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DEPARTMENT OF  
WATER RESOURCES

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Attorneys for Eckhardt Family LLLP

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

**IN THE MATTER OF APPLICATIONS  
FOR PERMIT 67-15292 THROUGH  
67-15298 AND 67-15300 IN THE NAME  
OF ECKHARDT FAMILY LLLP**

ECKHARDT FAMILY LLLP'S  
EXCEPTIONS TO AMENDED  
PRELIMINARY ORDERS DENYING  
APPLICATIONS AND ORDER GRANTING  
PETITIONS FOR RECONSIDERATION, IN  
PART

COMES NOW Applicant Eckhardt Family LLLP ("Eckhardt"), by and through its attorney of record Norman M. Semanko of the firm Parsons Behle & Latimer, and hereby submits to the Director of the Idaho Department of Water Resources ("Department" or "IDWR") the following Exceptions to the Hearing Officer's: (1) Amended Preliminary Order Denying Applications (In the Matter of Applications for Permit 67-15292 through 67-15297) ("Amended Preliminary Order 1"); (2) Amended Preliminary Order Denying Applications (In the Matter of Applications for Permit 67-15298 and 67-15300) ("Amended Preliminary Order 2"); and (3) Order Granting Petitions for Reconsideration, in Part (In the Matter of Applications for Permit 67-15292 through 67-15298 and 67-15300) ("Reconsideration Order"), pursuant to I.C. § 67-5243 and Rule 730 of the Rules of Procedure of the Department, IDAPA 37.01.01.730.

ECKHARDT FAMILY LLLP'S EXCEPTIONS TO AMENDED PRELIMINARY ORDERS DENYING APPLICATIONS AND ORDER GRANTING PETITIONS FOR RECONSIDERATION, IN PART – 1  
4845-6605-6610v1

## **I. PROCEDURAL BACKGROUND**

On September 12, 2019, Eckhardt filed the above-captioned applications. They were subsequently amended on November 9, 2019. The uses proposed in all eight applications are stockwater storage and stockwater from storage, ranging in size from 0.4 to 1.5 acre-feet, and totaling 4.9 acre-feet. Exhibits 1-8.

The applications were filed in direct response to an IDWR enforcement action. That enforcement action involved a total of 12 ponds. Eckhardt filed applications for all 12 ponds. Exhibit 366. In addition to the eight above-captioned applications, Eckhardt filed four other applications as part of the enforcement package. Three of those other applications were discussed at the hearing in this matter, including the fact that the protests had been conditionally withdrawn for those ponds to proceed forward with a condition limiting diversions to storage to occur only between November 15 and May 15, rather than year round. Testimony of Shaw.

The eight above-captioned applications were protested by John Hoff. A hearing was held on May 23, 2019. The Hearing Officer issued two separate Preliminary Orders denying the above-captioned applications on July 8. Eckhardt timely filed petitions for reconsideration on July 22.

The Hearing Officer issued a Reconsideration Order for all eight of the above-captioned applications, along with Amended Preliminary Order 1 and Amended Preliminary Order 2. All three orders are dated August 8, 2019 and were served on the parties by U.S. Mail on August 9, 2019, thereby providing a deadline of August 23 (14 days from the service date) for the filing of Exceptions with the Director. Rule 730, IDWR Rules of Procedure.

## II. EXCEPTIONS

The Director should modify the Amended Preliminary Orders to address the following Exceptions, and approve the applications for permit, with conditions.

1. The Proposed Stockwater Storage Diversions Can and Should be Conditioned to Prevent Injury.

Rather than continuing to pursue year round diversions to storage, Eckhardt has proposed shortening the diversion period to that period of the season which avoids injury. The Director has authority to condition approval of the permits to avoid injury. Rule 50.01, Water Appropriation Rules, IDAPA 37.03.08.

In his original Preliminary Orders, the Hearing Officer found that a May 15 shut-off date is too late in the spring to prevent injury for these particular applications. He further concluded on reconsideration that an April 15 shut-off date would not change his injury analysis or conclusions, despite the record-based arguments made to the contrary on reconsideration. Reconsideration Order at 4. Instead, he concluded: "Implementing a March 1 shut-off date for the proposed ponds would alleviate all injury concerns." *Id.*

Conditioning the water rights to include a fixed shut-off date would indeed alleviate all injury concerns. Eckhardt requests that the Director do exactly that, as a condition of approval for the applications. The Hearing Officer has correctly found that there is sufficient water available for the ponds and that all other criteria for issuance of the permit have been satisfied. Amended Preliminary Order 1; Amended Preliminary Order 2. The remaining question is injury and what the appropriate shut-off date is to avoid it, so that Eckhardt can divert and use the available, unappropriated water for the stockwater ponds on his property.

As discussed in Eckhardt's petitions for reconsideration, the Director's injury analysis requires an inquiry into the "historical amount beneficially used" by Hoff, not just what appears in his partial decrees. Rule 45.01.a.1, Water Appropriation Rules.

