

**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.

Case No. CV44-20-39

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent,

and

DOUBLE C & J LAND CO., INC.,

Intervenor-Respondent.

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

DOUBLE C & J LAND CO., INC.'S RESPONSE BRIEF

On Appeal of Final Agency Action by the Idaho Dept. of Water Res.

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a petition for judicial review filed by Eckhardt Family LLLP (“Eckhardt”) in response to an *Amended Final Order*¹ issued by the Director of the Idaho Department of Water Resources (“Director” or “IDWR”) in application for permit nos. 67-15298 and 67-15300 (“Applications”). Eckhardt disagrees with the Director’s evaluation of the evidence and reasoned conclusion that Eckhardt’s illegally built ponds, which intercept and store water tributary to Jenkins Creek and have been in place for years, injure Double C & J Land Company, Inc. (“Double C&J”) senior water rights.

B. Statement of Facts

The Director’s decision to deny the Applications was not made in a vacuum. Rather, an extensive factual record was developed by Double C&J to show how the Applications, which were filed by Eckhardt to cure ongoing, illegal diversions, injure Double C&J’s senior rights.

i. Double C&J Relies on Water from the Jenkins Creek Drainage for Irrigation and Stockwater

John Hoff is the president of Double C&J. Tr. at 161. Mr. Hoff was the only person with actual on-the-ground experience to testify at the hearing. No Eckhardt Family LLLP principle chose to testify at the hearing, leaving Mr. Hoff’s testimony un rebutted.

Mr. Hoff is 72 years old with over 60 years of experience irrigating, having been raised on his family’s farm in eastern Idaho, where he learned to farm and raise livestock. Tr. at 162. The Hoff’s bought the property in 1999 – known as Jenkins Creek Ranch and located one mile

¹ The Amended Final Order is located at R. 403. This brief will reference the actual page numbers of the order as opposed to the record page numbers.

north of Weiser – in order to work a farm with their own water supply. *Id.* Exhibit 330 shows the location of the Hoffs property in relation to the drainage: “And so we created the map to show – where the farm is exactly straight north. The drainage in the Jenkins Creek come out of the mountains and back down to our place.” Tr. at 163.

The drainage is “steep, hilly country.” Tr. at 167. The Hoffs irrigate the property with surface water from the Jenkins Creek drainage, represented by water right nos. 67-2044, 67-2097A, 67-2097B, 67-14246, 67-14247, and 67-14251. Exs. 301-303, 306-308. The water rights bear priority dates ranging from 1881 to 1918, and were decreed in the Snake River Basin Adjudication. *Id.* The water rights allow Double C&J to store water year-round for irrigation and stockwater, allow irrigation to begin as early as March 1, and allow Double C&J’s livestock to drink year-round. *Id.* The water rights and irrigation system have an interesting history, having been developed by Reverend Paddock in the early 1900s as the Intermountain Institute. Tr. at 171-72.

Like their predecessors before them, the Hoffs rely first on natural flow, then turn to storage water when the season turns dry. Tr. at 165 (“we use runoff until the runoff slows up, then we open the Monroe Reservoir, use it, and then we open the Jenkins Creek Reservoir last and use it. And then all of the water that comes out of the 50-acre pond here . . .”). Monroe Reservoir is eight miles up the system; Jenkins Creek Reservoir is 4 miles up the system; the 50 acre-foot pond is at the farm. Tr. at 168-71. In Mr. Hoff’s opinion, it is “perfect ground.” Tr. at 170. With the water, the Hoffs irrigate 453 acres of land with wheel lines, Tr. at 166, raising heritage wheat, dairy alfalfa, and black Angus cattle, Tr. at 161. Consistent with their water rights, the Hoffs start irrigating as early as March 1. Tr. at 178.

