

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

ECKHARDT FAMILY LLLP, an Idaho
Limited Partnership,

Petitioner,

vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Case No. CV-44-20-39

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

PETITIONER'S OPENING BRIEF

On appeal of final agency action by the Idaho Department of Water Resources

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This is a civil action pursuant to Idaho Code §§ 42-1701A(4) and 67-5270 through 67-5279 seeking judicial review of the December 20, 2019, *Order on Reconsideration; Amended Final Order* (“*Amended Final Order*”) by the Director (“Director”) of the Idaho Department of Water Resources (“Department”). The Amended Final Order denied several water permit applications filed by Eckhardt Family LLLP (“Eckhardt”), as described below.

B. Statement of Facts.

On September 12, 2018, Eckhardt filed Applications for Permit Nos. 67-15292 through 67-15298 and No. 67-15300 (“Applications”) with the Department, seeking authorization to use water from Jenkins Creek and tributary unnamed streams to fill several stock water ponds on Eckhardt’s property. The Department published notice of the Applications on December 6 and 13, 2018. Double C & J Land Co., Inc, through its President John D. Hoff (“Hoff” or “Protestant”), filed protests against each of the Applications. Hoff owns various Jenkins Creek water rights, which he claims will be injured if the Applications are approved. Hoff’s water rights include several rights to use water during the irrigation season (March 1 to November 15), several storage water rights, and a single year-round stock water right in the amount of .03 cfs. *Amended Final Order* at 5.

The Department split its consideration of the Applications into two matters. One matter consists of Applications for Permit Nos. 67-15298 and 67-15300, and the other matter consists of Applications for Permit Nos. 67-15292 through 67-15297. The Department held a single

consolidated hearing regarding both matters on May 23, 2019. But the matters were not formally consolidated, and separate orders were issued in each matter.

At the hearing, Eckhardt presented expert testimony from David Shaw (“Shaw”). Based on evidence in his expert report, Shaw testified that there is water available for appropriation from Jenkins Creek to satisfy the Applications. Shaw also testified that Eckhardt’s proposed uses would not injure existing water rights, as long as Eckhardt stopped diverting water into the ponds by May 15 of each year. (Hearing Transcript 55:16–56:4; *see generally* Hearing Transcript pp. 55–95.) Upon the conclusion of Hoff’s case at hearing, Shaw further suggested in rebuttal testimony that April 15 may be a more appropriate shutoff date for diversions to the ponds. (Hearing Transcript 270:1–271:11). Shaw’s testimony that Hoff’s water rights would not be injured by the Applications applied to all of Hoff’s water rights—as Shaw made no distinction between Protestant’s seasonal and year-round rights.

Hoff did not dispute Shaw’s testimony as it related to the non-irrigation season. Instead, Hoff presented evidence only that Eckhardt’s Applications would injure Hoff’s water rights during the irrigation season. (*See generally* Hearing Transcript pp. 161–268.) Hoff insisted that the Applications would reduce the quantity of water available to him during the late-spring, summer, and fall. (Hearing Transcript 228:14–232:5.) But Hoff provided no evidence or argument demonstrating any injury to his water rights during the non-irrigation season.

Eckhardt also provided evidence that Hoff had been unauthorizedly using up to 260 acre-feet of water from Jenkins Creek every year to fill up Monroe Reservoir without a water right. (Hearing Transcript 228:14–232:5.) Hoff acknowledged this fact, asserting only that he was

working to resolve that issue by applying for the necessary water rights. (Hearing Transcript 228:14–232:5.)

On July 8, 2019, hearing officer James Cefalo (“Hearing Officer”) issued a *Preliminary Order Denying Applications 67-15298 and 67-15300* (“*Preliminary Order*”).¹ The *Preliminary Order* denied the Applications for two reasons. First, the Hearing Officer determined that granting the Applications would injure Protestant’s water rights, as “Eckhardt’s proposal to cease diverting water through the ponds on May 15 of each year does not adequately protect [Protestant’s] water rights.” *Preliminary Order* at 7. Second, the Hearing Officer determined that Eckhardt failed to demonstrate that water “is available on the unnamed stream for an adequate time interval and in sufficient quantities to make the proposed projects economically feasible,” noting that “[t]he record does not contain any direct measurement data for the proposed source (unnamed stream) in the area of” Eckhardt’s ponds. *Preliminary Order* at 8.

