

**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.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent,

and

DOUBLE C & J LAND CO., INC.,

Intervenor-Respondent.

IN THE MATTER OF APPLICATIONS FOR
PERMIT 67-15292 THROUGH 67-15297 IN
THE NAME OF ECKHARDT FAMILY LLLP

Case No. CV-44-20-38

District Court - SRBA Fifth Judicial District In Re: Administrative Appeals County of Twin Falls - State of Idaho
<div style="border: 2px solid black; padding: 10px; display: inline-block;">MAY 21 2020</div>
By _____
Clerk

Deputy Clerk

BRIEF FOR RESPONDENT IDWR

Judicial Review from the Idaho Department of Water Resources
Honorable Eric J. Wildman, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
I. STATEMENT OF THE CASE	4
<i>A. NATURE OF THE CASE</i>	4
<i>B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND</i>	4
II. ISSUES ON APPEAL.....	16
III. STANDARD OF REVIEW	16
IV. ARGUMENT.....	18
<i>A. There is Substantial Evidence in the Record to Support the Director's Conclusion That Eckhardt Failed to Meet Its Burden to Prove the Stockponds Would Not Injure Existing Water Rights.</i>	18
i. The Director's Conclusion That There is Insufficient Evidence in the Record to Find No Injury to Hoff's Water Right for Year-Round Instream Stockwater is Supported by Substantial Evidence.....	20
a. There is Insufficient Evidence in the Record to Find That Excess Flows During the Non-Irrigation Season Will Fill Eckhardt's Stockponds Without Injury to Hoff....	20
b. To Prevent Injury to Hoff's Right to Year-Round Instream Stockwater, the Stockponds Would Require Daily Administration.....	22
c. Administration of the Stockponds is Impracticable and Unlikely Because the Stockponds Are Inaccessible and Because Hoff and Eckhardt are Unable to Communicate About Administration.....	24
ii. The Director's Conclusion That There is Insufficient Evidence in the Record to Find No Injury to Hoff's Water Rights for Irrigation is Supported by Substantial Evidence. ..	26

a.	Absent Proper Administration, the Stockponds Will Likely Injure the Irrigation Component of Hoff's Two Irrigation Water Rights.	27
b.	A February 28 Shut-Off Date Would Not Protect Hoff's Irrigation Uses.....	29
iii.	This Court Should Uphold the Director's Denial of the Applications	29
B.	<i>The Director's Amended Final Order Is Not Arbitrary or Capricious.</i>	31
C.	<i>Eckhardt Had Proper Notice and a Meaningful Opportunity to be Heard.</i>	33
D.	<i>The Director's Amended Final Order Does Not Prejudice the Applicant's Substantial Rights.</i>	36
I.	CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES

A & B Irrigation Dist. v. Idaho Dep't of Water Res., 153 Idaho 500, 284 P.3d 225 (2012) -----	31
Barron v. Idaho Dept. of Water Resources, 135 Idaho 414, 18 P.3d 219 (2001) -----	18, 37
Brett v. Eleventh Street Dock Owners, 141 Idaho 517, 112 P.3d 805 (2005) -----	32
Dovel v. Dobson, 122 Idaho 59, 831 P.2d 527 (1992) -----	17
Eddins v. City of Lewiston, 150 Idaho 30, 244 P.3d 174 (2010) -----	37
Idaho Power Co. v. Idaho Dep't of Water Res., 151 Idaho 266, P.3d 1152 (2011) -----	18
In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995) -----	34
Kirk v. Karcher Estates, Inc., 135 Idaho 230, 16 P.3d 906 (2000) -----	31
Matter of Permit No. 47-7680, 114 Idaho 600, 759 P.2d 891 (1988) -----	39
Neighbors for a Healthy Gold Fork v. Valley Cty., 145 Idaho 121, P.3d 126, (2007) -----	35, 37, 38
Noble v. Kootenai Cty. ex rel. Kootenai Cty. Bd. of Comm'rs, 148 Idaho 937, 231 P.3d 1034 (2010) -----	38
Petersen v. Franklin Cty., 130 Idaho 176, 938 P.2d 1214 (1997) -----	32
Price v. Payette Cty. Bd. of Cty. Comm'rs, 131 Idaho 426, 958 P.2d 583 (1998) -----	18
Roberts v. Bd. of Trustees, Pocatello, Sch. Dist. No. 25, 134 Idaho 890, 11 P.3d 1108 (2000) -----	38
Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 70 P.3d 669 (2003) -----	18
Sylte v. Idaho Dep't of Water Res., 165 Idaho 238, 443 P.3d 252 (2019) -----	37
Tupper v. State Farm Ins., 131 Idaho 724, 963 P.2d 1161 (1998) -----	18

STATUTES

Idaho Code § 42-202 -----	38
Idaho Code § 42-203A -----	17, 19, 37, 38
Idaho Code § 42-203A (5) -----	17, 19, 31, 32
Idaho Code § 42-1701A (4) -----	17
Idaho Code § 67-5277 -----	17
Idaho Code § 67-5279 -----	18
Idaho Code § 67-5279 (3) -----	18, 31
Idaho Code § 67-5279 (4) -----	18

REGULATIONS

IDAPA 37.03.08.40.04 (b)(i) -----	17, 19, 31
IDAPA 37.03.08.45.01(a) -----	16, 19, 38

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Eckhardt Family, LLLP (“Eckhardt”) is seeking judicial review of the December 20, 2019, *Order on Reconsideration; Amended Final Order* issued by the Director of the Idaho Department of Water Resources (“Department”) in which the Director denied applications for five water rights permits (Nos. 67-15292 through 67-15297). The Department denied the applications because Eckhardt failed to meet its burden to prove the requested appropriations would not injure existing water rights.

B. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Eckhardt and John Hoff of Double C & J Land Company, Inc. (“Hoff”), own neighboring ranches outside Weiser, Idaho. On September 12, 2018, Eckhardt filed applications for permit 67-15292 through 67-15297, 67-157298, and 67-15300 with the Department. The applications seek water rights for eight existing on-stream stockwater ponds within the Jenkins Creek drainage. R. 36-59. Each application is associated with a stockpond:

- Application 67-15292 seeks a permit for Eckhardt’s Pond 1.
- Application 67-15293 seeks a permit for Eckhardt’s Pond 2.
- Application 67-15294 seeks a permit for Eckhardt’s Pond 3.
- Application 67-15295 seeks a permit for Eckhardt’s Pond 4.
- Application 67-15296 seeks a permit for Eckhardt’s Pond 5.
- Application 67-15297 seeks a permit for Eckhardt’s Pond 6.
- Application 67-15298 seeks a permit for Eckhardt’s Pond 9.
- Application 67-15300 seeks a permit for Eckhardt’s Pond 11.

