposal.
6 In its reply brief, Eckhardt cited to
7 language from the hearing officer to argue that Eckhardt
8 did not submit evidence on that issue because, based on
9 the hearing officer's words, Eckhardt thought the
10 irrigation and non-irrigation season issue was resolved.
11 But at that point in the process when the hearing
12 officer made a statement, Eckhardt could not have
13 submitted additional evidence anyway and had not
14 previously attempted to submit evidence.
15 Hoff has senior year-round water rights, and
16 Eckhardt proposed stockponds with year-round seasons of
17 use. Eckhardt was aware of its burden to show no injury
18 during the entire seasons of use.
19 Last, the Department did not violate
20 Eckhardt's substantial rights because the Department
21 conducted the hearing under proper procedures, met all
22 due process requirements throughout the appeal process,
23 and made a determination that is supported by facts in
24 the record.
25 Thank you, and I'm happy to answer any

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1 was decided by the director based on the record that
2 was in front of both the hearing officer and the
3 director himself. I will address a few points.
4 This is an interesting case in that most
5 applications for permit, not all, but most that you see
6 in front of you and the director has in front of him
7 are for water rights that somebody wants to develop and
8 that they haven't done anything yet on the ground.
9 So they, under Idaho's application permit
10 and licensing statutes, you put an application together.
11 That's then published in the paper based on what you
12 think you may do with water. That then goes in front
13 of the director for the Department to decide, even if
14 there is a protest or not a protest, is there enough
15 information there to go out and develop a water right
16 that would first become a permit and then potentially
17 later a license based on beneficial use.
18 This is the opposite of that. These were
19 ponds that were built, we're not entirely sure how many
20 years ago, but the record suggests at least into the
21 90s. They have been in place for some time, all the
22 while have been injuring water rights, senior water
23 rights that are owned by Double C&J Land Company.
24 The evidence that's in the record goes back
25 prior to Double C&J. It goes back to Mr. Mainvil, who

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1 questions.
2 THE COURT: No, I don't have any questions.
3 Thank you.
4 Mr. Bromley.
5 MR. BROMLEY: Thank you, Your Honor.
6 I haven't done one of these by Zoom yet so
7 if you can't hear me and, Sabrina, I'll do my best to
8 speak slowly, please let me know. I did sit in --
9 What was that, Your Honor?
10 THE COURT: I was saying I was about ready to
11 raise my hand when Ms. Wendel was going, but Sabrina is
12 pretty good about letting me know if things get too
13 fast. So go ahead.
14 MR. BROMLEY: Thank you.
15 I did sit in on one of these where I was
16 co-counsel and the audio for the court reporter was
17 just tough. So please let me know, Sabrina, if you
18 can't hear me or if I'm going too fast or if I'm
19 mumbling, which I sometimes do.
20 May it please the Court: Chris Bromley on
21 behalf of Double C&J Land Company, Incorporated.
22 Your Honor, I'm not going to add a whole
23 lot. I feel like Ms. Wendel did a very nice job in
24 responding to what was in front of the director, what
25 was considered by the director and, ultimately, what

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1 was the owner of the property and the reservoirs, who
2 explained to Mr. Hoff that you need to be careful about
3 water use in this drainage. That evidence is put into
4 the record that the Mainvils protested applications
5 that were put together by Mr. Eckhardt.
6 There is a history in this drainage of: A,
7 not having enough water, which is why these reservoirs
8 were built in the first place in the early 1900s. And,
9 then, B, people who have come into the drainage later
10 in time with attempts to develop water rights, those
11 applications have been denied.
12 So what happened in this case is ponds were
13 built without water rights, without applications, and
14 they were just created. Mr. Hoff testified very
15 credibly that he gets by on less than an acre-foot of
16 water.
17 Mr. Hoff has farmed for over 60 years.
18 He's 72 years old. He grew up in Eastern Idaho on an
19 irrigated farm. He's an efficient farmer. He knows
20 how to irrigate. He knows how to raise cows.
21 Mr. Hoff testified that he begins irrigating
22 crops as early as March 1. The Idaho Power records
23 indicate that the pumps turn on in early March, so
24 that's known and understood.
25 Mr. Hoff explained that he has fewer alfalfa