Eckhardt timely filed a Petition for Reconsideration.² Eckhardt requested that the Hearing Officer reconsider his injury analysis by using the April 15 cutoff date offered in Shaw’s rebuttal testimony, rather than the May 15 cutoff date originally proposed. *Petition for Reconsideration* at 3–5. Eckhardt also asserted that all of the evidence in the record demonstrated that water was

¹ The Hearing Officer issued two orders, one in the instant matter and one in *In the Matter of Applications for Permit 67-15292 and 67-15297* owing to there being “important factual distinctions related to the ponds.” *Amended Final Order* at 1.

² Protestant also filed a *Response to Petition for Reconsideration*, which was not considered, as “responses to petitions for reconsideration are not recognized under the Department’s rules of procedure. See IDAPA 37.01.01.730.” *Amended Final Order* at 1, n.2.

available on Jenkins Creek to satisfy the Applications, and that no contrary evidence was offered. *Petition for Reconsideration* at 6–7. Eckhardt noted that “[w]hile water measurements might be helpful to determine water available for the ponds, they are not required.” *Petition for Reconsideration* at 6 (citing Water Appropriation Rule No. 35).

On August 8, 2019, the Hearing Officer issued a single *Order Granting Petitions for Reconsideration, in Part (In the Matter of Applications for Permit 67-15292 through 67-15298 and 67-15300)*. The Hearing Officer also issued two *Amended Preliminary Orders Denying Applications*, one in the *Matter of Applications for Permit 67-15298 and 67-15300*, and one in the *Matter of Applications for Permit 67-15292 and 67-15297*.

In the *Amended Preliminary Order*, the Hearing Officer correctly reversed course as to the sufficiency of water in Jenkins Creek—now ruling that there was sufficient water to satisfy Eckhardt’s Applications prior to Hoff’s demand for water, based upon the evidence in the record. *Amended Preliminary Order* at 8. However, the Hearing Officer declined Eckhardt’s request to determine injury based on an April 15 cutoff date—based on the “absence of a clearly defined proposal to stop diverting water to the ponds on April 15.” *Amended Preliminary Order* at 7 n.2. Consequently, the Hearing Officer denied the Applications, again ruling that allowing water to run through the ponds through May 15 of each year would injure Protestant’s water rights. But the Hearing Officer concluded that “[i]mplementing a March 1 shut-off date for the proposed ponds would alleviate all injury concerns.” *Order Granting Petitions for Reconsideration, in Part* at 3.

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”). Eckhardt formally requested that “if the Director determines that the ‘historical amount beneficially used by Hoff is not the appropriate benchmark for determining injury, then the shut-off date could be set as early as March 1.” *Eckhardt Exceptions* at 3–4. In response to the *Eckhardt Exceptions*, Hoff timely filed *Double C & J Land Co., Inc.’s Response to Eckhardt’s Exceptions to Amended Preliminary Order*.

On November 14, 2019, the Director issued his *Order on Exceptions; Final Order (In the Matter of Applications for Permit 67-15298 and 67-15300) (“Order on Exceptions”).* The Director appropriately concluded that there was sufficient water available in Jenkins Creek to satisfy the Applications, based upon the evidence in the record. *Order on Exceptions* at 12–13. The Director also duly determined (as the Hearing Officer had previously) that Hoff’s storage water rights would not be injured by the Applications, because “Hoff’s Lower Reservoir is comparatively small and fills every year from water available in the lower Jenkins Creek drainage,” and because “[t]he Jenkins Reservoir Diversion is upstream of the point where the unnamed stream, described in Applications 67-15298 and 67-15300, flows into Jenkins Creek.” *Order on Exceptions* at 6–7. However, the Director overturned the Hearing Officer’s determination that a March 1 cutoff date would alleviate all injuries to Protestant’s water right, asserting that “Hoff has senior year-round water rights that may not be protected even from a March 1 cutoff date.” *Order on Exceptions* at 8 n.5. The Director further concluded that “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,” and that “conditioning a water right on being able to access these

particular ponds in order to properly administer the rights, if approved, is unreasonable.” *Order on Exceptions* at 12. On these grounds, the Director denied the Applications.

