

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF)	
APPLICATION FOR PERMIT)	PRELIMINARY ORDER
67-15322 IN THE NAME OF)	DENYING APPLICATION
<u>ECKHARDT FAMILY LLLP</u>)	

PROCEDURAL HISTORY

On November 23, 2018, Eckhardt Family LLLP ("Eckhardt") filed Application for Permit 67-15322 with the Idaho Department of Water Resources ("Department"). The Department published notice of the application on December 6 and 13, 2018. John D. Hoff ("Hoff") filed a protest against the application.

The Department conducted an administrative hearing on May 23, 2019. Eckhardt was represented by attorney Norm Semanko. Hoff was represented by attorneys Candice McHugh and Chris Bromley.

Exhibits 1-17, 19 and 21 offered by Eckhardt and Exhibits 301-303, a portion of 305, 306-308, 314, a portion of 316, 321-323, 325-327, 330, 333, 355 for limited purposes, 359, 360, 362 and 366-368 offered by Hoff were admitted into the administrative record. Exhibits 304, 324 and 328 offered by Hoff were excluded from the record. The remaining exhibits identified by the parties in their pre-hearing disclosures were not offered for admission. Dave Shaw ("Shaw") testified as an expert witness for Eckhardt at the hearing and Hoff testified on his own behalf. Ron Shurtleff ("Shurtleff"), watermaster for Water District 65 (Payette River), testified as a public witness.

After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 67-15322 proposes to divert up to 200 acre-feet per year from Jenkins Creek for stockwater storage in an existing on-stream reservoir known as Monroe Reservoir in Section 6, T12N, R05W. Ex. 9.

2. Eckhardt owns the property where the Monroe Reservoir dam is located. Testimony of Shaw. Eckhardt does not own Monroe Reservoir dam or any of the infrastructure associated with the dam. *Id.* Eckhardt does not propose to operate any of the infrastructure at the dam. *Id.*

3. Part of the land that would be inundated by the proposed storage use is owned by the BLM. Ex. 9. Eckhardt has a grazing lease from the BLM for the subject property, but has not provided evidence of authority to inundate the BLM property.

4. Monroe Reservoir is located in the upper reaches of the Jenkins Creek drainage. Ex. 11 at Exhibit 1. Constructing a stockwater reservoir in the upper part of the drainage allows livestock to access the upland forage areas in the basin and reduces the stream bank erosion in the lower portions of Jenkins Creek. Ex. 17.

5. Jenkins Creek is a low-elevation drainage with little or no forested areas. Ex. 11 at 1 and Ex. 11 at Exhibit 4 (map). The snow melt run-off period lasts for only a few days. Ex. 5 at Preliminary Order (Findings of Fact, ¶ 7). After the run-off period, flow in Jenkins Creek remains high during the early spring, but diminishes to little or no flow during the summer months. *Id.*

6. Hoff purchased his property on Jenkins Creek in 1999. Testimony of Hoff. Hoff conducts business under the name Double C & J Land Co., the listed owner of record for the following water rights on Jenkins Creek:

Water Right 67-2097A

Quantity:	6.54 cubic feet per second (cfs)		
	345 acre-feet per year (afy)		
Priority Date:	6/29/1914		
Beneficial Uses:	Irrigation	3/1 to 11/15	6.54 cfs
	Irrigation Storage	1/1 to 12/31	345 afy
	Irrigation from Storage	3/1 to 11/15	345 afy
	Diversion to Storage	1/1 to 12/31	14.5 afy

Water Right 67-2097B

Quantity:	9.06 cfs		
Priority Date:	5/11/1918		
Beneficial Uses:	Irrigation	3/1 to 11/15	9.06 cfs

Water Right 67-14251

Quantity:	23.38 cfs		
	345 afy		
Priority Date:	4/12/1881		
Beneficial Uses:	Irrigation	3/1 to 11/15	9.06 cfs
	Irrigation Storage	1/1 to 12/31	345 afy
	Irrigation from Storage	3/1 to 11/15	345 afy
	Stockwater	1/1 to 12/31	0.03 cfs
	Stockwater Storage	1/1 to 12/31	1.4 afy
	Stockwater from Storage	1/1 to 12/31	1.4 afy
	Diversion to Storage	1/1 to 12/31	14.5 cfs

Exs. 302, 303, 308.

7. Water rights 67-2097A, 67-2097B and 67-14251, when combined, are limited to a diversion rate of 9.06 cfs for irrigation purposes.

8. Water rights 67-2097A, 67-2097B and 67-14251, in combination, authorize the irrigation of 453 acres. These water rights describe three common points of diversion:

NENE, Section 24, T12N, R06W ("Jenkins Reservoir Diversion")
SEnw, Section 6, T11N, R05W
Lot 2 (NWNW), Section 18, T11N, R05W ("Pump Station")

Exs. 302, 303, 308.