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1 cuttings than his neighbors who rely on Weiser River
2 water because of his water supply. So he gets three.
3 His neighbor gets five. He grew up raising potatoes in
4 Eastern Idaho, but he can't do that on his farm because
5 of lack of water supply.
6 Mr. Hoff has had cows die. That's in the
7 record. It was testified to. Cows have died for lack
8 of water.
9 As Ms. Wendel described, this is a drainage
10 that goes dry. These ponds were built, not like your
11 typical application process where they were put in
12 front of the director to decide. This is not
13 theoretical. Evidence was put on by Mr. Hoff, through
14 Double C&J Land Company, about the reductions in water.
15 So we know this. This is different than a typical
16 proceeding that's in front of you.
17 Mr. Hoff's opinions of what he's seen on
18 the ground since he's owned the property for the last
19 20 years were then confirmed by Ron Shurtleff, who's
20 the watermaster for Water District 65. I believe you've
21 had him in front of you in your court a time or two.
22 Mr. Shurtleff explained that in his
23 district, which is the Payette that also shares
24 similarities in terms of elevation and topography, that
25 he sees these types of ponds as injurious to senior

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1 application filed for them, there were no measurements
2 taken. That seems like a reasonable thing to do would
3 be to try and establish what your water use would and
4 wouldn't do, and how it would or would not injure senior
5 water rights.
6 And again going back to Ms. Wendel, the
7 standard of review here is: Is there evidence in the
8 record to support what the director did? This is the
9 evidence. The burden is on the applicant to prove no
10 injury. So that's what they chose to do to prove no
11 injury was to have a guesstimated look at what was
12 flowing.
13 Then, while the applications were filed for
14 year-round use, during the hearing on not once but two
15 occasions, Mr. Shaw walked back his idea of a cut-off
16 date. So that was a moving target.
17 The moving target then that Mr. Worthen was
18 asking you to consider was that there was some sort of
19 last minute argument about stockwater rights. That I've
20 never been clear on.
21 Double C&J has water rights that were
22 decreed by your court. They have elements. They have
23 priority dates. They have seasons of use. They all
24 explain clearly what the water rights are and aren't.
25 They were known to the Eckhardt family. They were

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1 water rights, and that he hasn't seen one of these
2 types of ponds not cause injury. So that was the
3 testimony of Mr. Shurtleff who appeared as a public
4 witness.
5 So you have the testimony of Mr. Hoff with
6 his 60 years of experience of irrigating and farming and
7 raising cattle. You had Mr. Shurtleff's testimony as
8 watermaster for Water District 65.
9 The only testimony then that came in front
10 of the hearing officer and the director from the
11 Eckhardt's side was through Dave Shaw. Mr. Shaw had
12 been to the property and looked around once in March.
13 It was stated by Mr. Worthen that there was a
14 measurement.
15 There was -- and I think Ms. Wendel, I liked
16 her word of guesstimated. It was an idea of what flow
17 might have been. If I recall correctly, there was a
18 photo in the record of a board placed over a running
19 bit of water someplace where Mr. Shaw, when he was
20 prompted by Hearing Officer Cefalo, you know, how much
21 water do you think that might be? Well, maybe it was
22 about a cfs. And that's it.
23 So despite these ponds being illegal for
24 many, many years, despite knowing for many years that
25 these ponds needed to be addressed and have an

