

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

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 82712)	PRELIMINARY ORDER
IN THE NAME OF)	DENYING TRANSFER
<u>ECKHARDT FAMILY LLLP)</u>	

PROCEDURAL HISTORY

On September 12, 2018, Eckhardt Family LLLP (“Eckhardt”) filed Application for Transfer 82712 with the Idaho Department of Water Resources (“Department”). Eckhardt filed an amended application (“Application 82712”) on November 9, 2018. The Department published notice of Application 82712 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 hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On July 7, 2003, the Snake River Basin Adjudication (“SRBA”) Court issued a partial decree for water right 67-14386, which included the following elements:

Priority Date:	12/31/1908
Sources:	Springs tributary to Jenkins Creek Spring tributary to Monroe Creek Spring tributary to Scott Creek Springs tributary to Sheep Creek Pond tributary to Jenkins Creek
Beneficial Use:	Stockwater

Diversion Rate: 0.02 cfs
 Period of Use: 1/1 to 12/31
 Points of Diversion: NESWSE, Section 7, T12N, R05W
 NENWNW, Section 17, T12N, R05W
 NWNWSE, Section 11, T12N, R06W
 NESWNW, Section 12, T12N, R06W ("Existing POD 1")
 SWSENE, Section 31, T13N, R05W
 SESENE, Section 36, T13N, R06W ("Existing POD 2")
 NENESW, Section 36, T13N, R06W
 Places of Use: SWSE, Section 7, T12N, R05W
 NWNW, Section 17, T12N, R05W
 NWSE, Section 11, T12N, R06W
 SWNW, Section 12, T12N, R06W
 SENE, Section 31, T13N, R05W
 SENE and NESW, Section 36, T13N, R06W

2. The partial decree for water right 67-14386 included the following conditions:

This right shall be used in conjunction with right no. 67-14385 and is limited to a total combined diversion rate of 0.02 cfs and a total quantity of 13,000 gallons per day.

The quantity of water decreed for this water right is not a determination of historical beneficial use.

Ex. 10 at 8.

3. An existing on-stream, manmade pond ("Pond 2") is located on Jenkins Creek and can hold approximately 0.4 acre-feet of water. Ex. 2. Pond 2 is located in the SWSENE of Section 36, T13N, R06W. *Id.* The administrative record does not include any evidence about when Pond 2 was constructed.

4. Another existing on-stream, manmade pond ("Pond 6") is located on an unnamed stream tributary to Jenkins Creek and can hold approximately 0.4 acre-feet of water. Ex. 6. Pond 6 is located in the NWNWSW of Section 12, T12N, R06W. *Id.* The record does not include any evidence about when Pond 6 was constructed.

5. Application 82712 proposes to change one of the points of diversion for water right 67-14386 from Existing POD 1 to Pond 6.

6. Application 82712 also proposes to change another point for diversion for water right 67-14386 from Existing POD 2 to Pond 2.

7. Application 82712 also proposes to change a portion of the authorized place of use for water right 67-14386 from the SWNW, Section 12, T12N, R06W to the NWSW, Section 12, T12N, R06W.

8. Application 82712 lists the proposed season of use for water right 67-14386 as 1/1 to 12/1. During the hearing, Shaw confirmed that the ending date (12/1) was a typographical error. Application 82712 does not propose to change the season of use for water right 67-14386.

9. Eckhardt does not propose to change the number of cows being supplied stockwater under water right 67-14386. Shaw Testimony.

10. 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.*

11. Hoff purchased his property on Jenkins Creek in 1999. Hoff Testimony. 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	14.50 cfs

Exs. 302, 303, 308.

12. Water rights 67-2097A, 67-2097B and 67-14251, when combined, are limited to a diversion rate of 9.06 cfs for irrigation use and the irrigation of 453 acres. Exs. 302, 303, 308.