Mr. Hoff, who has irrigated since he was a little boy, considers himself an efficient farmer. Tr. at 179. Despite his abilities, yields are determined by water supply. Neighbors who rely on water from the nearby Weiser River are able to get up to five cuttings of alfalfa, whereas the Hoff's only get up to three. Tr. at 179-80. While the Hoff's would like to raise potatoes, they cannot due to the limited water supply. Tr. at 180. With the water they have, and through experience, efficiencies, and perfect ground, the Hoff's are able to farm with "less than an acre-foot" of water. Tr. at 180. The Hoff's' margins are "incredibly thin." Tr. at 180. Thus, any diversion of water from sources tributary to Jenkins Creek are acutely felt by the Hoff's.

ii. Double C&J And Its Predecessors Before Them Have Had to Fight For Its Right to Water Against Eckhardt For Decades

Despite owning the senior rights in the drainage, and without a water district or watermaster in place, *Amended Final Order* at 14, the Hoff's and their predecessors before them have fought to protect their senior rights against Eckhardt for nearly thirty years.

The record shows that, in 1992, Eckhardt filed for a water right with IDWR, seeking 1.0 cfs from Jenkins Creek. Ex. 326. It was around this time that Eckhardt also started contemplating development of ponds in the upper reaches of Jenkins Creek. Ex. 17. The application was protested by the Mainvils – the Hoff's' predecessor – on the basis that it would "injure our use of the historical rights from Jenkins Creek due to the fact that there is not enough water available for new appropriation even in normal water years and especially in drought years." *Id.* This 1992 application was later voided by IDWR due to the fact that Eckhardt "failed and refused to respond to requests from the Department to supply necessary information." Tr. at 188.

Apparently unable to advance a claim for a water right for new diversions, Eckhardt was warned by IDWR in 1999 that his development of springs required water rights: "During our

appointment on Wednesday, 3/30/1999, you told me that you have developed approximately 20 springs or bogs. . . . I spoke with my supervisor, Steve Lester, to determine if these developments require a water right. Idaho Code does require that all surface water diversions are required to have a water right . . .” Ex. 360.

In 1999, the Hoff's bought Mainvil's property, and were cautioned to be very cognizant of water developments by Eckhardt. Tr. at 193 (“Mainvils called us and said there was a claim in the paper. And every claim so far in the paper we have not been notified, we’ve had to stay at home and read – watch the paper for what happens. And so it’s always a surprise. You sort of – we – again, you don’t sleep here.”); Tr. 194-95 (“Vernon Kelly told me about a pond that Mr. Eckhart had made to stop the water from going across his pastures.”).

In 2001, Double C&J protested an application filed by Eckhardt with IDWR, this time for 0.80 cfs from unnamed stream, tributary to Jenkins Creek for irrigation of 40 acres. Ex. 305 at 1. According to the protest: “Water right nos. 67-2097A and 6702097B are our water rights from Jenkins Creek dating back to 1914. These rights cover both our storage right and live flow diversion right which have been continuously used since 1914 with no excess water available to any additional acres. We are limited to the type of crops that we can raise due to the lack of water.” Ex. 325. A hearing ensued, with the application denied on the basis that it would injure Double C&J’s senior rights: “Diversion of water from unnamed stream would injure Hoff’s water rights.” *Id.* at 12 (emphasis added).

Forewarned of pond developments by Mr. Kelly, some of the ponds that are represented by the Applications were initially conceived of by Eckhardt in the early 1990s: “There are six productive springs in the uplands which if developed would be reliable sources of water . . .

Three stock ponds could be built to further access upland forage” Ex. 17 at 1. By the early 2000s, there were five ponds in the works. Ex. 359.

Starting in 2014, and in an attempt to stop the illegal diversion of water, the Hofffs sent a letter to IDWR asking for assistance. Ex. 327. In the 2014 letter, the injury caused by the ponds was identified: “The historic Jenkins Creek Ranch (1881) owned by Double C&J Land Co., Inc. (John + Christy Hoff) has been dried up because of ponds Damage to us may go back years, but this being a dry year made it obvious that these ponds still have water as I flew over a week ago. Most [of] the tributaries to Jenkins Creek are block[ed] with pond dams causing damage to us.” Ex. 327 at 1-2. The Hofffs explained the damage as: loss of stockwater; forced to move pastures; lost crop income; lost customer base; and damage to old growth trees. *Id.* at 2.

In August 2017, and with the illegal diversions still in place, the Hofffs sent another letter to IDWR, seeking enforcement against Eckhardt: “We therefore respectfully request that you take all necessary steps to ensure immediate removal of every illegal diversion placed in the Jenkins Creek drainage by Eckhardt.” Ex. 323. Approximately a month later, the ponds were investigated by IDWR, who agreed they were illegal and required a water right. Ex. 316.