On November 29, 2019, Eckhardt timely filed a single *Petition for Reconsideration of Orders on Exceptions; Final Orders (In the Matter of Applications for Permit 67-15292 through 67-15298 and 67-15300 in the Name of Eckhardt Family LLLP)*. Eckhardt argued that neither Hoff’s seasonal water rights nor his year-round water rights would be injured if the Department imposed a March 1 cutoff date as a condition of approving the Application. Eckhardt noted Shaw’s testimony that none of Hoff’s water rights would be injured if an early-spring cut-off date was imposed. *Petition for Reconsideration* at 3–4. And Eckhardt emphasized that there was no evidence provided at the hearing that Hoff’s year-round water rights would be injured during the non-irrigation season if the Applications were granted. *Id.* Eckhardt also stressed that an absolute cutoff date of March 1 would remove any significant administrative needs—as only two trips to the ponds would be required each year (one to divert the water away from the ponds on March 1, and another to end the diversion at the end of the irrigation season). *Petition for Reconsideration* at 5–6. Finally, Eckhardt underscored that “[i]f the area is muddy and inaccessible on or before February 28 in a particular year, a shutoff date as soon as possible thereafter would not result in injury given the high flow conditions that would exist in such a circumstance.” *Id.* at 6.

On December 20, 2019, the Director issued his *Amended Final Order* in the *Matter of Applications for Permit Nos. 67-15298 and 67-15300*. The *Amended Final Order* did not meaningfully alter the Director’s prior conclusions in the *Order on Exceptions*.

II. ISSUES PRESENTED ON APPEAL

- A. Whether the Department's *Amended Final Order* is without the support of substantial evidence on the record as a whole.
- B. Whether the Department's *Amended Final Order* is arbitrary, capricious, or an abuse of discretion.
- C. Whether the Department's *Amended Final Order* violates Eckhardt's rights under the Due Process Clause of the United States Constitution and the Idaho Constitution.
- D. Whether the Department's *Amended Final Order* prejudices Eckhardt's substantial rights.

III. LEGAL STANDARD

Judicial review of the *Amended Final Order* is governed by Idaho Code §§ 42-1701A(4) and 67-5270 through 67-5279. The Court reviews the *Final Amended Order* on the record created before the Department. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). The Court cannot “substitute its judgment for that of the [Department] as to the weight of the evidence on questions of fact.” Idaho Code § 67-5279(1); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). But the Court may set aside the *Final Amended Order* and remand the matter for further proceedings if the order prejudiced a substantial right of Eckhardt and the Department's “findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or

(e) arbitrary, capricious, or an abuse of discretion.” Idaho Code § 67-5279(3), (4); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

IV. ARGUMENT

Eckhardt is entitled to have the *Amended Final Order* vacated, as both of the requirements under Idaho Code Section 67-5279 are met in this case. The first requirement is met because the *Amended Final Order* (1) is not supported by substantial evidence, (2) is arbitrary and capricious, and (3) violates the Due Process Clause of the United States Constitution and the Idaho Constitution. Although the Department’s order contains all three of these maladies, any one of them is sufficient to satisfy the first requirement. *See* Idaho Code § 67-5279(3). The second requirement is met because the *Amended First Order* violates Eckhardt’s substantive rights—including his right to a reasonably fair decision-making process and his right to pursue the appropriation of unappropriated water through his applications.

A. The Amended Final Order Is Not Supported by Substantial Evidence.

A finding of fact without any basis in the record is clearly erroneous. *Tappen v. IDHW*, 98 Idaho 576, 579–80 (1977). Indeed, any finding or conclusion must be supported by substantial evidence. Idaho Code § 67-5279(3)(d); *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265. “[S]ubstantial evidence” is “relevant evidence that a reasonable mind might accept to support a conclusion.” *In re IDWR Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212 (2009).