R. 384-385, 405-406. All eight Applications list year-round seasons of use for stockwater storage. R. 384-385, 405-406. Five of the eight applications, Applications 67-15292 through 67-15297, are at issue in this appeal.

On November 11, 2018, Eckhardt filed amended applications (“Applications”) changing the source on 67-15292 and 67-15293 from unnamed stream tributary to Jenkins Creek to Jenkins Creek tributary to Snake River and changing the purpose of use for all eight applications from instream stockwater use to stockwater storage and stockwater from storage. R. 36-59.

On December 10, 2018, Hoff filed protests against all eight of Eckhardt’s applications for permit. R. 133-148. Hoff holds three senior water rights on Jenkins Creek: 67-2097A, 67-2097B, and 67-14251. R. 406-407. Hoff’s water rights along Jenkins Creek permit Hoff to divert water into two on-stream reservoirs on Jenkins Creek. *Id.* Hoff also holds water right 67-2044 that allows Hoff to divert water from Monroe Creek into a third reservoir on Jenkins Creek, the Monroe Reservoir. *Id.* Hoff’s water rights are used to irrigate and to supply water to stock. *Id.* The irrigation season for the area is March 1 through November 15. *Id.* Hoff’s water rights read as follows:

- 67-2097A
 - Quantity: 6.54 cfs
 - Priority Date: 6/29/1914
 - Source: Jenkins Creek tributary to Snake River
 - 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 11/1 345 afy
 - Diversion to Storage 1/1 to 12/31 14.5 afy

- 67-2097B
 - Quantity: 9.06 cfs
 - Priority Date: 5/11/1918
 - Source: Jenkins Creek tributary to Snake River
 - Beneficial Uses:
 - Irrigation 3/1 to 11/15 9.06 cfs

- 67-14251
 - Quantity: 23.38 cfs, 345 afy
 - Priority Date: 4/12/1881
 - Source: Jenkins Creek tributary to Snake River
 - 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

- 67-2044
 - Quantity: 6.4 cfs, 320 afy
 - Priority Date: 5/03/1914
 - Source: Monroe Creek tributary to Weiser River
 - Beneficial Uses:
 - Irrigation Storage 1/1 to 12/31 320 afy
 - Irrigation from Storage 3/15 to 11/15 320 afy
 - Diversion to Storage 11/15 to 3/15 6.4 cfs

Ex. 301-303, 308. Water rights 67-2097A, 67-2097B, and 67-14251 share three points of diversion:

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

Id. Both water rights 67-2097B and 67-14251 list a fourth point of diversion with an incorrect legal description not relevant to the Jenkins Creek drainage. R. 386-387. The point of diversion

for water right 67-2044 is on Monroe Creek, but the Monroe Reservoir it diverts water to is located on Jenkins Creek. Ex. 308. Hoff previously had a ditch diverting water from Monroe Creek to inject water into Jenkins Creek to divert under 67-2044, but the ditch is in disrepair. R. 387.

Hoff and Eckhardt have been engaged in disputes over stockponds 1-6, 9 and 11 since at least 2001. Ex. 305 at 9. The stockponds were constructed prior to the time Eckhardt filed the applications. R. 405. The Applications are the result of a complaint Hoff filed against Eckhardt in 2014. Ex. 316, 323. As a result of the complaint, the Department conducted a field exam of fourteen existing stockponds on Eckhardt's property and determined that stockponds 1-6 and 9 and 11 required water rights. Ex. 316.

On August 1, 2018, the Department issued a Notice of Violation ("NOV") to Eckhardt for illegally diverting from five spring boxes to seven stock troughs, and for illegally diverting and storing water in twelve ponds without a water right. Ex. 366 at 2; *See* Ex. 362. The eight stockponds currently at issue were included in that NOV. *Id.* As a result of the NOV, Eckhardt signed a consent order agreeing to breach Ponds 3, 4, and 11 by December 31, 2018, and to breach the remaining 9 ponds by August 31, 2019. Ex. 366 at 3. On December 4, 2018, the Department received evidence that Eckhardt had breached ponds 3, 4, and 11. Ex. 367. At the administrative hearing for the present case, Hoff submitted flyover photographs of water in Eckhardt's previously breached ponds, suggesting that at the time of the hearing Eckhardt was not compliant with the consent order. Ex. 368.

On September 27, 2018, Eckhardt filed a complaint against Hoff for illegally diverting water from Jenkins Creek to fill the Monroe Reservoir. Ex. 15. On November 9, 2018, the Department a sent letter notifying Hoff that water right 67-2044 authorizes him to divert water from Monroe Creek to fill Monroe Reservoir but does not authorize any diversions from Jenkins Creek to fill the Monroe Reservoir. Ex. 15. The letter required Hoff to immediately discharge all Jenkins Creek water from Monroe Reservoir. *Id.* At the hearing for the present case, Hoff stated that he was not yet complying with the Department's request. Tr. p. 231, l.16. At the time of the hearing, however, the Department had not commenced a formal enforcement action against Hoff. *Id.* On January 25, 2019, Hoff filed an Application for Transfer with the Department for water right 67-2044 to add Jenkins Creek as a point of diversion for Monroe Reservoir. Ex. 333. Eckhardt has filed an objection to the transfer. Tr. p. 228, l. 20.