13. All of Hoff's authorized points of diversion from Jenkins Creek are located downstream of Existing POD 1 and 2 and Ponds 2 and 6. Ex. 11 at Exhibit 1.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

ANALYSIS

Error Correction

Eckhardt asserts that Application 82712 was filed to correct two of the seven points of diversion listed on water right 67-14386. Ex. 11 at 1; Shaw Testimony. According to Eckhardt, two of the points of diversion (Existing POD 1 and 2) were described incorrectly in the partial decree and the proper points of diversion should have been the current locations of Ponds 6 and 2. Shaw Testimony. Outside of one sentence in Shaw's expert report and a few vague statements from Shaw during the hearing, Eckhardt provided no evidence demonstrating that the points of diversion proposed to be changed were decreed in error or that Ponds 2 and 6 were even in existence in 2003 (when the SRBA partial decree for water right 67-14386 was issued).

It would have been easy for Eckhardt to establish the basis for its assertion that the two points of diversion were described incorrectly in the partial decree. For example, Eckhardt could have provided aerial photos from the 1980s or 1990s showing that Ponds 2 and 6 were in place prior to the issuance of the SRBA partial decree. James Eckhardt could have testified about the condition of Ponds 2 and 6 when he acquired the property and about the existence or absence of water sources at Existing POD 1 and 2. No such evidence was provided. In the absence of persuasive evidence establishing the nature of and source of the alleged error in legal descriptions, the hearing officer must evaluate Application 82712 as a proposal to change two points of diversion for water right 67-14386 from two existing points of diversion to two new points of diversion.

Idaho Code § 42-222, which governs applications for transfer, does not specifically authorize a water user to change the source of a water right. A water user may, however, pursue a transfer application (or exchange application) to divert water from a different source as long as the original source described on the water right and the proposed source have a direct and immediate hydraulic connection. Even if this direct and immediate hydraulic connection exists, the diversion of water at the proposed point of diversion cannot result in injury to existing water rights or enlargement in use of the water right.

Injury

A proposal to divert a water right from a different source can injure existing water rights if the proposed change will reduce the quantity of water available under existing rights. Changing the extent of or timing of return flows or increasing the incidental losses in a stream channel through a change in the location of a point of diversion can injure existing water rights. In this case, Eckhardt proposes to change the location for two points of diversion listed on water right 67-14386. Instead of diverting stockwater at Existing POD 1 and 2, Eckhardt proposes to divert stockwater from Ponds 6 and 2.

Water right 67-14386, which bears a priority date of 12/31/1908, is senior to Hoff's water rights 67-2097A and 67-2097B, but is junior to Hoff's water right 67-14251. Water right 67-14251 authorizes diversion of 14.5 cfs from Jenkins Creek to fill Jenkins Reservoir during the entire year and the diversion of 9.06 from Jenkins Creek for irrigation use during the irrigation season (3/1 – 11/15). Outside of the short snowmelt run-off period in the early spring, Hoff can usually divert the entire flow of Jenkins Creek under water right 67-14251.

Eckhardt is currently authorized to divert water for stockwater use from a spring or a pond tributary to Jenkins Creek at Existing POD 2. Eckhardt proposes to divert water for stockwater use from Pond 2 (on Jenkins Creek), located approximately 1/8th mile west of Existing POD 2. There is no information in the record about the amount of water available at Existing POD 2 or Eckhardt's historical water use at Existing POD 2.

Eckhardt is currently authorized to divert water for stockwater use from a spring or a pond tributary to an unnamed stream at Existing POD 1. Eckhardt proposes to divert water for stockwater use from Pond 6 (on an unnamed stream), located approximately 1/4th mile southwest of Existing POD 1. Based on the map provided by Eckhardt, Existing POD 1 is tributary to a different unnamed stream than the unnamed stream associated with Pond 6. Ex. 11 at Exhibit 1. There is no information in the record about the amount of water available at Existing POD 2 or Eckhardt's historical water use at Existing POD 2.