The Department denied Eckhardt’s Applications exclusively on the grounds that the proposed use of water would injure Hoff’s existing water rights. This conclusion is based on two

factual findings. First, the Department found that “Hoff has senior year-round water rights that may not be protected even from a March 1 cutoff date.” *Amended Final Order* at 8 n.6; *id.* at 12. Second, the Department found that Hoff’s irrigation-season water rights may also be injured with a March 1 cutoff date, as “it would be highly unlikely for Eckhardt, Hoff, or a watermaster to access [Eckhart’s ponds] during critical regulatory time periods.” *Id.* at 13. The Court’s conclusion and the underlying factual findings are not supported by substantial evidence. Thus, the Department’s order must be vacated.

1. *The Department’s conclusion that Hoff’s year-round water rights “might be injured” by the proposed water use in the Applications is not supported by substantial evidence.*

Hoff’s year-round water rights consist of several storage water rights and one lone stock water right, in the amount of .03 cfs. *Amended Final Order* at 5. The Director concluded that Eckhardt’s proposed water use would not injure any of Hoff’s water storage rights. *Amended Final Order* at 7. Thus, the only water right that “might be injured” by Eckhardt’s proposed use of water is Hoff’s .03 cfs stock water right. *Amended Final Order* at 5. All of the substantial evidence regarding Hoff’s use of his year-round stock water right demonstrates that the right will not be injured if the Applications are approved.

Eckhardt’s expert witness, David Shaw, testified that there would be no injury to any of Hoff’s water rights if the Department required a cutoff date of April 15 or May 15 as a condition of approving the Applications. (Hearing Transcript 55:16–56:4; 270:1–271:11; *see generally* Hearing Transcript pp. 55–95.) This testimony was not limited to injuries during the irrigation season. Shaw also testified that Eckhardt would ensure that any conditions imposed by the

Department would be met—including any conditions requiring Eckhardt to shut the diversions off during the irrigation season. (Hearing Transcript 156:21–157:6.) Shaw’s expert testimony constitutes substantial evidence that supports Eckhardt’s position. *Cowan v. Board of Commissioners of Fremont County*, 143 Idaho 501, 518 (2006) (“Qualified expert testimony and analysis within the record is considered to be substantial evidence.”).

Shaw’s testimony is supported by the historical amount of water Hoff has beneficially used during the non-irrigation season—which is the basis of determining injury to water rights under Rule 45.01.a.i of the Water Appropriations Rules. Hoff’s testimony and actions demonstrate that he has not had any stock water shortage in the non-irrigation season, despite the construction and existence of Eckhardt’s ponds for the last several years. (Hearing Transcript 220:1–17.) Hoff has owned the property served by his water rights since 1999. At hearing, Hoff recited his water-use history for his twenty years of ownership. Hoff consistently and frequently noted that he experienced stock water shortages in the summer and fall (i.e., during the irrigation season). (Hearing Transcript 177:23–179:5; 221:9–17; 239:24–241:16.) But he never once mentioned any shortages during the non-irrigation season (from November 16 to February 28) to refute that aspect of Shaw’s testimony. In fact, during questioning from the Hearing Officer, Hoff admitted to excess flows—beyond his water right needs—during the non-irrigation season. (Hearing Transcript 220:117.)

In addition, Hoff has been diverting Jenkins Creek water into the Monroe Reservoir during the non-irrigation season without water right authorization. *Order on Reconsideration; Amended Final Order for Permit Nos. 67-15292 through 67-15297* at 8. (Hearing Transcript 228:14–232:5.)

This unauthorized diversion during the non-irrigation season consists of up to 260 acre-feet of water every year. *Order on Reconsideration; Amended Final Order for Permit Nos. 67-15292 through 67-15297* at 6. If this Jenkins Creek water was allowed to flow down Jenkins Creek during this time period, it would easily satisfy Hoff's .03 cfs stock water right, even if all of Eckhardt's Applications (totaling less than 5 acre-feet per year) were approved. There is no evidence in the record that contradicts this fact. Indeed, the Director concluded that Eckhardt's proposed uses of water would not injure the storage elements of the Hoff's water rights in the sister matter—which are for much more water than his stock water right—for precisely this reason. *Order on Reconsideration; Amended Final Order for Permit Nos. 67-15292 through 67-15297* at 8.