On May 23, 2019, the Department held a consolidated administrative hearing for applications for permit 67-15292 through 67-15297 and applications for permit 67-15298 and 67-15300. R. 382. At the hearing, Hoff testified that the base flow of Jenkins Creek has decreased since he moved to the property in 1999. Tr. p. 185, l. 1. Hoff stated that illegal stockponds on Eckhardt's property have "literally, ruined our ranch, ruined our livestock program." Tr. p. 210, l. 6. Hoff was asked about water right 67-8051, Eckhardt's application for permit for a stockpond on a tributary to Jenkins Creek that was denied by the Department in 2001. Tr. p. 189, l. 15; Ex. 305 at 9-11. During that previous application process, John Mainvil, the former owner of Hoff's ranch, testified before the Department regarding harm to his stockwater rights as a result of Eckhardt's illegal stockponds on a tributary to Jenkins Creek. Tr.

p. 240, l. 1. At the hearing, Hoff testified repeatedly that Jenkins Creek dries up completely by mid-summer and stays dry through the fall. Tr. p. 236, l. 9, p. 243, l. 4. Hoff stated his cattle have suffered as a result of a lack of water during the summer. Tr. p. 181, l. 7.

Eckhardt presented expert testimony from David Shaw, an engineer with ERO Resource Corporation. Tr. p. 30. Shaw's testimony was based on two visits to the Eckhardt property in March of 2019 and in October of 2017. Tr. p. 103. Shaw testified that the stockponds are meant to capture early season runoff. Tr. p. 157, l. 2. Shaw testified that after the day of allocation, when the supply from the river equals demand, the drainage is dry and the stockponds are no longer collecting water. Tr. p. 34, l. 17. Prior the date of allocation, Shaw stated that water is available for capture in the stockponds. Tr. p. 34, l. 9. Shaw proposed restricting the season of use for the stockponds and stated that a May 15 shut-off date would protect Hoff's rights during the irrigation season. Tr. p. 65, l. 9. Shaw also testified that during dry years, an April 15 shut-off date would prevent injury to Hoff's water rights. Tr. p. 271, l. 6. But Shaw testified that in some years, the stockponds are inaccessible through April. Tr. p. 158, l. 17.

There is no watermaster for the Jenkins Creek drainage. Tr. p. 21, l. 3. However, Ron Shurtleff, Watermaster for Water District 65 on the Payette River since 2002, testified as a public witness. Tr. p. 9. Shurtleff testified about the injuries caused by unregulated stockponds. Tr. p. 9-29. Shurtleff testified that stockponds in the area "continue to capture water after the day of allocation." Tr. p. 12, l. 13. Shurtleff also testified that administering the stockponds would need "a lot more than a watermaster," the stockponds would require a high level of regulation including "stream gauges, every impoundment would need a measuring device going into it and

out of it... because of the diminishing flows that happen, it would take daily maintenance.” Tr. p. 21, l. 9.

On July 8, 2019, the Department issued a *Preliminary Order Denying Applications*. R. 208. The *Preliminary Order* concluded that “Eckhardt has not demonstrated that the proposed project will not reduce the quantity of water under existing water rights. Nor has Eckhardt demonstrated that the water supply is sufficient for the proposed uses.” R. 215. The Hearing Officer concluded that Eckhardt’s Ponds 9 and 11 would not injure Hoff’s irrigation storage, irrigation from storage, or diversion to storage rights under water rights 67-2097A and 67-14251 because Ponds 9 and 11 are on a tributary that enters Jenkins Creek downstream from the Jenkins Creek Reservoir, and because Hoff’s Lower Reservoir fills every year from water available in the lower Jenkins Creek drainage. R. 210. But the Hearing Officer found that the stockponds would injure (1) the year-round stockwater component of Hoff’s water right no. 67-14251 for 0.03 cfs, and (2) the irrigation components of Hoff’s Water Right 67-2097A for 6.54 cfs, and the irrigation component of Water Right 67-14251 for 9.06 cfs. R. 212. The Director concluded that “Eckhardt’s proposal to cease diverting water through the ponds on May 15 of each year does not adequately protect Hoff’s water rights from injury prior to May 15,” and that “complete protection against injury would require daily administration of water rights on Jenkins Creek.” *Id.* The Hearing Officer held that daily administration was not possible due to the lack of communication between Hoff and Eckhardt and due to the inaccessibility of Ponds 1-6 “during at least a portion of the run-off period.” *Id.* Further, the Hearing Officer found that there was insufficient water supply to fill the six ponds because “[t]he record does not contain sufficient

information about the interval when water would be available on Jenkins Creek” and because it was “unclear whether there is a sufficient quantity of water available at the ponds in a two-day time period to fill the proposed ponds.” R. 214.

On July 22, 2019, Eckhardt filed a *Petition for Reconsideration* for the *Preliminary Order*. R. 232. Eckhardt abandoned its position on the May 15 shut-off date by requesting the Hearing Officer consider “whether injury will occur to Jenkins Creek water rights, using a storage diversion shut-off date of April 15.” Eckhardt also asked the Hearing Officer to reconsider “whether there is a sufficient supply of water based upon the record.” *Id.*

On August 8, 2019, the Hearing Officer issued *Order Granting Petitions for Reconsideration, In Part*. R. 307. The Hearing Officer granted Eckhardt’s petition for reconsideration of the sufficiency of water supply to address the “facts and the logical conclusions” that could be drawn from the field exam of Ponds 9 and 11 completed by Department employee Erik Boe on March 19, 2018. R. 310-311. In the *Preliminary Order*, the Hearing Officer noted that Boe’s field exam conducted on April 27, 2018, supplies the only evidence in the record about the flow rates on Jenkins Creek and its tributaries. R. 213. The Hearing Officer concluded that he had overlooked Boe’s March 19, 2018 field exam, and that the March 19th field exam “constitutes persuasive evidence that the water supply in the Jenkins Creek drainage is...sufficient to fill” Ponds 1-6 R. 310.

In the *Order Granting Petitions*, the Hearing Officer found that an April 15 shut-off date would not alter his previous injury analysis, and held that the change in shut-off date did not warrant a change to the *Preliminary Order* because the stockponds would still require daily

administration, which was impracticable. *Id.* The Hearing Officer held that the *Preliminary Order* made clear that daily administration was not a viable option for these water rights, in large part because Eckhardt's stockponds are difficult to access during the snowmelt run-off period due to snowy or muddy conditions. *Id.* The Hearing Officer found that a March 1 shut-off date would "alleviate all injury concerns" for Hoff's water rights, and stated "[i]t is not clear from the record, however, that the Department or a watermaster would be able to administer a March 1 shut-off date due to remoteness of the ponds and poor road conditions." *Id.* Accordingly, the Hearing Officer rejected reconsideration of the shut-off date analysis. *Id.*

Along with the *Order Granting Petitions*, the Hearing Officer issued an *Amended Preliminary Order Denying Applications* and reversed his position regarding the sufficiency of water supply. R. 281. He found that "Eckhardt has shown that the water supply is sufficient for the proposed uses." *Id.* However, the Hearing Officer still denied the applications in the *Amended Preliminary Order* because the Eckhardt had not demonstrated that the applications would not reduce the quantity of water under existing water rights. R. 291.