In November 2017, IDWR formally notified Eckhardt that his diversions were illegal: “Diversion and use of water without a valid water right is unlawful pursuant to Idaho Code § 42-351. No water may be stored or diverted until a valid water right is secured for the diversion.” Ex. 362. Stemming from this letter, Eckhardt entered into a *Consent Order and Agreement* with IDWR, dated October 1, 2018, requiring the ponds be breached or modified, with no ability to divert and store water without first obtaining a water right. Ex. 366 at 3.

On December 4, 2018, IDWR responded to photos sent by Eckhardt that purported to show some of the ponds were breached in compliance with the Consent Order. Ex. 367.

However, as explained at the hearing by Mr. Hoff who flew over the ponds in a helicopter, and shown through photographic evidence, the ponds were not breached, and continue to impound water. Tr. at 206-09; Ex. 368.

As summarized by Mr. Hoff, “we’ve had to find out about the dams ourselves and single-handedly. The information has not come from the applicant at all. We’ve asked questions and questions. . . . We’ve asked everybody to let them know what’s up. And so we have a job to do. This is – this is very serious.” Tr. at 211-12.

iii. The Illegal Ponds, Represented by the Applications, Injure Double C&J’s Water Rights

It is not speculative that the Applications injure Double C&J’s water rights. Unlike the traditional water rights process where an application is first filed, then a permit issued, and a water right developed that may or may not be licensed, the ponds represented by the Applications are built and have been injuring Double C&J’s water rights for years.

The Applications at issue are for year-round diversion and storage of stockwater. Exs. 7-8. The ponds are on-stream. *Amended Final Order* at 4. Notably, the Applications did not explain that water will be passed through the on-stream ponds or that they will mitigate for injury to existing water rights. Exs. 7-8. Some of the ponds are built on top of springs. Ex. 316 at 3. The ponds are remote, in the upper reaches of Jenkins Creek, making them difficult or impossible to reach in the winter and early spring. *Amended Final Order* at 13; Ex. 13 (map locating the ponds in relation to the drainage); Ex. 316 at 2 (showing same).

Double C&J’s points of diversion are located downstream of the applications. *Amended Final Order* at 5. In some years, Jenkins Creek reservoir does not fill. R. at 389. In addition, the Applications impact the year-round stockwater right of Double C&J. *Id.* at 7-8. As

explained at the hearing by Mr. Hoff, Double C&J has had cattle die due to lack of water supply in the Jenkins Creek drainage. Tr. 181-184.

As explained by Ron Shurtleff, Watermaster for Water District No. 65, who testified as a public witness: “I have concern about the effect of ponds and small reservoirs constructed on tributaries to Idaho streams. . . . [T]hese applications for permit on Jenkins Creek, the subject of this hearing, create a vivid example demonstrating how ponds and small reservoirs interfere with prior water rights, are operated detrimental to the water supply, and become destructive to the natural watershed.” R. at 180 (emphasis added). The Eckhardt ponds have losses due to evaporation and seepage, which, in his experience, injure senior water rights. Tr. at 9-15. According to Mr. Shurtleff: “Without management, without daily management, they will very likely end up detrimental. I have not witnessed a pond yet in my basin that was not detrimental to the system.” Tr. at 21 (emphasis added).

The only testimony on behalf of Eckhardt came through its engineer, Dave Shaw. Mr. Shaw visited Jenkins Creek on March 11, 2019. Ex. 11 at 2. Following up on questioning from counsel for Double C&J, and despite knowing the ponds were illegal for years, the hearing officer determined no measurements of water were taken by Mr. Shaw. Tr. at 137. Consistent with taking no measurements of water, Mr. Shaw rendered no written opinion in his expert report that the Applications would not injure Double C&J’s senior rights. Ex. 11 at 2. At the hearing, and over repeated objection by counsel for Double C&J, Tr. at 40, 47-48, Mr. Shaw opined that approval of the ponds “would not injure senior water rights.” Tr. at 41. The objection was noted by the hearing officer. Tr. 41, 49, 51. This “opinion” of Mr. Shaw, with no measurements to support it, and who was Eckhardt’s only witness, stands in stark contrast to the testimony of Mr. Hoff and Mr. Shurtleff. While the original Applications were for year-round use, Mr. Shaw

revised his opinions several times throughout the proceeding from a “cut-off” date of April 15 or alternatively May 15. *Opening Brief* at 2-3.

iv. The Director Weighed the Evidence, Finding the Applications Injure Double C&J’s Senior Rights

Based on the record before him, the Director concluded the Applications, if approved, would injure Double C&J’s water rights:

As proposed, stockwater storage in Ponds 1-6 will reduce the quantity of water under Hoffs 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.