Eckhardt did not provide sufficient evidence for the hearing officer to evaluate whether changing the point of diversion from Existing POD 2 to Pond 2 and changing the point of diversion from Existing POD 1 to Pond 6 will injure other water rights. In order to properly evaluate injury, the hearing officer would need to know the quantity of water available at Existing POD 1 and 2, the amount of water historically diverted by Eckhardt at POD 1 and 2, and would need to understand how those sources of water are connected to Jenkins Creek.

Enlargement

The only beneficial use listed on water right 67-14386 is stockwater. The partial decree for water right 67-14386 does not describe stockwater storage. Stockwater and stockwater storage are separate and distinct beneficial uses in Idaho. The elements listed on water right 67-14386 are not ambiguous. See *In re Distribution of Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.)*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) (the determination of whether ambiguity exists in a partial decree is a question of law). Application 82712 does not propose to change the nature of use for water right 67-14386. Therefore, if Application 82712 were approved, water right 67-14386 would be limited to stockwater use only. Water right 67-14386, in its current form, would not authorize Eckhardt to store water in Ponds 2 or 6. Shaw Testimony (confirming that water right 67-14386 does not include a storage component). The storage in Ponds 2 and 6 must be covered under some other water right or by changing the nature of use for water right 67-14386.

An application for transfer proposing to change the point of diversion to a new location or a different source, where water would be available in greater quantities or for a longer duration than the original point of diversion, can result in an enlargement of use under the water right. In order to prevent enlargement in use under water right 67-14386, Eckhardt must be limited to the amount of water available at the original points of diversion.

Eckhardt did not provide evidence that Existing POD 1 and 2 have a direct and immediate hydraulic connection to the proposed points of diversion. Further, there is no evidence in the record about the amount of water available at Existing POD 1 and 2. If there is no water at Existing POD 1 and 2, then any diversion of water from Pond 2 or 6 would constitute an enlargement of use under water right 67-14386. Eckhardt did not provide sufficient evidence for the hearing officer to evaluate whether the proposed change will result in an enlargement of water right 67-14386.

Conservation of Water Resources

Changing the elements of a water right in a way that would significantly increase the incidental losses in a natural system is not consistent with the conservation of water resources in the state of Idaho. Eckhardt did not provide any evidence about the amount of water available at Existing POD 1 or 2. Therefore, it is impossible to properly evaluate whether the proposed changes will increase the losses in the Jenkins Creek watershed.

Local Public Interest

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). Diverting water from springs and ponds for livestock use is a common practice in the state of Idaho and is in the local public interest. A change in source which would injure other water rights or enlarge the transferred right is not in the local public interest. Eckhardt failed to provide sufficient evidence to properly evaluate questions of injury and enlargement. Therefore, it is impossible to make a determination as to whether the proposed changes are in the local public interest.

Change in Place of Use

The proposal to change a portion of the place of use for water right 67-14386 appears to be closely tied to the change in point of diversion. Because Eckhardt proposes to change the authorized point of diversion from the SWNW of Section 12, T12N, R06W to the NWSW of Section 12, Eckhardt proposes to make a similar change to the authorized place of use. There is no evidence in the record that Eckhardt intends to construct new stockwater infrastructure in the NWSW of Section 12. Rather, the place of use change appears to be associated with the change in point of diversion. Because the change in point of diversion is being denied, there is no need to change the corresponding place of use.

CONCLUSIONS OF LAW

Eckhardt failed to demonstrate that the changes proposed in Application 82712 will not injure other water rights, will not result in an enlargement of water right 67-14386, are consistent with the conservation of water resources in the state of Idaho, or are in the local public interest. Therefore, Application 82712 should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 82712 is DENIED.

Dated this 12th day of August, 2020.



James Cefalo
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of August 2020, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING TRANSFER, 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 TRANSFER 82712

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

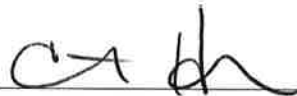
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**John Hoff
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Courtesy copy sent via email to:

**Ron Shurtleff
waterdist65@srvinet.com**



Christina Henman
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.