On August 23, 2019, Eckhardt filed *Eckhardt Family LLLP's Exceptions to Amended Preliminary Orders Denying Applications and Order Granting Petitions for Reconsideration In Part* ("Exceptions"). R. 315. In the Exceptions, Eckhardt first argued that "the proposed stockwater storage diversions can and should be conditioned to prevent injury." R. 317. Eckhardt's exceptions next argued that "daily administration is not required if there is a fixed cut-off date for diversions to storage" because in the *Order Granting Petitions*, the Hearing Officer held that either daily administration or a shut-off date prior to the irrigation season would

protect Hoff's water rights. R. 320. Eckhardt lastly argued that "access to the ponds is a manageable implementation issue." R. 317, 320.

In response, Hoff claimed that a March 1 shut-off date would not prevent injury to Hoff's year-round stockwater and stockwater storage rights. R. 327. Hoff also stated that daily administration of the stockponds would be required to prevent injury but would be untenable due to difficulties in accessing the ponds and in communication between the parties. R. 329-330.

On November 14, 2019, the Director issued his *Order on Exceptions; Final Order*, denying the applications. R. 341. The Director concluded that Eckhardt failed to satisfy his burden of proving no injury existing water rights. *Id.* The Director found that the stockponds would require daily administration, and that Eckhardt had failed to supply evidence of a viable mitigation strategy during the non-irrigation season. R. 352. The Director concluded that based on evidence in the record, neither the Department nor Eckhardt would be able to access the ponds "during potential critical periods of administration." *Id.*

Eckhardt filed a *Petition for Reconsideration of Orders on Exceptions; Final Orders* on November 29, 2019. R. 374. Eckhardt claimed that there is no injury to Hoff's water rights during the non-irrigation season because there are excess flows available. R. 375. Eckhardt also abandoned the request for a March 15 shut-off date and instead argued that a March 1 shut-off date would avoid injury during the irrigation season and invited the Director to impose a March 1 shut-off date on the applications. R. 378.

On December 20, 2019, the Director issued the *Order on Reconsideration; Amended Final Order* reaffirming his denial of the applications because Eckhardt did not satisfy its burden to show

the stockponds will not reduce the quantity of water under (1) the year-round stockwater component of Hoff's water right no. 67-14251, and (2) the irrigation component of Hoff's water right no. 67-2097A, and the irrigation component of Hoff's water right no. 67-14251. R. 394, 399.

The Director found that Eckhardt had not presented sufficient evidence to find no injury to the year-round stockwater component of Hoff's water right no. 67-14251 for three reasons. First, the Director found that there was insufficient evidence to show that excess flows during the non-irrigation season could fill both Hoff's right and Eckhardt's stockponds without harm to Hoff. *Id.* Second, because evidence of sufficient flows was not submitted, the Director determined that daily administration would be required. *Id.* Third, the Director found that proper daily administration could not be maintained. *Id.*

The Director found "there could be times during the non-irrigation season when the impoundment of water in the ponds would reduce the quantity of water available to satisfy Hoff's year-round stockwater right." R. 394. Though Shaw had testified that there were high flows available for appropriation during one visit in March, the Director found Shaw's observations of "one cfs in excess flow on a single day in March" to be "unreasonably speculative" of consistent high flows in amounts necessary to prevent injury to Hoff. *Id.* Because there is potential for injury during the non-irrigation season, the stockponds would require daily administration. *Id.* The Director found that daily administration would not be possible because "(1) ponds 1-6 are remote and difficult to access; (2) there is no water district, watermaster or rental pool to help alleviate administrative concerns; (3) losses caused by impoundment, seepage, and evaporation may still

accrue if the applications were approved but Eckhardt could not access the requisite diversion components; and (4) Hoff and Eckhardt are incapable of reasonable communication in relation to administration.” R. 394, 397. Thus, the Director found that there is not enough evidence in the record to support the finding that high flows in Jenkins Creek during the non-irrigation season would prevent Eckhardt’s stockponds from injuring Hoff’s senior year-round stockwater right. R. 393-394.

The Director also found that there is insufficient evidence in the record to find no injury to the irrigation component of Hoff’s water right no. 67-2097A, and the irrigation component of Hoff’s water right no. 67-14251. First, the Director found that absent proper administration, the stockponds could injure Hoff’s irrigation rights. R. 394. Second, the Director found that though properly administered February 28 shut-off date would prevent injury to all of Hoff’s water rights during the irrigation season, a February 28 shutoff date could not be properly implemented because the ponds are inaccessible and because Hoff and Eckhardt are incapable of communication in regards to administration. R. 399. Because daily administration is not reasonable, the Director concluded that “Eckhardt’s mitigation proposals do not adequately protect Hoff’s water rights from injury” so Eckhardt had not satisfied “his burden of proving no injury as required by Idaho Code § 42-203A(5) and IDAPA 37.03.08.45.01.a.” R. 397.

In response to the *Amended Final Order*, Eckhardt filed a timely *Petition for Judicial Review*. R. 422. On April 23, 2020, Eckhardt filed its *Petitioner’s Opening Brief* (“*Opening Brief*”).

II. ISSUES ON APPEAL

Through its framing of the issues on appeal, Eckhardt attempts to flip the burden of proof and put the burden on the Director to show no injury to other water rights. Under Idaho law, the burden is on the applicant to show no injury to other water rights. IDAPA 37.03.08.40.04 (b)(i); Idaho Code § 42-203A(5). In this case, the Director concluded Eckhardt failed to meet its burden to show no injury to senior water rights. Accordingly, the Department reformulates the statement of issues on appeal as follows:

1. Whether the Director's conclusion that Eckhardt failed to meet its burden to prove that the appropriations would not injure senior water rights is supported by substantial evidence.
2. Whether the Director's conclusion that Eckhardt failed to meet its burden to prove that the appropriations would not injure senior water rights is arbitrary and capricious.
3. Whether Eckhardt was denied due process.
4. Whether the *Amended Final Order* prejudices Eckhardt's substantial rights.