On this record, it was clearly erroneous for the Department to find that Hoff's year-round water rights might be injured during the non-irrigation season. All of the evidence cuts against this finding, and there is not a shred of evidence to support it.

2. *The Department's conclusion that Hoff's water rights may be injured during the irrigation season is not supported by substantial evidence.*

The Department concluded that Hoff's water rights may be injured during the irrigation season because Eckhardt likely could not access his ponds to execute a March 1 cutoff date. *Final Amended Order* at 13–15. The Director attempted to support this conclusion by pointing to statements that two individuals were unable to access the ponds due to mud and snow—once in early March 2019 (David Shaw) and once on March 19, 2018 (Department employee, Eric Boe (“Boe”)). *Amended Final Order* at 14–15. These statements are not substantial evidence that

Hoff's water rights would be injured during the irrigation season if Eckhardt's Applications are approved.

While it may not always be easy, Eckhardt's ponds have been accessed during the spring. The record confirms that a Department agent was able to hike to some of the ponds and throughout the subdrainage for those ponds, with limited familiarity of the property. (*See* Hearing Transcript 42:6–25.) Eckhardt's employees—including Rocky Stone, who was mentioned during Shaw's testimony—are well familiar with the property and could certainly access the ponds once a year in late February to shut off the diversions. (Hearing Transcript 43:16–44:15.) Accessing remote locations on the Eckhardt property, including existing water sources, is a necessary part of managing the ranch and has been for decades.

That a Department employee and a water rights expert chose not to access the ponds to conduct surveys has no bearing on whether Eckhardt will be capable of accessing the ponds once a year during the early spring to comply with the permits. Eckhardt will be mandated as a condition of the permits to access the ponds and shut off the water, whereas neither the Department employee Boe nor Shaw had any requirement to physically access the ponds on their visits. Eckhardt has represented, through Shaw's testimony, that it will fulfill all of the conditions placed on the Applications by the Department. That includes diverting water away from the ponds as required—Eckhardt's employee(s) will traverse the mud and snow that kept Shaw and the Department employee away. After all, only one visit to each pond is necessary to divert the water as required, and no additional administrative action is required. (Hearing Transcript 59:19–25.)

Finally, if the ponds truly are inaccessible on or before February 28 in a particular year—as the Department suggests—a shut-off date as soon as possible thereafter would not result in injury to Hoff’s water rights, given the high flow conditions that would necessarily exist in such a circumstance. Consequently, the statements from Shaw and Boe are not “relevant evidence that a reasonable mind might accept to support a conclusion” that Hoff’s water rights will be injured if the Applications are approved. *In re IDWR Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 212 (2009).

For these reasons, the *Final Amended Order* is not supported by substantial evidence and must be vacated.

B. The Amended Final Order Is Arbitrary and Capricious.

An agency decision is “arbitrary if it was done in disregard of the facts and circumstances presented or without adequate determining principles.” *American Lung Assoc. of Idaho/Nevada v. Dept. of Ag.*, 142 Idaho 544, 547 (2006). An agency decision is “capricious” if it “was done without a rational basis.” *Id.* Additionally, an agency decision is arbitrary and capricious if it lacks “a thorough and detailed discussion of why it came to the specified conclusions.” *Terrazas v. Blaine Cty. ex rel. Board of Commissioners*, 147 Idaho 193, 205 (2009).

The *Amended Final Order* is both arbitrary and capricious. For the last twenty years, Hoff has illegally diverted up to 260 acre-feet of Jenkins Creek water during the non-irrigation season to fill the Monroe Reservoir. *Order on Reconsideration; Amended Final Order for Permit Nos. 67-15292 through 67-15297* at 5, 8. If Hoff abstains from this illegal conduct, there will be more than enough water to satisfy all of his water rights during the non-irrigation season—even if Eckhardt’s

Applications are approved. Eckhardt raised this issue to the Department on multiple occasions, as the Director acknowledged in the *Order on Reconsideration; Amended Final Order for Permit Nos. 67-15292 through 67-15297*. But inexplicably, the Director entirely ignored Hoff's unauthorized water use when analyzing whether Hoff's .03 cfs year-round stock water right might be injured by Eckhardt's Applications.