....

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.

Amended Final Order at 15.

II. ISSUES PRESENTED ON APPEAL

Eckhardt raises four issues on appeal: (1) Whether the Department’s Amended Final Order is without support of substantial evidence on the record as a whole; (2) Whether the Department’s Amended Final Order is arbitrary, capricious, or an abuse of discretion; (3) Whether the Department’s Amended Final Order violated Eckhardt’s rights under the Due Process Clause of the United States Constitution and the Idaho Constitution; and (4) Whether the Department’s Amended Final Order prejudices Eckhardt’s substantial rights. *Opening Brief* at 7.

Pursuant to Idaho Appellate Rule 35, Double C&J raises the following additional issues on appeal, which will be discussed in Section V and Section VI, below:

Whether the Director’s Amended Final Orders should be affirmed on the alternative basis that Eckhardt failed to disclose expert opinions prior to hearing upon which he now relies?

Whether Double C&J is entitled to an award of its reasonable costs and attorneys' fees?

III. LEGAL STANDARD

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. I.C. § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). "When reviewing the decision of a district court acting in its appellate capacity under the Idaho Administrative Procedure Act, 'we review the decision of the district court to determine whether it correctly decided the issues presented to it.' However, we review the agency record independently of the district court's decision." *Rangen, Inc. v. Idaho Dep't of Water Res.*, 160 Idaho 251, 255, 371 P.3d 305, 309 (2016) (quoting *Clear Springs Foods v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011)). Furthermore, 'the agency's factual determinations are binding on the reviewing court, even when there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.' *Id.* (quoting *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505-06, 284 P.3d 225, 230-31 (2012)). We review questions of law de novo. *Vickers v. Lowe*, 150 Idaho 439, 442, 247 P.3d 666, 669 (2011)." *City of Blackfoot v. Spackman*, 162 Idaho 302, 305-306, 396 P.3d 1184, 1187-88 (2017). The court "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279(1). "The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Urrutia v. Blaine County, ex rel. Bd. of Comm's*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).

The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the 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. I.C. § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in I.C. § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. I.C. § 67-5279(4); *Barron* at 417, 18 P.3d at 222.

IV. RESPONSE TO ECKHARDT'S ARGUMENT

At the outset, Double C&J concurs with and joins in the arguments made by IDWR in its response brief. In this brief, Double C&J adds additional support for affirming the Amended Final Order.

A. The Amended Final Order Is Supported By Substantial Evidence

Eckhardt claims the Amended Final Order should be vacated because it is not supported by substantial, competent evidence in the record. *Opening Brief* at 8. To make this assertion, Eckhardt must establish that the Amended Final Order is “clearly erroneous . . . where factual findings are not supported by substantial and competent evidence.” *Nw. Farm Credit Servs., FLCA v. Lake Cascade Airpark, LLC*, 156 Idaho 758, 763, 331 P.3d 500, 505 (2014) (emphasis added). Eckhardt points only to the testimony of its expert, Mr. Shaw, to support this claim. Setting aside whether Mr. Shaw could render such an opinion without first disclosing it, the great weight of the evidence in the record supports the Amended Final Order.

Not to be lost is the fact that Double C&J's water rights are senior to the Applications. *Amended Final Order* at 3-4. Double C&J's most senior most senior right, no. 67-14251, bears an 1881 priority date, authorizes year-round irrigation storage and stockwater storage, with year-

round stockwater from storage, and irrigation and irrigation from storage from March 1 through November 15. *Id.*; *see also* Exs. 301-303, 306-308 (Double C&J's water rights). Double C&J's points of diversion are located downstream of the illegal ponds represented by the Applications. *Amended Final Order* at 5. The ponds are located in the upper reaches of the Jenkins Creek drainage, making them difficult or impossible to access in the winter and spring, *Amended Final Order* at 13-14. In some years, Jenkins Creek reservoir (water right no. 67-14251), does not fill. R. at 389; Tr. at 136-37 (Testimony of Mr. Shaw acknowledging Jenkins Creek reservoir does not fill in some years).