III. STANDARD OF REVIEW

Judicial review of a final decision by the Idaho Department of Water Resources ("IDWR") is governed by the Idaho Administrative Procedure Act ("IDAPA"), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). 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. Idaho Code § 67-5279(3); *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

“This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented...Rather, this Court defers to the agency's findings of fact unless they are clearly erroneous.” *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 835, 70 P.3d 669, 673 (2003); *See* Idaho Code § 67-5279. In other words, 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. *Price v. Payette Cty. Bd. of Cty. Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222. “Where conflicting evidence is presented that is supported by substantial and competent evidence, the findings of the [agency] must be sustained on appeal regardless of whether this Court may have reached a different conclusion.” *Tupper v. State Farm Ins.*, 131 Idaho 724, 727, 963 P.2d 1161, 1164 (1998).

If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 272, 255 P.3d 1152, 1158 (2011).

IV. ARGUMENT

A. There is Substantial Evidence in the Record to Support the Director's Conclusion That Eckhardt Failed to Meet Its Burden to Prove the Stockponds Would Not Injure Existing Water Rights.

The Director denied applications for permit 67-15298 and 67-15300 because Eckhardt failed to meet its burden to present sufficient evidence that the stockponds would not harm existing water rights. The Department must evaluate all applications for permit using the criteria in Idaho Code § 42-203A and IDAPA 37.03.08.45.01. Section 203A 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 ...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.

Idaho Code § 42-203A. An application is “determined to reduce the quantity of water under an existing water right (i.e. injure another water right) when:

- 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.
- ii. The holder of the existing water right will be forced to an unreasonable effort or expense to divert his existing water right.

IDAPA 37.03.08.45.01(a). The applicant bears the burden of proof that existing water rights will not be harmed by the appropriations. IDAPA 37.03.08.40.04 (b)(i); Idaho Code § 42-203A(5).

The protestant has no burden to allege or prove injury. *Id.*

Eckhardt argues that “[t]he Department’s conclusion that Hoff’s year-round water rights ‘might be injured’ by the proposed water use in the Applications is not supported by substantial evidence” and that “[t]he Department’s conclusion that Hoff’s water rights may be injured during the irrigation season is not supported by substantial evidence.” *Opening Brief* at 9, 11.

Eckhardt misstates the Director’s conclusion in this matter. The Director’s ultimate conclusion was not that Hoff’s water rights may be injured; the Director’s ultimate conclusion was that Eckhardt failed to meet its burden of proof to show that Hoff’s water rights will not be injured. R. 394, 399. Specifically, the Director found that there is insufficient evidence in the record to find that Eckhardt’s stockponds would not injure the year-round stockwater component of Hoff’s water right no. 67-14251 because (1) there is insufficient evidence in the record to find that excess flows during the non-irrigation season will fill Eckhardt’s stockponds without injury to Hoff’s water rights, (2) that to prevent injury to Hoff’s stockwater right, the stockponds would need daily administration, and (3) that daily administration is impracticable and unlikely to occur. *Id.* The Director also found that there was insufficient evidence in the record to find that Eckhardt’s stockponds would not injure the irrigation component of Hoff’s Water Right 67-2097A, and the irrigation component of Water Right 67-14251 because (1) absent proper administration, the stockponds will likely injure those two water rights, and (2) because a February 28 shut-off date would not protect Hoff’s water rights. The Director’s conclusion in the *Amended Final Order* is supported by substantial evidence in the record as a whole and is consistent with applicable law. *Id.*

i. **The Director's Conclusion That There is Insufficient Evidence in the Record to Find No Injury to Hoff's Water Right for Year-Round Instream Stockwater is Supported by Substantial Evidence.**

Eckhardt bore the burden of proof to show that the stockponds would not injure the year-round stockwater component of Hoff's water right no. 67-14251. The Director determined that there is insufficient evidence in the record to find no injury to the year-round stockwater component of Hoff's water right no. 67-14251 because (1) Shaw, Eckhardt's expert, did not present sufficient data to back his statements that excess flows during the non-irrigation season will always fill the stockponds without injury to Hoff's senior water rights, (2) absent sufficient excess flows every year, the stockponds would require daily administration to ensure no injury to Hoff's water rights, and (3) proper daily administration is impracticable and unlikely because the ponds are inaccessible and because the parties cannot reasonably communicate about water administration issues.

a. There is Insufficient Evidence in the Record to Find That Excess Flows During the Non-Irrigation Season Will Fill Eckhardt's Stockponds Without Injury to Hoff

Though Hoff did not have a burden to show harm, his testimony from the hearing made clear that he believes the stockponds injure his instream stockwater right. During the hearing, Hoff testified that at times of the year he has "no stockwater, period." Tr. p. 243, l. 8. Hoff testified extensively on injury to his cattle as a result of Eckhardt's stockponds. Hoff has faced health issues in his cattle because of the lack of water, including difficulties in finding pastures with water to turn out the cattle and worms in stockwater screens that have made cattle sick. Tr. p. 181-182. In previous years, Hoff has resorted to using a truck to haul stockwater out to his

cattle. Tr. p. 243, l. 10. Hoff did not specify that injury to his stockwater right occurs only during the irrigation season.

Shaw did not present sufficient data to show that the stockponds will not harm Hoff's stockwater right. Shaw stated that Eckhardt's stockponds intend to catch only the early season runoff. Tr. p. 157, l. 2. But there is limited evidence in the record that details the nature of spring runoff flows in the drainage. Shaw visited Eckhardt's property only twice: once in March of 2019 and once in October of 2017. Tr. p. 103. Shaw took no measurements of the stockponds during his 2017 visit and was unable to access the ponds during his 2019 visit due to snow and mud on the road. *See Ex. 11*. Shaw also did not provide evidence to the record of measurements of streamflow in any location along the stockponds. Tr. p. 16, l. 5.