This omission lacked any rational basis, as it was internally inconsistent. The quantity of Hoff's year-round storage rights far exceeds his .03 cfs year-round stock water right. *Amended Final Order* at 5. Yet, the Director concluded that the storage rights—but not the smaller stock water right—would be entirely satisfied if Hoff simply stopped using Jenkins Creek water to fill the Monroe Reservoir. *Order on Reconsideration; Amended Final Order for Permit Nos. 67-15292 through 67-15297* at 8–9. The Director provided no discussion (much less a thorough and detailed one) regarding why it reached these contradictory conclusions. Therefore, the Department's conclusion that Hoff's year-round stock water right might be injured by Eckhardt's Applications is arbitrary and capricious.

The Department's analysis of potential injury to Hoff's water rights during the irrigation season is also arbitrary. The Director determined that it was unlikely that Eckhardt could access the ponds in time to prevent injury to Hoff's water rights. It was arbitrary for the Director to make this determination when Eckhardt represented that it would ensure that any condition set by the Department would be fulfilled. Based on this representation, the Department could set the condition, with which Eckhardt would be required to comply. It is arbitrary to assume that

Eckhardt would not find a way to timely cutoff water to the ponds, when its livestock rely upon the supply provided under the permit.

For these reasons, the *Final Amended Order* is arbitrary and capricious and must be vacated.

C. The Amended Final Order Violates the Due Process Clause.

The Due Process Clause of the United States Constitution and of the Idaho Constitution prohibits the government from depriving any person “of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV; Idaho Const. art. 1, § 13. This right “requires that a person involved in the judicial [or administrative] process be given meaningful notice and a meaningful opportunity to be heard.” *State v. Doe*, 147 Idaho 542,544, 211 P.3d 787, 789 (Ct. App. 2009) (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972)); *see also Rios-Lopez v. State*, 144 Idaho 340, 343, 160 P.3d 1275, 1278 (Ct. App. 2007) (“[P]rocedural due process requires an opportunity to be heard.”).

In administrative proceedings, due process principles prohibit an agency from “basing its decision on an issue upon which no evidence was presented,” at least where the agency did not provide the parties with “notice that the [agency] may base its decision upon the issue.” *Sanders Orchard v. Gem Cty. ex rel. Bd. of Cty. Comm’rs*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002). Where an agency decision violates these principles, it “must be vacated.” *Id.*

Here, Eckhardt had no meaningful notice or meaningful opportunity to be heard regarding potential injuries to Hoff’s water rights during the non-irrigation season. At the hearing, Eckhardt provided evidence regarding the lack of injury to Hoff’s water rights—which was not limited to

injuries during the irrigation season. (Hearing Transcript 55:16–56:4; 270:1–271:11; *see generally* Hearing Transcript pp. 55–95.) In response, Hoff did not present any evidence of injury during the non-irrigation season, or to even raise the potential issue. (*See generally* Hearing Transcript pp. 161–268.) And the Hearing Officer did not concern himself with non-irrigation season injury concerns. Accordingly, Eckhardt had no reason to believe that he needed to provide any additional evidence as to potential injuries during the non-irrigation season. The lack of injuries during the non-irrigation season was undisputed, and it would have been a waste of precious time to provide additional evidence on that issue – nor was it necessary, given the established record.

It was not until well after the time for presenting evidence had passed that any apparent need for additional evidence arose. Indeed, even the Department’s Preliminary Orders did not suggest there was any potential issue relating to non-irrigation season injuries to Hoff’s water rights. The dispute was first raised in an authorized document only after Eckhardt had submitted his *Exceptions* to the Department’s Preliminary Orders—the last meaningful chance Eckhardt had to craft his arguments and proposals to the Department. In Hoff’s response to the *Exceptions*, he declared without further analysis that “in some years, Jenkins Creek reservoir does not fill. Because of this, the Applications could impact the fill during the non-irrigation season. In addition, the Applications can impact the year-round stockwater right of Double C&J.” *Response* at 4 (internal citations omitted).