As recited in the Statement of Facts, Mr. Hoff was the only person with actual on-the-ground experience to testify at the hearing, leaving his observations and opinions unrebutted. Mr. Hoff and his wife bought the Jenkins Creek Ranch in 1999. The fact that the farm had its own water supply was a key factor in his decision. Every drop of water is precious for Double C&J, as it gets by on less than 1 acre-foot of water per acre. Thus, any losses of water in the drainage or interference with flows to Jenkins Creek and the reservoir acutely impact Double C&J's water rights, supply, and livestock. Double C&J has year-round stockwater as evidenced by water right no. 67-14251. As explained at the hearing by Mr. Hoff, Double C&J has had cattle die due to lack of water supply in the Jenkins Creek drainage since the illegal construction and diversion of water into Eckhardt's ponds.

Mr. Hoff has been forced to fight for his right to water against Eckhardt for nearly twenty years. Mr. Hoff testified credibly, with nothing to hide. Despite being present at the hearing, none of the Eckhardt Family LLLP principles chose to testify, making it impossible to know their experience with water, livestock, or to gauge their credibility and sincerity. *State ex rel. Child v. Clouse*, 93 Idaho 893, 896-97, 477 P.2d 834, 837-38 (1970) ("As we have so often held,

the trial judge is the arbiter of conflicting evidence and his determination of the weight, credibility, inferences, and implications thereof is not to be supplanted by this court's impressions or conclusions from the written record."'). The only testimony on behalf of Eckhardt came through Mr. Shaw, who took no measurements of water to support any of his disclosed opinions, let alone the undisclosed ones.

As explained by Mr. Shurtleff, watermaster for Water District No. 65, the ponds have losses due to evaporation and seepage, which, in his experience, injure senior water rights. R. 180; Tr. at 9-15, 21. This is consistent with the Amended Final Order: "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." *Amended Final Order* at 7. Furthermore, Mr. Shurtleff's testimony credibly explained how and why such ponds impact water supply in a drainage like Jenkins Creek.

Possibly trying to rebut Mr. Shurtleff's testimony without recognizing the statements made, the Opening Brief alleges Eckhardt "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." *Opening Brief* at 12. To the extent this is possible, it flies in the face of the evidence presented at the hearing that Eckhardt will do what he says.

Eckhardt has attempted to chip away at the Double C&J water rights for decades, despite previous findings of injury from IDWR, Ex. 305 at 12, statements from IDWR that water rights are required, Ex. 360, and failure to comply with IDWR requests for information, Tr. 188. Most recently, Eckhardt was required to breach the ponds pursuant to the Consent Order he negotiated with IDWR. Ex. 367. The employee referenced in the Opening Brief, Rocky Stone, is the same employee who purportedly carried out the task of breaching the ponds. Ex. 367 (IDWR “received photographs from Rockford Stone . . . documenting that Pond Nos. 3, 4, and 11 were breached”). As explained at the hearing through the testimony of Mr. Hoff and photographic evidence, the ponds were not breached, and continued to impound water. Tr. at 206-09; Ex. 368. Without a watermaster, it will be left to Eckhardt to administer the very ponds he illegally built and that have been injuring Double C&J’s water rights ever since. Eckhardt’s own actions show he is incapable of following through with IDWR’s requirement and cannot administer the ponds without injuring Double C&J’s senior rights. The Amended Final Order is consistent on this point: “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.” *Amended Final Order* at 12.

The Director weighed the evidence before him, finding the Applications will injure Double C&J’s senior rights. “This Court has recognized the Director’s discretion to direct and control the administration of water in accordance with the prior appropriation doctrine.” *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) (hereinafter “BWI-17”). On review, the court “shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” I.C. § 67-5279(1). “The agency’s factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.” *Urrutia* at 357, 2

P.3d at 742. “[T]he state engineer is the expert on the spot, and we are constrained to realize the converse, that judges are not super engineers. The legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state, and we must extend to his determinations and judgment, weight on appeal.” *BWI-17* at 394, 336 P.3d at 801 (citing *Keller v. Magic Water Co.*, 92 Idaho 276, 282, 441 P.2d 725, 731 (1968)). The Amended Final Order is supported by the record, was issued within the realm of the Director’s expert discretion, and should be affirmed.