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1 produced in discovery. They're also records of your
2 court, and then it becomes records of the Department of
3 Water Resources. So they were in front of everyone.
4 There was no surprise here on what the
5 Double C&J water rights are and aren't. They have
6 year-round storage rights. They have irrigation season
7 use, flow rights. They have year-round stockwater
8 rights.
9 Again, Mr. Hoff testified as the only person
10 with any on-the-ground experience as to the shortages
11 experienced to his water rights.
12 I think, Your Honor, that's probably all I
13 have. Maybe before I close I will note that Mr. Worthen
14 referenced remedies, and quote, unquote, to punish, how
15 there would be a remedy or how there would be a
16 punishment to Mr. Eckhardt if the ponds were not
17 properly administered. I don't know what that means.
18 I don't know what those remedies would be or the
19 punishment would be.
20 Again, we know there isn't a rental pool in
21 place. There aren't other water rights that could be
22 used say in a more typical example where you would use
23 a water right, a more senior right to mitigate for a
24 more junior right. We don't have those in this case.
25 So I'm not sure what those remedies or the punishment

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1 would be. Again, he is a junior right holder coming
2 into this system and was not able to carry this burden
3 of proof.
4 Again, as Ms. Wendel pointed out, you don't
5 have to look at the evidence in the same way that the
6 director did. It's just was there evidence in the
7 record to support the decision? I say absolutely
8 there was through the testimony of Mr. Hoff and the
9 concurrence by Mr. Shurtleff, the watermaster for Water
10 District 65.
11 The last point, Your Honor, and this goes
12 to my duty to inform the Court of recent decisions, and
13 this goes to the argument that I made for an award of
14 costs and fees.
15 Mr. Semanko or Mr. Worthen in their
16 brief cited the case of Laughy vs. Department of
17 Transportation. It was a 2010 Idaho Supreme Court case
18 saying that fees were not allowed under 12-121 in these
19 types of administrative proceedings.
20 There were cases subsequent to the Laughy:
21 Aspen Park vs. Bonneville County, a 2019 case; Floyd vs.
22 Board of Ada County Commissioners, a 2019 case; and
23 Ravenscroft vs. Boise County, a 2013 case, all Idaho
24 Supreme Court reported decisions where attorney's fees
25 were raised, and they were denied simply because the

1 found that as well.
2 So with that, Your Honor, I have nothing
3 else unless you have any further questions.
4 THE COURT: I don't. You did answer one question
5 that I had though. You said that opinion was issued
6 this morning?
7 MR. BROMLEY: That's correct, Your Honor. It's
8 on the Idaho Supreme Court website under its decisions,
9 and it came out, I assume, this morning. It's dated
10 June 18th.
11 THE COURT: All right. I'll look it up, but that
12 also answered my question that indeed the Supreme Court
13 is working during all of this COVID.
14 MR. BROMLEY: That's correct.
15 THE COURT: I will look at it.
16 Okay. Mr. Worthen?
17 MR. WORTHEN: Yes. Thank you for that concession
18 by the way. We appreciate the advance notice of that.
19 MR. BROMLEY: Thank you, Mr. Worthen. You know,
20 I just thought I could (audio interruption).
21 MR. WORTHEN: So just a few points of
22 clarification.
23 The idea that there was no evidence in the
24 record supporting flow during the non-irrigation season
25 is not correct. Again, Hoff argued that he has asserted

1 standard was not met. They weren't brought in order to
2 be able to meet the pursued frivolously, unreasonably,
3 or without merit standard.
4 So after the Laughy decisions were issued
5 by the court, I don't think we're entirely clear what
6 the past precedent was and what was available.
7 This morning I looked on the Idaho Supreme
8 Court's website for new reported decisions, and I found
9 a decision that was issued this morning, Travelers
10 Insurance Company vs. Ultimate Logistics, LLC, docket
11 number 46840. The court there very clearly says that
12 attorney's fees under 12-121 are not available in this
13 kind of proceeding because it is not a civil action.
14 So that's consistent with the Laughy decision.
15 Interestingly, the Travelers case issued
16 today doesn't cite Laughy. It also doesn't cite the
17 cases that I just referenced to you from 2019 and 2013.
18 So in my mind it was, I think, it was still an open
19 question up until today when I read Travelers, the case
20 that was issued this morning.
21 In my mind now there is no basis for me to
22 be asking for an award of fees so I withdraw that.
23 That's just my ongoing duty to be looking at precedent
24 and notify the Court and provide candor to the tribunal,
25 and I let Mr. Semanko know prior to argument that I had