9. Water rights 67-2097A, 67-2097B and 67-14251 contain an error in the legal description for one of the three common points of diversion. The Pump Station described in Lot 2 (NWNW) of Section 18 is actually located in Lot 1 (NWNW) of Section 18. Ex. 11 at Exhibit 1.

10. Water rights 67-2097B and 67-14251 describe another common point of diversion in the SENW, Section 7, T11N, R05W ("Lower Reservoir Diversion"). Water right 67-2097A describes a fourth point of diversion in the SENW, Section 6, T11N R05W. It appears this Section 6 reference is incorrect and should have been in Section 7 to match water rights 67-2097B and 67-14251, consistent with the physical location of the Lower Reservoir Diversion. Ex. 11 at Exhibit 1.

11. All of Hoff's authorized points of diversion on Jenkins Creek are located downstream of Monroe Reservoir. *Id.*

12. Hoff is currently authorized to divert water from Jenkins Creek for storage at two locations on Jenkins Creek. Ex. 11 at Exhibit 1. The upper reservoir, known as Jenkins Reservoir, is an off stream reservoir located upstream of Hoff's irrigated acres. *Id.* The other reservoir, referred to as the Lower Reservoir in this order, is a small off-stream reservoir with a capacity less than 50 acre-feet located adjacent to Hoff's irrigated farm ground. *Id.*

13. Hoff conveys water from Jenkins Creek to Jenkins Reservoir through a 15-inch diameter pipeline, which can become clogged with debris. Testimony of Hoff. Jenkins Reservoir, which has an estimated capacity of 175 acre-feet, fills most years but not every year. *Id.*; Ex. 16.

14. Hoff also stores water in Monroe Reservoir, an on-stream reservoir located approximately 2.5 miles upstream of the Jenkins Reservoir Diversion. Ex. 11 at Exhibit 1. Monroe Reservoir has an estimated capacity of 260 acre-feet. Testimony of Hoff.

15. Hoff owns water right 67-2044, which bears a priority date of May 3, 1914 and authorizes the diversion of 6.40 cfs from Monroe Creek to fill Monroe Reservoir. Ex. 301. Monroe Creek is a separate drainage located to the east of the Jenkins Creek drainage. Ex. 11 at Exhibit 1.

16. The ditch used to convey water from Monroe Creek into the Jenkins Creek drainage is in poor repair. Testimony of Hoff. Because of the condition of the Monroe Creek ditch, Hoff has diverted very little water from Monroe Creek in the last twenty years. *Id.*

17. Hoff has historically used Jenkins Creek water to fill Monroe Reservoir. Testimony of Hoff. Monroe Reservoir fills every year. *Id.*

18. Hoff has filed a transfer application to add Monroe Reservoir as an authorized point of diversion under Jenkins Creek water right 67-2097A. Ex. 333. Currently, Hoff is not authorized to capture Jenkins Creek water in Monroe Reservoir. Ex. 15.

19. In the Jenkins Creek drainage, the irrigation season is March 1 to November 15. The non-irrigation season is November 16 to February 28.

20. In most years, the flow in Jenkins Creek exceeds the demand under Hoff's water rights for a period of time. Testimony of Hoff.

21. According to data from Idaho Power Company, over the last six years Hoff commenced irrigation (pumped water from the Lower Reservoir) on the following days:

Year	Irrigation Start Date
2013	April 3
2014	April 10
2015	March 11
2016	April 7
2017	May 25
2018	April 6

Exs. 321 and 322.

RELEVANT LEGAL PROVISIONS / ANALYSIS

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of

water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The applicant bears the burden of proof for the elements set forth in Idaho Code § 42-203A(5). IDAPA 37.03.08.40.04.

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

...

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

Injury to Storage Rights

Hoff's water rights do not authorize the diversion of Jenkins Creek at Monroe Reservoir. Ex. 15. Since purchasing his property in 1999, Hoff has captured Jenkins Creek water in Monroe Reservoir. Hoff has filed an Application for Transfer to add Monroe Reservoir dam as an authorized point of diversion for water right 67-2097A from Jenkins Creek. Hoff's transfer application has not been approved. The hearing officer must evaluate injury based on the existing elements of relevant water rights not based on elements that may exist in the future.

Hoff testified that Jenkins Reservoir fills most years, but not every year. According to Hoff, there have been two or three years out of the last twenty years where Jenkins Reservoir has not filled. If Eckhardt diverts and stores Jenkins Creek water in Monroe Reservoir, it could affect Hoff's ability to fill Jenkins Reservoir under water rights 67-2097A and 67-14251 in certain years. To protect Hoff's senior storage rights from injury, once it is determined that Jenkins Reservoir will not fill, Eckhardt could be required to release enough water to fill the remaining space in Jenkins Reservoir.