B. The Amended Final Orders Are Neither Arbitrary, Capricious, Nor An Abuse Of Discretion

In a similar vein to his argument that the Amended Final Order should be vacated because it is not supported by substantial evidence, Eckhardt alleges the decision is arbitrary, capricious, and an abuse of discretion. *Opening Brief* at 13. The standard of review for this assertion is slightly different:

Each standard of review, though similar, uses a slightly different means to ensure the fact finder reaches a reasonable conclusion. Clearly erroneous applies where factual findings are not supported by substantial and competent evidence. *Nw. Farm Credit Servs., FLCA v. Lake Cascade Airpark, LLC*, 156 Idaho 758, 763, 331 P.3d 500, 505 (2014). An abuse of discretion standard examines whether the district court acted within the boundaries of its discretionary decision and applicable legal standards, and reached a decision by exercising reason. *Wohrle v. Kootenai Cnty.*, 147 Idaho 267, 271, 207 P.3d 998, 1002 (2009). Whereas an arbitrary and capricious decision occurs where the decision was reached in an unreasonable manner or based on clearly erroneous findings. *See Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 595, 599, 288 P.3d 810, 812, 816 (2012).

Floyd v. Board of Ada County Commissioners, 164 Idaho 659, 668, 434 P.3d 1265, 1274 (2019) (emphasis added).

As stated immediately above in Section IV.A., the Amended Final Order evaluated the evidence in the record, coming to the reasoned conclusion that the evidence supported a finding of injury to Double C&J’s senior water rights. The manner in which the Director arrived at his

decision was not unreasonable given the water supply in the Jenkins Creek drainage, the lack of any measurements taken by Mr. Shaw, the actions of Eckhardt, and the very real fact that Double C&J has had calves die for lack of water. While Eckhardt dislikes the outcome, the Director acted within the realm of reason and should be affirmed based on the standard of review. *Matter of Permit No. 47-7680*, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988) (“In this case the department was required to resolve conflicting facts . . . and apply its statutory authority in deciding this fact-specific case. The department did this and found that the applicants had not met their burden of proof . . .”).

New to the arguments presented in Section A of Eckhardt’s Opening Brief is his allegation that Double C&J is illegally storing water in Monroe Reservoir. Any questions relating to Monroe Reservoir are irrelevant to this proceeding. However, to respond briefly to this new allegation: Monroe Reservoir was built in the early 1900s and is represented by water right no. 67-2044. Tr. at 171; Ex. 301. Monroe Reservoir is a historic structure, built on Jenkins Creek, Ex. 5 to Ex. 11, and has been storing water in the same way for a hundred years. To what extent Monroe Reservoir fills with water from Monroe Creek and/or Jenkins Creek is not before this Court. Ex. 333. The Director recognized the issue, considered it, *Amended Final Order* at 10, and found injury to Double C&J’s water rights, *id.* at 15.

C. The Amended Final Order Did Not Violate Eckhardt’s Due Process Rights

Eckhardt next alleges deprivation of “procedural due process” on the basis that he was not provided a meaningful opportunity to present evidence and argument in relation to Double C&J’s year-round water rights: “Eckhardt had no meaningful notice or meaningful opportunity to be heard regarding potential injuries to Hoff’s water rights during the non-irrigation season.” *Opening Brief* at 15.