1 throughout that his Jenkins Creek -- or his Monroe Creek
2 water right let him store water in the Monroe Reservoir
3 from Jenkins Creek. That water right was for 6.4 cfs he
4 was filling throughout the non-irrigation season.
5 There is no question that if that water
6 was allowed to go it would satisfy, during the
7 non-irrigation season, the .03 cfs stockwater right.
8 The second point is that communication
9 between Eckhardt and Hoff is not necessary here.
10 Again, for the reason I just said, there is no
11 communication needed during the non-irrigation season,
12 and there's also no need for communication during the
13 irrigation season because the water will be shut off by
14 February 28th every year.
15 And, in any event, it seems like a --
16 THE COURT: Well, let me ask you this,
17 Mr. Worthen. I mean, the director wasn't going into
18 this in a vacuum. There has been issues between the
19 two parties before.
20 MR. WORTHEN: Sure.
21 THE COURT: He made the finding that he doesn't
22 have any confidence that if he does issue the permit
23 with conditions that the conditions are going to be
24 met. Based on what, you know, in the briefing with
25 respect, and in the record with respect to the notice,

1 the director already issuing a notice of violation, and
2 then Mr. Eckhardt not abiding by it.
3 So when you say there's remedies, yeah, the
4 remedy is if there is an issue that the director can
5 issue a notice of violation, and then the expectation
6 would be that the diversions to the pond would stop.
7 But if he's not stopping, based on the director's own
8 experience, why can't he find that, yes, I can put
9 conditions on there, but they're not going to be abided
10 by?

11 MR. WORTHEN: I appreciate that question. The
12 short answer is whether Eckhardt ever violated a
13 previous condition is an open question. There has not
14 been a condition placed on a water right that Eckhardt
15 has previously violated. There has been an enforcement
16 letter sent out, and whether that has been violated is
17 still proceeding forward before the Department.

18 THE COURT: Okay.

19 MR. WORTHEN: Does that answer your question?

20 THE COURT: Yes, but this is not the first time
21 I've dealt with this issue with respect to parties not
22 complying with a condition by any stretch of the
23 imagination. I could rattle off a number of cases.

24 But the point is if the director -- if the
25 evidence is that, yes, there potentially would be water

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1 evidence that Eckhardt has violated that kind of order
2 before. The question -- there's an honest disagreement
3 currently about whether a water right was required for
4 Eckhardt to fill these ponds. And, ultimately, Eckhardt
5 agreed to file these applications to satisfy that
6 question, to address that question, but there's nothing
7 in the record indicating that he would not comply with
8 the directive to go and turn off the water, which is
9 again a one-time event.

10 THE COURT: Okay. All right. Go ahead.

11 MR. WORTHEN: And to further address the
12 question, even if communication was required, it seems
13 like it would be a fine line of how to address that,
14 how to consider that given that it would give current
15 water right holders all the incentive in the world to
16 not get along with anyone else who might in the future
17 want water.

18 If they could say, hey, I'm going to be
19 disagreeable with everyone so that no one can ever get
20 a water right that requires daily administration, that
21 seems like it would be a perilous route to go to me.

22 So moving on to the next question, unless --
23 did that address your question, Your Honor?

24 THE COURT: It does, yes. Go ahead.

25 MR. WORTHEN: So before the director was the

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1 available for a new permit provided that there is this
2 intensive level of administration, and if the director
3 isn't satisfied that the applicant could meet that
4 intensive level of administration or that they would
5 even abide by it, can't the director take that into
6 account in determining whether the senior water right
7 is going to be injured by issuing, you know, by issuing
8 the permit?

9 MR. WORTHEN: So it seems to me there are two
10 different administration issues. I just want to make
11 sure I'm addressing both of them.