The Hearing Officer seemed to recognize the relevance of Hoff's actual beneficial use in some places. See e.g., Reconsideration Order at 3 (noting that protections are necessary "after Hoff starts irrigating") and 4 (noting that water was available to fill the ponds "prior to Hoff's irrigation demand" and that "Hoff did not commence irrigation from Jenkins Creek until April 6" in 2018). For example, the Amended Preliminary Orders include a table setting forth the dates on which Hoff commenced irrigation each year for the past six years. Amended Preliminary Order 1, Finding of Fact 34. None of these dates -- the dates when beneficial use actually commenced -- were March 1. The Hearing Officer nevertheless concluded that March 1 is the shut-off date that "would alleviate all injury concerns," without regard to when Hoff's irrigation actually begins. Hoff's historical use spans 20 years and has been well-recorded by Idaho Power. Reconsideration Order at 4; Exhibits 21, 321, 322.

On reconsideration, Eckhardt suggested that a shut-off date of April 15 would avoid injury to Hoff's water rights, as discussed during rebuttal testimony. Petition for Reconsideration at 4. Since arriving in 1999, Hoff has not irrigated his property until April in all but one year. Exhibits 21, 321, 322. March 1 is not reflective of Hoff's historical use; April is. Since some of Hoff's use has commenced during the first half of the month, an earlier date in April may be an appropriate shut-off date than April 15.

In the alternative, 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.

For the Director's consideration, Eckhardt suggests that the following condition be included in the permits:

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

This proposed condition is taken directly from the Department's proposed permits for three additional ponds on the Eckhardt property, which are applications 67-15299, 67-15301 and 67-15302 (the conditionally withdrawn protests discussed above and at the hearing by Dave Shaw), albeit with a different shut-off date (May 15). Those three ponds were part of the same case enforcement action as the other ponds. Exhibit 366. They are situated just east of Jenkins Creek in the Sheep Creek and Monroe Creek drainages. Testimony of Shaw. Additional details are available in the records of the Department. See e.g., Letter from Nick Miller, Regional Manager to Norman Semanko, Kirk Chandler and David Woodcock (August 20, 2019) (setting forth proposed condition and draft permit with shut-off date). Department records also verify that one other Eckhardt pond permit application, 67-15303, was not protested and will soon be approved.

This accounts for all 12 ponds that are subject to the Department's enforcement action. Four of them are moving forward to final permitting; the eight at issue here are before the Director on Exceptions. They are all situated on the Eckhardt ranch and are a valuable, coordinated part of providing water for cattle and reducing stream bank erosion. Exhibit 17; Testimony of Shaw.

If necessary to avoid injury, the Director could of course substitute the bracketed dates above with February 28 and March 1 (the beginning of the decreed irrigation period of use), or

whatever dates he determines are appropriate from his review of this matter, pursuant to the Director's authority under I.C. § 42-203A(5) and Rule 45.01.a.1, Water Appropriation Rules.

By these Exceptions, Eckhardt requests that the Director determine the appropriate shut-off date to avoid injury and include it as a condition of approval in the permits.

2. Daily Administration is not Required if there is a Fixed Cut-Off Date for Diversions to Storage.

On reconsideration, the Hearing Officer concluded that "to fully protect Hoff's senior water right from injury, there must either be daily administration during the irrigation season, or the shut-off date needs to occur prior to the irrigation season." Reconsideration Order at 3 (emphasis added). However, the Amended Preliminary Orders continue to rely upon an extensive discussion of the need for daily administration. With a firm shut-off date, there would be no need for daily administration.

3. Access to the Ponds is a Manageable Implementation Issue.

The last remaining concern expressed by the Hearing Officer in his injury analysis is access to the ponds during the spring, when the flow to the pond would need to be shut-off. The Hearing Officer concluded that all injury concerns can be alleviated with a fixed shut-off date before irrigation commences. Reconsideration Order at 3-4. However, he then opined "that the proposed ponds would likely be inaccessible" and therefore decided that the applications should still be denied, even with a fixed shut-off date. Id.

While it may not always be easy, the ponds have been accessed during the spring. If, as the record confirms, an IDWR agent could hike to some of the ponds (and throughout the sub-drainage for those ponds) (Exhibit 11), with limited familiarity of the property, then Eckhardt's employees (including Rocky Stone, mentioned during Shaw's testimony), who are well familiar

with the property, could certainly access the ponds to shut-off the diversions. These pond sites are all located on the Eckhardt ranch. Accessing remote locations on the property, including existing water sources, is a necessary part of managing the ranch and has been for decades. Testimony of Shaw. Again, there will be no need for daily administration, only an annual shut-off.

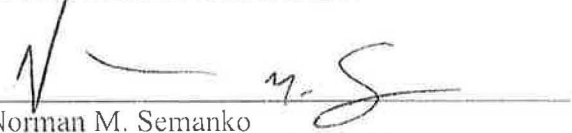
Accordingly, the Hearing Officer's conclusion that the ponds are inaccessible is overstated and not an appropriate basis for concluding that injury will occur or otherwise denying the applications. Administration will not occur on a daily basis, as the Hearing Officer had contemplated. As a condition, the fixed shut-off date will prevent injury from occurring. It will be Eckhardt's responsibility to meet that condition, or risk losing the water right for failure to comply with the conditions, just as with his other - soon to be final - stockwater pond water right permits.

### III. CONCLUSION

For the reasons set forth above, and as further supported by the petitions for reconsideration previously filed, and the exhibits and witness testimony in this matter, Eckhardt Family LLLP respectfully requests that the above-captioned applications for permit be granted, with conditions included to prevent injury.

DATED this 23rd day of August, 2019.

PARSONS BEILE & LATIMER

By   
Norman M. Semanko  
Attorneys for Eckhardt Family LLLP

## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2019, 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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