First, there is no remedy the Court can provide on this point. Eckhardt is merely an applicant for a water right: “Idaho law has recognized that a water right is a property interest for purposes of the Fourteenth Amendment and, therefore, due process of law must be provided before the state deprives a citizen of a water right. *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977). In *Martin v. Spalding*, the Court of Appeals emphasized that in order for a cause of action for procedural due process to be established, the plaintiff must demonstrate not only that a property interest exists, but that state action is depriving him of that property interest. 133 Idaho 469, 473, 988 P.2d 695, 699 (Ct.App.1998). *See also Elbert v. Bd. of Educ.*, 630 F.2d 509, 512 (7th Cir.1980).” *In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (emphasis added). Here, the Applications are not water rights: “The case law is clear that an applicant does not obtain a vested water right at the point where an application is filed or the point where the permit is obtained. . . . We conclude that a water right does not vest until the statutory procedures for obtaining a license are completed, including the issuance of a license.” *Idaho Power Co. v. Idaho Dept. of Water Res.*, 151 Idaho 266, 274-75, 255 P.3d 1152, 1160-61 (2011).

Second, while Eckhardt disagrees with the Amended Final Order, it cannot be said that he was denied an opportunity to evaluate documents provided to him in discovery, the exhibits that were designated prior to hearing, and mount a defense. All of Double C&J’s water rights were made part of the record in this case, were before the Director, and are before this Court. Exs. 301-303, 306-308. Water right nos. 67-2044, 67-2097A, 67-14247, and 67-14251 have year-round seasons of use for storage and stockwater. Exs. 301, 302, 307, and 308. Water right nos. 67-2097B and 67-14246 have an irrigation season of use. Exs. 303 and 306. Moreover, the Applications themselves were for a year-round season of use, Exs. 1-10, putting them squarely

against all of Double C&J's water rights. Eckhardt's due process argument is without merit because he had every opportunity to prepare and present evidence and testimony.

D. The Amended Final Orders Do Not Prejudice Eckhardt's Substantial Rights

Similar to the argument as to lack of procedural due process, Eckhardt asserts his substantial rights were violated when the Director considered all of Double C&J's water rights in evaluating injury. *Opening Brief* at 17. As stated immediately above, Eckhardt had every chance to mount a defense.

Eckhardt also argues his substantial rights were violated when the Director denied the 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." *Opening Brief* at 18. As stated previously, the Applications, if approved, would injure Double C&J: "Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing senior rights." *Amended Final Order* at 17. Because the Applications will injure Double C&J, no substantial right of Eckhardt has been prejudiced.

V. WHETHER THE AMENDED FINAL ORDER SHOULD BE AFFIRMED ON THE ALTERNATIVE BASIS THAT NOT ALL ECKHARDT'S EXPERT OPINIONS WERE PREVIOUSLY DISCLOSED

As an alternative basis upon which to affirm the Amended Final Orders, this Court may find that the expert "opinion" of Mr. Shaw as to injury and sufficiency of supply should be excluded for failure to disclose. *Hauser Lake Rod & Gun Club, Inc. v. City of Hauser*, 162 Idaho 260, 264, 396 P.3d 689, 673 (2017) (lower decision may be affirmed on an alternative basis). In the *Opening Brief*, Eckhardt relies almost exclusively on the testimony of Mr. Shaw, which includes Mr. Shaw's undisclosed opinion of no injury to Double C&J's senior rights. *See e.g. Opening Brief* at 9 ("Eckhardt's expert witness, David Shaw, testified that there would be no injury to any of Hoff's water rights . . .").

Mr. Shaw's expert report contained two opinions:

1. There is unappropriated water in the Jenkins Creek basin available for appropriation.
2. The public interest would be served by maintaining the rest/rotation grazing that has been established through the use of stock watering ponds.

Ex. 11 at 2.

In this case, the *Scheduling Order* set an expert report disclosure deadline and Mr. Shaw filed his report on two narrow issues. R. 170-71. The burden is upon the applicant, Eckhardt, to prove a variety of factors to support the application, injury and sufficiency of supply being two key factors. I.C. § 42-203A(5); IDAPA 37.03.08.40.04. Mr. Shaw's expert report did not include opinions as to either of these critical factors. Yet, at the hearing, Mr. Shaw was allowed to testify to opinions not contained in his expert report over the repeated objection of counsel.

Mr. Shaw was a retained expert; thus, it was reasonable for Double C&J to expect his testimony to be limited to what was contained in his report. Expert witness disclosures are governed by the Idaho Rules of Civil Procedure which require, for retained experts, a "complete statement of all opinions to be expressed and the basis and reason of the opinion." I.R.C.P. 26(b)(4)(A)(i). The purpose of the rule is to "promote candor and fairness in the pre-trial discovery process. . . . Concerns are heightened when expert testimony is involved." *Zylstra v. State of Idaho*, 157 Idaho 457, 466, 337 P.3d 616, 625 (2014) (internal citations removed). "It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved." *Clark v. Klein*, 137 Idaho 154, 158, 45 P.3d 810, 814 (2002) (citation omitted). "Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he [or she] must have some idea of the bases of that opinion and the data relied upon."