12 THE COURT: Okay.

13 MR. WORTHEN: The first is a communication issue;
14 correct? On that one we're asserting that there's
15 simply no -- it's irrelevant whether they communicate
16 or not because either the water will be turned off by
17 February 28th or they won't be. We're not asking for
18 daily administration past that. So there's no
19 communication needed there.

20 So any disagreement Hoff and Eckhardt have
21 had before is irrelevant to that question because
22 we're asking only for a shut-off date that would be
23 unilaterally done by Eckhardt.

24 As to the other issue, it would be whether
25 Eckhardt would turn it off on time, and there's no

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1 question of whether the shutoff in February would
2 prevent an injury. As I've stated before, the only
3 evidence was in March and April, and the evidence was
4 it was too muddy. There was too much mud, too much mix
5 of mud and snow. There is no evidence that February
6 would be problematic. It's easier to walk, to snowshoe
7 out there on more completed snow. It's not in the
8 melted stage.

9 And, again, if there was a day where if --
10 they could have the whole non-irrigation season when
11 they need to turn it off; they could plan for it. They
12 could prepare to get there, and there is no evidence to
13 the contrary.

14 Let me just check my notes for a second to
15 see if there is anything else.

16 THE COURT: That's fine.

17 MR. WORTHEN: So the Department argued that it
18 is impossible to say from the evidence that every day
19 in the future during the non-irrigation season there
20 would not be an injury. The Department cannot rely on
21 speculation.

22 I just want to clarify that certainly there
23 has got to be some speculation from the director because
24 there could be any sort of reasons that some day in
25 the future 20 years from now there might be a day, based

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1 on a huge drought, I mean, an earthquake. There's a
2 lot of different events. At some point the director
3 would have to speculate somewhat based on the evidence
4 before it.

5 Hoff has, in its response, Hoff indicated
6 that this case is unique. We agree with that. And the
7 uniqueness of this case is expanded exponentially by
8 the fact that the protestant in this case is illegally
9 capturing the very water that the applicant is proposing
10 to appropriate, and the water and flow from that water
11 that's being captured is what's needed to prevent any
12 injury to the protestant.

13 Again, the director found no injury to
14 Hoff's downstream storage right on that very basis, and
15 he simply failed to address the issue with regard to
16 the stockwater rights.

17 Finally, it is true that Eckhardt knew
18 about the stockwater rights throughout this case, but
19 at the hearing the only evidence was that there was no
20 injury to stockwater rights during the non-irrigation
21 season. There is no evidence anywhere that Hoff was
22 injured during the non-irrigation season.

23 Even in Hoff's testimony he testified that
24 only in late summer and early fall, summer and fall.
25 He did not testify about the non-irrigation season.

1 There's simply no indication anywhere in the record
2 that any injury would come during that time.

3 Thank you, Your Honor. That's all I have.

4 THE COURT: Okay. I do not have any further
5 questions.

6 Like I had indicated, I have been through
7 the record as well as the good briefing from all
8 parties. Thank you.

9 So I will consider the matter fully
10 submitted for a decision and issue a written opinion,
11 okay?

12 MR. WORTHEN: Thank you, Your Honor.

13 THE COURT: Thank you, Counsel. We'll be
14 adjourned.

15 MR. BROMLEY: Thank you, Your Honor.

16 MS. WENDEL: Thank you.

17 (Proceedings concluded.)

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REPORTER'S CERTIFICATE

STATE OF IDAHO)
)
County of Twin Falls)

I, SABRINA VASQUEZ, duly appointed, qualified and acting official reporter of the Fifth Judicial District of the State of Idaho, DO HEREBY CERTIFY that I reported in stenotype the evidence and proceedings adduced in the above and foregoing cause, and that I thereafter transcribed said stenotype notes in longhand typewriting, and that the within and foregoing constitutes and is a true and correct copy of the transcript of said proceedings, said transcript consisting of pages 1 through 46, inclusive.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of June, 2020.

 /s/Sabrina Vasquez
Official Reporter
Fifth Judicial District
Twin Falls, Idaho
CSR #377