Shaw even testified that the stockponds could harm Hoff's stockwater right. The stockponds lose water to seepage and evaporation. Hoff alleged that stockponds lose water "at an extreme rate" and "seep like a sieve" in the Jenkins Creek drainage. Tr. p. 226, l. 22, p. 165, l. 11. Shaw agreed that Eckhardt's stockponds generate water losses in the form of seepage and evaporation. Tr. p. 129, l. 10. At the hearing, Shaw agreed that evaporation "is increased by a storage pond" because the surface of a pond is increased "above and beyond what the natural channel would have." Tr. p. 129, l. 17. Shaw had no calculations of seepage or evaporation from the stockponds. Tr. p. 105, l. 6. In fact, Shaw testified that because it is impossible to anticipate whether the water system will see a good or bad water year, and because it is impossible to drain water already stored in the stockponds, in a bad water year Eckhardt "should never turn [the

bypass] on” to its stockponds and should allow all water to flow to Hoff’s water rights. Tr. p. 142, l. 15.

Shaw’s Expert Report contains the only evidence in the record that the stockponds would not cause injury to Hoff’s stockwater right. The report finds that on March 9, 2019, there was an unknown amount of unappropriated water available on one day in March prior to the irrigation season. Ex. 11 at 5. At the hearing, Shaw estimated that the flowing water available for appropriation on March 9, 2019, was one cfs. Tr. p. 143, l. 13. Shaw’s report also contains general charts showing precipitation in Jenkins Creek drainage for the years 2010 through 2018. Ex. 11 at 4. Based on the above evidence, Shaw broadly claimed “there’s water available for ponds to be filled” without evidence to support the claim. Tr. p. 34, l. 9. Lacking concrete data from Shaw, the Director concluded that “Shaw’s broad conclusions about injury over the entire non-irrigation season are based mostly on speculation” and do not support a finding of no injury to Hoff’s senior water rights during the non-irrigation season. R. 393.

The record contains no significant measurements of streamflow during the non-irrigation season. The Director’s decision that there is not enough evidence in the record on high flows to show no injury to Hoff’s senior stockwater component of water right 67-14251 is reasonable and based on the record as a whole.

b. To Prevent Injury to Hoff’s Right to Year-Round Instream Stockwater, the Stockponds Would Require Daily Administration.

Because Shaw did not submit concrete evidence of high flows sufficient to protect Hoff’s stockwater right, and because Eckhardt did not propose any mitigation measures for the non-

irrigation season, the Director concluded that the stockponds would require daily administration to prevent injury to Hoff. R. 394, 397.

At the hearing, Shaw stated that bypassing water around the stockponds could prevent injury to Hoff's senior water rights. Tr. p. 59, l. 19. Eckhardt's Applications made no mention of a possible bypass mechanism, and Shaw did not submit evidence that bypass mechanisms will prevent injury by allowing water to flow unimpeded down Jenkins Creek. At the hearing Ron Shurtleff, Watermaster for Water District 65 on the Payette River since 2002, testified that regulating the stockponds would require more than bypass mechanisms, it would require "stream gauges, every impoundment would need a measuring device going into it and out of it... because of the diminishing flows that happen, it would take daily maintenance." Tr. p. 21, l. 9. After listening to the testimony and reviewing facts in the record, the Hearing Officer concluded that on a daily basis "[s]omeone would need to determine whether Jenkins Creek (or its tributaries) was connected from above each pond to Hoff's diversions, whether Hoff's diversions were within amounts authorized by water rights, and whether there was excess water flowing past Hoff's diversions." R. 394. There is no watermaster for the Jenkins Creek drainage, so Hoff and Eckhardt would be responsible for this daily administration. Tr. p. 21, l. 3.

Shaw's proposal of bypass mechanisms was vague and unsubstantiated by details in the record. Shurtleff, a long-time watermaster with familiarity of stockponds located on drainages like Jenkins Creek, stated that bypass mechanisms are not sufficient to prevent harm, and that proper administration would require stream gauges and daily administration. The Director properly concluded that daily administration of the stockponds would be required during the non-

irrigation season to prevent injury to Hoff. This conclusion is supported by substantial and competent evidence.

c. Administration of the Stockponds is Impracticable and Unlikely Because the Stockponds Are Inaccessible and Because Hoff and Eckhardt are Unable to Communicate About Administration.

The Director determined that daily administration is impracticable and unlikely because the ponds are difficult or impossible to access during the relevant time periods, and because Hoff and Eckhardt would be responsible for managing the administration but are incapable of reasonable communication in relation to administration.

Shaw himself stated that the ponds are inaccessible. Shaw testified that the ability to access the ponds depends on the water year, and that in some years the stockponds “would not be accessible... in April.” Tr. p. 158, l. 15. Shaw visited the Eckhardt property on March 11, 2019. Ex. 11 at 3. At the hearing, Shaw testified that during his March 2019 visit the ponds were inaccessible, stating “[b]etween the snow and the mud, [Ponds 1-6] just weren’t accessible.” Tr. p. 138, l. 23. Shaw testified that Eckhardt could bypass water to the stockponds by May 15 only “assuming you get access [to the ponds] by mid-May.” Tr. p. 59, l. 22. Boe visited Eckhardt’s property on March 19, 2019 but was unable to visit Ponds 1, 2, 3, and 4 because he “could not access these sites due to muddy road conditions.” Ex. 11 at 11.

There is no evidence in the record that the stockponds are accessible; the above testimony represents the only evidence in the record about individuals accessing the stockponds. Shaw testified both that the ponds are inaccessible and that Eckhardt “intends to comply” with any

conditions the Department places on the water rights, including accessing the ponds for administration. Tr. p. 156, l. 24; *Opening Brief* at 14. Despite this contradiction, the facts in the record show the ponds are difficult to access by May and certainly inaccessible in March and April. The Director properly concluded that “it is unlikely that Eckhardt, Hoff, a department employee, or a watermaster could, or should, access [Ponds 9 and 11] during potential critical periods of administration.” R. 397.

