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DEPARTMENT OF  
WATER RESOURCES

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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**

PETITION FOR RECONSIDERATION OF  
ORDERS ON EXCEPTIONS; FINAL  
ORDERS

COMES NOW Applicant Eckhardt Family LLLP (“Applicant” or “Eckhardt”), by and through its attorney of record, Norman M. Semanko of the firm Parsons Behle & Latimer, and hereby respectfully requests that the Director reconsider: (1) *Order on Exceptions; Final Order* (In the Matter of Applications for Permit 67-15292 through 67-15297) (“Final Order 1”); and (2) *Order on Exceptions; Final Order* (In the Matter of Applications for Permit 67-15298 and 67-15300) (“Final Order 2”), both dated and served on November 14, 2019, pursuant to Idaho Code Section 67-5246 and Rule 740 of the Rules of Procedure of the Idaho Department of Water Resources (“Department” or “IDWR”), IDAPA 37.01.01.740. The Applicant does not request reconsideration of Order 1 as it applies to Application for Permit No. 67-15294 (Pond 3) and requests that said application be denied.

## ISSUES FOR RECONSIDERATION

1. The Director should reconsider whether injury will occur to Jenkins Creek water rights during the non-irrigation season.

2. The Director should reconsider whether a condition requiring a complete diversion shutoff during the irrigation season would eliminate potential injury to water rights on Jenkins Creek during the irrigation season.

## GROUND FOR RECONSIDERATION

The Director appropriately concluded that the Applicant's proposed use would not injure the storage elements of the Protestant's water rights. Order 1 at 7-8; Order 2 at 6-7. However, he further concluded that injury could occur to the Protestant's "year-round water rights." Order 1 at 9, n.5 and 10; Order 2 at 8, n.5 and 9.

There are two discrete issues regarding injury to the Protestant's year-round water rights, which should be reconsidered: (1) Whether injury will occur to Jenkins Creek water rights during the non-irrigation season; and (2) whether injury that might otherwise occur during the irrigation season could be eliminated by conditioning the use to require a diversion shutoff date of February 28 (i.e., no diversion of water during the irrigation season of March 1 to November 15).

### 1. There is No Injury to the Protestant's Water Rights During the Non-Irrigation Season.

The Director concluded that the Applicant did not address the potential of injury to the Protestant's year-round water rights. Order 1 at 10; Order 2 at 9. Presumably, the Director is referring to the Protestant's stock water right, which is a component of Water Right No. 67-14251. This is the Protestant's only year-round (non-storage) water right on Jenkins Creek. Order 1 at 4-5; Order 2 at 4; Exhibits 302, 303, 308. The Protestant's stock water right has an authorized diversion rate of .03 cfs and is limited to 13,000 gallons per day. Exhibit 308.

The Applicant's expert witness testified regarding injury to water rights on Jenkins Creek, which included his review of the Protestant's water rights, and gave his opinion that there is water available for appropriation and that the proposed use would not injure existing water rights. Testimony of Dave Shaw ("Shaw"), IDWR's May 23, 2019 Hearing Audio ("Hearing Audio") beginning at minute 44. There was no limitation in his opinion regarding injury to irrigation v. year-round water rights (including Protestant's .03 cfs/13,000 gallon per day stock water right).

Shaw's no injury opinion was based on the evidence included in his expert report (Exhibit 11). Id. This included the fact that the Protestant was diverting all available water during March, 2019 (through a 15-inch pipe, according to Testimony of Hoff ("Hoff"), Hearing Audio at 4 hours 52 minutes; Order at 5), while additional water was spilling past the Protestant's diversion and discharging into the Snake River. Id. During the Hearing Officer's questioning, Shaw testified that the excess flow past the Protestant's diversion was 1 cfs. Shaw, Hearing Audio beginning at 3 hours 11 minutes. The Protestant offered no expert opinion to the contrary.

Shaw's testimony revealed that water in Jenkins Creek is low in the summer for cattle. Shaw. However, this stock water shortage does not exist in the non-irrigation season. The Protestant has owned the property since 1999. During those 20 years, the Protestant has noted stock water shortages in the summer and fall, during the irrigation season (March 1 to November 15), not during the non-irrigation season (November 16 to February 28). Hoff, Hearing Audio at 3 hrs 50 mins (Jenkins Creek dries up in July or August), 3 hrs 52 mins (land hardens up until it rains in fall), 4 hrs 1 min (run out of water in July or August), 4 hrs 2 mins (water starts to run again in the fall), 4 hrs 55 mins (out of water in August); 4 hrs 59 mins (excess water exists before irrigation season), 5 hrs, 1 min (shortage problem begins in July and August), 5 hrs 21 mins (Jenkins Creek dries up completely in July), 5 hrs 23 mins (Jenkins Creek is dry from August

until fall), 5 hrs 26 mins (concerns are about summer flows), 5 hrs 28 mins (concerns are about stock water in late spring and early summer), 5 hrs 32 mins (lack of stock water in the fall).