Injury to Irrigation and Stockwater Rights

Monroe Reservoir is located on Jenkins Creek. Hoff is not currently authorized to store Jenkins Creek water in Monroe Reservoir. Ex. 15. The evaporation and seepage losses associated with Monroe Reservoir occur continuously when the reservoir is impounding water. During times when Jenkins Creek is flowing through Monroe Reservoir and reaching Hoff's diversions, the losses associated with the reservoir could diminish the quantity of water available to Hoff. If Hoff diverts water from Monroe Creek (as authorized by water right 67-2044) to fill Monroe Reservoir, then the storage in Monroe Reservoir will not injure Hoff's other water rights. In other words, Hoff cannot injure his own water rights. In contrast, if Eckhardt diverts Jenkins Creek to fill Monroe Reservoir, then the evaporation and seepage from the reservoir could injure Hoff's water rights. Eckhardt did not provide any mitigation plan to offset the losses associated with Monroe Reservoir when Jenkins Creek is flowing throughout the basin and Hoff's demand for water on Jenkins Creek (within the authorized limits of water rights 67-2097A, 67-2097B and 67-14251) is not fully satisfied. Therefore, Eckhardt has not satisfied its burden of proof under Idaho Code § 42-203A(5)(a).

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible . . ." IDAPA 37.03.08.45.01.b.

Hoff testified that he has historically filled Monroe Reservoir with Jenkins Creek water and that Monroe Reservoir fills every year. Hoff testified that the current capacity of Monroe Reservoir is approximately 260 acre-feet. It is reasonable to assume that Hoff was able to store Jenkins Creek water in Monroe Reservoir during times and in quantities that were not adverse to his Jenkins Creek irrigation rights. Eckhardt proposes to store only 200 acre-feet in Monroe Reservoir, less than the 260 acre-feet historically captured by Hoff. Eckhardt has demonstrated, through Hoff's testimony, that the water supply is sufficient for the proposed use.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An applicant must have "legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way." IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is "in the process of obtaining other permits needed to construct and operate the project" and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

Eckhardt has not demonstrated legal access to the property and facilities necessary to construct and operate the proposed project. Eckhardt does not have legal access to the diversion infrastructure at Monroe Reservoir dam and has no authority to open or close the gates associated with the reservoir. Without the authority to close the outlet for the dam, Eckhardt has no ability to complete the proposed project. Further, Eckhardt has not demonstrated the authority to impound water on the BLM property. This would likely require a right-of-way from the BLM. Eckhardt did not provide any evidence that it is pursuing an easement or right-of-way from the BLM for inundation of the BLM property.

Sufficient Financial Resources

Rule 45.01.d of the Department's Water Appropriation Rules sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. "An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director." IDAPA 37.03.08.45.01.d.ii.

As noted above, Eckhardt has not demonstrated legal access to the Monroe Reservoir infrastructure. Therefore, in order to accomplish the proposed beneficial use, Eckhardt would need to construct his own diversion dam. Eckhardt did not provide any information about the cost of constructing a dam which could impound 200 acre-feet. Nor did Eckhardt provide financial records confirming that he could afford to construct such a dam.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3).

It is in the local public interest to distribute livestock use of a stream throughout a watershed rather than concentrate the use in a small area of a stream, which can lead to loss of riparian vegetation, erosion and degradation of the stream. Ex. 17.

Conservation of Water Resources

Providing stockwater to animals through on-stream ponds and reservoirs is a common practice in Idaho and is consistent with the conservation of water resources within the state of Idaho. Further, it is consistent with the conservation of water in Idaho to capture and store water that would otherwise flow out of the basin and out of the state.

CONCLUSIONS OF LAW

Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing water rights, that the application was made in good faith or that it has sufficient financial resources to complete the project. Therefore, Application 67-15322 should be denied. Eckhardt has demonstrated that the water supply is sufficient for the proposed storage and that the proposed project is in the local public interest and is consistent with the conservation of water resources in the state of Idaho.

ORDER

IT IS HEREBY ORDERED that Application for Permit 67-15322 in the name of Eckhardt Family LLLP is DENIED.

Dated this 8th day of August, 2019.



James Cefalo
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 9th day of August 2019, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING APPLICATION, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

US MAIL - CERTIFIED

RE: APPLICATIONS FOR PERMIT 67-15322

**Norman M. Semanko
Parsons Behle & Latimer
800 West Main Street, Suite 1300
Boise, ID 83702**

**Eckhardt Family LLLP
1275 Jenkins Creek Road
Weiser, ID 83672**

**Candice McHugh
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380 South 4th Street, Suite 103
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**John Hoff
990 Jenkins Creek Road
Weiser, ID 83672**

Courtesy copy sent via email to:

**Ron Shurtleff
waterdist65@srvinet.com**



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.