Apparently, this eleventh-hour conclusory statement persuaded the Director, who based his decision to deny Eckhardt’s Applications on his conclusion that “Hoff has senior year-round water rights that may not be protected even from a March 1 cutoff date.” *Amended Final Order* at 8 n.6.

As previously discussed, this decision was made without any substantial evidence to support it. It was also made without any notice to Eckhardt that the Department might base its decision upon this issue, in violation of Eckhardt's due process rights. This lack of notice is particularly problematic because Eckhardt is now stuck with the administrative record and cannot meaningfully address the issue by bringing in new evidence. *See* Idaho Code § 67-5277. Consequently, the only way to remedy the Department's due process violation is to vacate the Director's *Amended Final Order*. *See Sanders Orchard*, 137 Idaho at 702, 52 P.3d at 847.

D. The Amended Final Order Prejudices Eckhardt's Substantial Rights.

The *Amended Final Order* prejudices at least two of Eckhardt's substantive rights. It prejudices his right to a reasonably fair decision-making process and his right to pursue the appropriation of unappropriated water through his Applications.

1. Eckhardt's right to a reasonably fair decision-making process.

"Generally, as a procedural matter, all the parties involved in [an administrative] decision have a substantial right to a reasonably fair decision-making process. . . . This includes the right for all interested parties to have a meaningful opportunity to present evidence to the governing board on salient factual issues." *State Transp. Dep't v. Kalani-Keegan*, 155 Idaho 297, 301, 311 P.3d 309, 313 (Ct. App. 2013) (internal citations omitted).

As discussed above, Eckhardt was deprived a meaningful opportunity to present evidence regarding the lack of injury to Hoff's water rights during the non-irrigation season—which became a salient factual issue when the Department reversed course and unexpectedly based its decision to deny Eckhardt's Applications on this issue. By failing to give Eckhardt such an opportunity, the

Department prejudiced Eckhardt’s substantial right. *See Kalani-Keegan*, 155 Idaho at 301, 311 P.3d at 313.

2. *Eckhardt’s right to pursue the appropriation of unappropriated water.*

By statute, “any person . . . intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho,” may file an application to appropriate the water—which must be approved before the person can divert any of the unappropriated water. Idaho Code § 42-202.

Consequently, in erroneously denying Eckhardt’s Applications, the Department prejudiced Eckhardt’s substantial right to seek and ultimately use some of the unappropriated water in Jenkins Creek and tributary unnamed streams. This conclusion is supported by the fact that at least one district court in the state has already found that an order denying a water right application prejudices the applicant’s substantial right. *N. Snake Ground Water Dist. v. Idaho Dep’t of Water Res.*, 160 Idaho 518, 529, 376 P.3d 722, 733 (2016) (noting that “[t]he district court concluded that the Director’s final order prejudiced the Districts’ substantial rights relating to the ability to pursue the appropriation of unappropriated water and in their application for permit,” but ultimately ruling that any argument against the district court’s conclusion was waived).

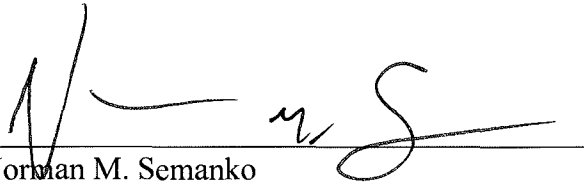
For these reasons, the *Final Amended Order* prejudices Eckhardt’s substantial rights and must be vacated.

V. CONCLUSION

Because the *Amended Final Order* is not supported by substantial evidence, is arbitrary and capricious, violates Eckhardt's due process rights, and prejudices Eckhardt's substantial rights, the Court should vacate the order and remand the matter to the Department for further proceedings.

DATED THIS 23rd day of April, 2020.

PARSONS BEHLE & LATIMER

By: 
Norman M. Semanko
Attorneys for Petitioner

CERTIFICATE OF SERVICE

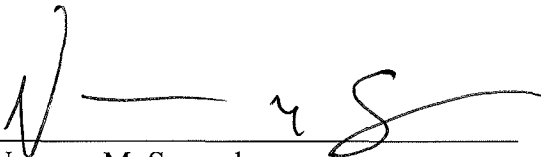
I hereby certify that on this 23rd day of April, 2020, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service.

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