During questioning from the Hearing Officer, the Protestant admitted to excess flows (beyond his water right needs) during the non-irrigation season. Id. at 4 hrs 59 mins. This is consistent with the Protestant's previous testimony in another matter regarding high or excess flows during the non-irrigation season. Exhibit 305 (large quantities of flow during spring runoff). The Protestant offered no testimony or other evidence suggesting that there have been any impacts to the stock water right during the non-irrigation season over the 20 years that the Protestant has owned the property. This is despite the construction and existence of the Applicant's Jenkins Creek ponds during that period. As a result, the record supports a finding that the Protestant's year-round stock water right will not be injured during the non-irrigation season.

In addition, the Protestant has been storing Jenkins Creek water in Monroe Reservoir during the non-irrigation season without water right authorization. Order 1 at 8. The Protestant diverts water to storage in Monroe Reservoir from November 15 to March 15. Exhibit 14; Hoff, Hearing Audio at 4 hrs 55 mins. If this Jenkins Creek water (up to 260 acre feet of unauthorized storage that fills every year, according to Hoff, Hearing Audio at 5 hours 17 minutes; Order 1 at 7), had been allowed to flow down Jenkins Creek during this time period, it would have satisfied the Protestant's stock water right. Like the Director's conclusion that the Applicant's proposed use would not injure the storage elements of the Protestant's water rights (Order 1 at 8), the proposed use would not injure the Protestant's stock water right during the non-irrigation season. Because there is no injury during the non-irrigation season, no mitigation is required during that period.

2. A Diversion Shutoff During the Entire Irrigation Season Would Avoid Any Potential Injury to Water Rights During the Irrigation Season.

The Director disagreed with the Hearing Officer's conclusion that "[i]mplementing a March 1 shut-off date for the proposed ponds would alleviate all injury concerns." Order 1 at 9, n.5; Order 2 at 8, n.5. This is understandable, given the Director's concerns about potential injury during the non-irrigation season. However, those concerns have been addressed above and should be reconsidered by the Director accordingly. There is no injury during the non-irrigation season. As a result, the remaining concern is avoiding injury during the irrigation season. On that point, the Hearing Officer's conclusion about a March 1 shut-off date alleviating all injury concerns is valid and should be reconsidered by the Director. In addition, the Director's concerns about the Applicant's ability to implement such a condition should be reconsidered.

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

The Hearing Officer took official notice of the enforcement action file (E2017-1235) involving the Applicant's ponds which are the subject of this matter. Hearing Audio at 2 hrs 59 min; see also, Exhibits 362-367. The Applicant has complied with the Consent Order and Agreement. Exhibit 367; see also enforcement action file (E2017-1235), including email communications between Applicant and IDWR staff regarding continuing compliance. As part of that process, the Applicant first breached Ponds 3, 4 and 11. Exhibit 367. The Applicant then modified the other five Jenkins Creek ponds (1, 2, 5, 6 and 9), as well as Ponds 4 and 11, to allow

water to bypass the ponds entirely. See, enforcement action file (E2017-1235). After initially breaching Pond 3, the Applicant has since destroyed Pond 3 and does not intend to use it, thus the request above (on page 1) that the Director deny Application for Permit No. 67-15294.

The existing bypass devices on the 7 remaining Jenkins Creek ponds will allow the Applicant to implement the irrigation season shut-off condition by February 28. Only one visit to each pond is necessary to accomplish this. The Applicant has demonstrated that he has adequate manpower for this work. Shaw, Hearing Audio beginning at min 44 (discussing Rockford Stone, who works for the Applicant); see also, enforcement action file (E2017-1235), including email communications between Applicant and IDWR staff regarding work done at ponds by Rockford Stone. If the area is muddy and inaccessible on or before February 28 in a particular year, a shut-off date as soon as possible thereafter would not result in injury given the high flow conditions that would exist in such a circumstance. Turning the diversion back on after the irrigation season would also be a one-time event each year.

While it has cost money and comes with a shorter season of use, the Applicant has demonstrated its willingness – and ability – to comply with such a condition and to avoid injury to existing water rights. This is consistent with the public witness testimony provided by Ron Shurtleff, Water District 65 Watermaster, which indicated that there are methods to avoid being a detriment to downstream water rights, including bypassing the ponds. Testimony of Ron Shurtleff. He further testified that such a mechanism might come at a cost financially and would shorten the season of use but could still be of value to the Applicant. *Id.* That is exactly the case here. This is the type of conditioned operation that he testified could be successful. *Id.*

## CONCLUSION

For the reasons set forth above, the Director should reconsider Order 1 and Order 2 and issue amended Final Orders granting the above-captioned applications (except for Application for Permit No. 67-15294), with conditions.

DATED THIS 29th day of November, 2019.

PARSONS BEHLE & LATIMER

By 

Norman M. Semanko

Attorneys for Eckhardt Family LLLP

## CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 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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