Even if the ponds were accessible, daily administration would be impossible due to the relationship between Hoff and Eckhardt. There is no watermaster for Jenkins Creek drainage, so Hoff and Eckhardt would be responsible for daily communication regarding administration. Eckhardt and Hoff have a history of animosity over water rights as a result of both parties’ non-compliance with water right permitting. The dispute between Hoff and Eckhardt over these eight existing stockponds has existed for at least twenty years. Ex. 305 at 9. R. 405. Eckhardt and Hoff have previously filed complaints against each other for unlawful water diversions; at the time of the hearing, Eckhardt had an open NOV action with the Department, and Hoff had received a letter with directives from the Department regarding the unlawful diversion of Jenkins Creek to Monroe Reservoir. Ex. 366; Ex. 15. There is evidence in the record that at the time of the hearing, neither party was compliant with the Department’s orders. Ex. 16; Tr. p. 231, l. 16. While Eckhardt’s expert witness, Shaw, testified that Eckhardt intends to comply with any water right issued by the Department for the stockponds (Tr. p. 156, l. 240), this is not testimony from the principles in Eckhardt Family, LLLP but rather from a retained consultant. Substantial and

competent evidence in the record demonstrated that Eckhardt had disobeyed IDWR directives in the past, which calls into question Mr. Shaw's assurance.

Both communication and compliance between the parties are essential to making daily administration feasible. Because the dispute has been ongoing and unresolvable, and because both parties have ongoing non-compliance issues, the Director correctly concluded that proper daily administration could not occur because "Hoff and Eckhardt are incapable of reasonable communication in relation to administration." R. 394.

Without proper access and communication, daily administration cannot be maintained and there is insufficient evidence in the record that Hoff's stockwater right will not be injured. The Director's determination that daily administration is necessary but impracticable and unlikely is reasonable and based on the record as a whole.

ii. The Director's Conclusion That There is Insufficient Evidence in the Record to Find No Injury to Hoff's Water Rights for Irrigation is Supported by Substantial Evidence.

The Director determined that there is insufficient evidence in the record to show no injury to the irrigation component of Hoff's water right no. 67-2097A, and the irrigation component of water right no. 67-14251 because (1) there is evidence that Hoff's two irrigation components could be harmed during the summer, and (2) a February 28 shut-off date would not protect Hoff's irrigation rights.

a. Absent Proper Administration, the Stockponds Will Likely Injure the Irrigation Component of Hoff's Two Irrigation Water Rights.

Absent proper administration of the stockponds, Hoff's irrigation rights would likely be injured during the irrigation season because there is little to no water available for appropriation in the lower Jenkins Creek drainage.

Shaw, Hoff, and Shurtleff all testified that there are times of the year when parts of Jenkins Creek drainage go completely dry. Tr. p. 236, l. 9, p. 180, l. 9, p. 183, l. 24, p. 13, l. 4, p. 46, l. 17; p. 34, l. 20. Hoff stated that Jenkins Creek dries up by July or August and stays dry until the weather changes in the fall. Tr. p. 236, l. 9. Though Eckhardt's expert understood how dry the drainage can get, no mitigation measures were proposed until the hearing when Shaw speculated that some type of bypass mechanism in conjunction with either a May 15 or an April 15 could work to protect Hoff's rights.

In the absence of a concrete mitigation measure to consider, the Director had to consider the amount of water available for appropriation in the drainage during the irrigation season. As described above, Shaw did not submit any streamflow measurements to the record but speculated that there is sufficient water year-round to fill the stockponds without harm to Hoff. Tr. p. 34, l. 9. But additional testimony from Shaw indicated otherwise.

Shaw stated that in a low water year, like 2014, Eckhardt's ability to lawfully retain water for the stockponds would depend on whether the runoff came "at a steady, uniform, low rate" or "in a flash." Tr. p. 140, l. 17. If the runoff came slowly, Hoff would be able to take all of the runoff for his water rights and there would be no runoff for Eckhardt to appropriate. *Id.* If the

runoff came quickly, then there would be excess flows for Eckhardt to appropriate for the stockponds. *Id.* A problem that Shaw acknowledged, though, is that the stockponds will begin to store water before it is clear whether the runoff is ultimately slow or quick. *Id.* Shaw acknowledged that the stockponds could then store water adverse to existing water rights. Tr. p. 141, l. 14. Shaw stated that if the ponds retained water in a slow runoff year, draining the ponds after they captured water would be the only remedy to injury of Hoff's water rights. Tr. p. 141, l. 18. But Shaw also acknowledged that Eckhardt is not proposing to install a mechanism to drain the ponds; Eckhardt is proposing a bypass system. Tr. p. 141, l. 21. If the stockponds began to store water during a slow runoff year, even a perfectly functioning bypass system would injure Hoff's water rights because there would be no way to return the stored water to Jenkins Creek. Shaw testified that because it is impossible to anticipate how runoff will occur, and because there is no proposal to drain water already stored in the stockponds, in a slow runoff year Eckhardt "should never turn [the bypass] on" to its stockponds and should allow all water to flow to Hoff's water rights. Tr. p. 142, l. 15.

Because both Shaw, Hoff and Shurtleff all stated that the Jenkins Creek drainage goes dry by mid to late summer every year, and because Shaw testified that the ponds could store water adverse to Hoff's water rights, the Director's determination that absent proper administration of the stockponds, the irrigation component of Hoff's water right 67-2097A , and the irrigation component of Water Right 67-14251 could be injured is reasonable and based on the record taken as a whole.

b. A February 28 Shut-Off Date Would Not Protect Hoff's Irrigation Uses.

The Director held that a properly administered shut-off date of February 28 could protect Hoff's water rights during the irrigation season but found that proper administration is unlikely to occur and so a February 28 shut-off date would not prevent injury to Hoff's water rights. R. 394, 397.

First, there is no evidence that the stockponds can be accessed to implement a February 28 shut-off date. For reasons previously discussed, the ponds are inaccessible during much of the year due to weather conditions, and the Director determined that "it is unlikely that Eckhardt, Hoff, a department employee, or a watermaster could, or should, access [Ponds 9 and 11] during potential critical periods of administration." R. 397.

Additionally, proper administration of the stockponds would require Eckhardt and Hoff to communicate regarding the administration of the water rights. For reasons previously discussed, the Director found that Hoff and Eckhardt are incapable of reasonable communication regarding the administration of water rights.