Id. (brackets in original). “Typically, a failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence.” *Zylstra* at 466, 337 P.3d at 625.

Although the Rules of Civil Procedure do not specifically apply in IDWR’s administrative cases, the rationale behind requiring parties to fully disclose expert opinions prior to the hearing protects the hearing process and promotes the fairness that all parties coming before the agency expect. In fact, in the Rangen, Inc. delivery call, the Director struck the undisclosed expert opinion of Dr. Charles Brendecke, given at the administrative hearing, in order to protect parties from surprise. *Order Granting May 15, 2013 Motion to Strike Certain Testimony of Dr. Charles Brendecke* (May 16, 2013). “Counsel for Rangen and SWC orally objected to Dr. Brendecke rendering an opinion on values he had not previously disclosed. Counsel for Rangen and SWC sought to strike that testimony of Dr. Brendecke. . . . While the parties were allowed to cross-examine Dr. Brendecke, the parties were not afforded to discover the bases upon which he assigned his numerical values for ‘correction’ to the ‘water budget’ and for ‘conceptual uncertainty.’ Because the parties were not afforded the opportunity to discover the bases of Dr. Brendecke’s opinions, the Director agrees to strike Dr. Brendecke’s testimony” *Id.* at 3.²

When an expert is allowed to testify to opinions not disclosed, an unfair advantage is created for the party to whom the undisclosed opinion is given. In this case, it is compounded by the fact that the undisclosed opinions were given on key factors to support Eckhardt’s applications and are now also used to support Eckhardt’s main argument on appeal. Therefore,

² This delivery call, CM-DC-2011-004, was before the Court on judicial review in CV-2014-1338. *See also In re Distribution of Water to Water Right Nos. 36-02551 & 36-07694(Rangen, Inc.)*, 159 Idaho 798, 367 P.3d 193 (2016).

the expert “opinions” of Mr. Shaw should have been excluded for failure to disclose and they should be disregarded on review.

VI. WHETHER DOUBLE C&J ENTITLED TO AN AWARD OF ITS COSTS AND ATTORNEYS’ FEES ON APPEAL

Double C&J raises as an issue whether it is entitled to an award of its reasonable costs and attorneys’ fees pursuant to I.C. § 12-121, I.R.C.P. 54, I.A.R. 40, and I.A.R. 41. Reasonable attorneys’ fees may be awarded to the prevailing party when the court finds “the case was brought, pursued or defended frivolously, unreasonably or without foundation.” I.C. § 12-121; I.R.C.P. 54(e). Costs are awarded to the prevailing party as a matter of right. I.R.C.P. 54(d); I.A.R. 40.

Here, Eckhardt built illegal ponds over the course of many, many years, injuring the senior rights of Double C&J. Eckhardt has attempted to chip away at the Double C&J water rights for decades, despite previous findings of injury from IDWR, Ex. 305 at 12, statements from IDWR that water rights are required, Ex. 360, and failure to comply with IDWR requests for information, Tr. 188. Most recently, Eckhardt was required to breach the ponds pursuant to the Consent Order he negotiated with IDWR, Ex. 367, which he has not done, Ex. 368. Eckhardt attempted to remedy the illegal diversions through the Applications.

The hearing officer and Director both denied the Applications, finding injury to Double C&J. Eckhardt advances to this Court the same or similar theories previously presented to IDWR, asking the Court to second-guess and reweigh evidence already considered. An award of reasonable costs and attorneys’ fees is proper in this scenario. “Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law.”

Furquay v. Low, 162 Idaho 373, 379, 397 P.3d 1132, 1138 (2017).

VII. CONCLUSION

Based on the foregoing, Double C&J respectfully requests the Court affirm the Amended Final Order and, in so doing, award Double C&J its reasonable costs and attorneys' fees incurred on review.

DATED this 21st day of May, 2020



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2020, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

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