Neither access nor communication is plausible. Therefore, the Director properly concluded that he will "not impose a cutoff date that may cause injury to senior water rights" and that "Eckhardt's mitigation proposals do not adequately protect Hoff's water rights from injury" so Eckhardt has not satisfied its burden of proof for non-injury. R. 397.

iii. This Court Should Uphold the Director's Denial of the Applications

A reviewing court "defers to the agency's findings of fact unless they are clearly erroneous," and "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.” *A & B Irrigation Dist. v. Idaho Dep't of Water Res.*, 153 Idaho 500, 505–06, 284 P.3d 225, 230–31 (2012). Substantial and competent evidence consists of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Kirk v. Karcher Estates, Inc.*, 135 Idaho 230, 232, 16 P.3d 906, 908 (2000). The substantial evidence rule requires a court to determine whether the agency's findings of fact are reasonable. *Id.*

In all applications for permit, the applicant “shall bear the initial burden” of proof and “the ultimate burden of persuasion” of coming forward with evidence to prove that the appropriation will not injure existing water rights. IDAPA 37.03.08.40.04 (b)(i); Idaho Code § 42-203A(5). The protestant bears no burden to allege or prove injury to existing water rights. *Id.* Here, Eckhardt bore the burden of proving that the stockponds would not injure (1) the year-round stockwater component of Hoff’s water right no. 67-14251, and (2) the irrigation components of Hoff’s Water Right 67-2097A, and the irrigation component of Water Right 67-14251.

The Director denied the eight applications for permit because, in failing to supply sufficient evidence of no injury to the year-round stockwater component and two irrigation components of Hoff’s water rights, Eckhardt did not meet the burden of proof required of all applicants for water right permits to show no injury to existing water rights. A reviewing court must uphold the Director’s “findings, inferences, conclusions, or decisions” if they are supported by substantial evidence on the record as a whole. Idaho Code § 67-5279(3).

The Director's denial of applications for permit 67-15298 and 67-15300 is based on reasonable analysis consistent with Idaho Code § 42-203A(5) and is supported by substantial evidence in the record. Facts in the record indicate that the stockponds could injure Hoff's senior water rights, that as a result the stockponds would require daily administration during the non-irrigation season and a properly administered shut-off date during the irrigation season to prevent injury to Hoff's senior year-round water rights. Both forms of administration are unreasonable to expect. Eckhardt has not supplied sufficient evidence to prove that the stockponds would not injure Hoff's water rights.

B. The Director's *Amended Final Order* Is Not Arbitrary or Capricious.

An agency decision is not arbitrary or capricious if it is "sufficiently detailed to demonstrate that it considered applicable standards and reached a reasoned decision ... based on substantial evidence in the record." *Brett v. Eleventh Street Dock Owners*, 141 Idaho 517, 112 P.3d 805 (2005). "Factual determinations are not erroneous when they are supported by competent and substantial evidence even though conflicting evidence exists." *Petersen v. Franklin Cty.*, 130 Idaho 176, 182, 938 P.2d 1214, 1220 (1997).

Eckhardt argues that the Director's decision was arbitrary and capricious because the Director (1) did not consider Hoff's unlawful diversion from Jenkins Creek in the injury analysis, and (2) because the Director concluded that access to the ponds was unlikely though Eckhardt's consultant stated otherwise. *Opening Brief* at 13-14.

Eckhardt's allegation about Hoff's unlawful diversion is misguided. The allegation wrongfully places the burden on the Department to gather facts about the protestant's water rights. Eckhardt bore the burden of proof that the proposed applications would not injure Hoff's water rights. It was not the Department's burden to collect facts on streamflow in the drainage, nor was it the Department's burden to show the effects that any illegal diversions have on the streamflow. These applications are unique in that both Eckhardt and Hoff had unlawful diversions at the time of the applications. Without measurements of the streamflow of Jenkins Creek or the evaporation and seepage from the ponds, it is impossible for the Director to determine the full impact of the unlawful diversions on Jenkins Creek. The role of the Department is not to speculate that an application will not harm existing water rights; the role of the Department is to consider the facts presented by the applicant and determine whether those facts support a finding of no harm to existing water rights. If Eckhardt wanted the Department to count the number of acre-feet unlawfully leaving the stream, it needed to supply additional evidence for the Department to consider.

The Director's conclusion regarding access was also not arbitrary or capricious. Shaw, Eckhardt's own expert, testified multiple times that the ponds were inaccessible. Shaw testified that the ability to access the ponds depends on the water year, and that in some years the stockponds "would not be accessible...in April." Tr. p. 158, l. 15. Shaw visited the Eckhardt property on March 11, 2019. Ex. 11 at 3. At the hearing, Shaw testified that during his March 2019 visit the ponds were inaccessible, stating "[b]etween the snow and the mud, [Ponds 1-6] just weren't accessible." Tr. p. 138, l. 23. At the hearing Shaw testified that Eckhardt could

bypass water to the stockponds by May 15 only “assuming you get access [to the ponds] by mid-May.” Tr. p. 59, l. 22. It is unreasonable for the Director to consider this testimony and find that the ponds are accessible. Two field exams from Boe also highlight the inaccessibility of the ponds; Boe was not able to visit Ponds 1-6 in mid-March due to snow and mud in the road and was only able to visit Ponds 9 and 11 during the same visit by hiking two miles round-trip. Ex. 11 at 11. Eckhardt offers the only testimony that the ponds are accessible in simply stating that the ponds can be accessed. R. 317, 320. While Eckhardt’s statements are admissible, the countervailing testimony from Eckhardt’s own expert and the Department’s staff undermine its credibility. It was reasonable for the Director to conclude that the ponds are inaccessible.

The Director considered all of the facts in the record, and reasonably concluded that Eckhardt provided insufficient evidence to prove that the stockponds would not injure Hoff’s senior water rights, and that the mitigation strategies proposed would fail due to the inaccessibility of the ponds and the inability of Eckhardt and Hoff to communicate about administration of the ponds.

C. Eckhardt Had Proper Notice and a Meaningful Opportunity to be Heard.

“The due process provisions of the Idaho and United States constitutions provide a right for claimants to be heard at a meaningful time and in a meaningful manner.” *In re SRBA Case No. 39576*, 128 Idaho 246, 261, 912 P.2d 614, 629 (1995). “Due process is not a concept to be rigidly applied, but is a flexible concept calling for such procedural protections as are warranted

by the particular situation.” *Neighbors for a Healthy Gold Fork v. Valley Cty.*, 145 Idaho 121, 127, 176 P.3d 126, 132 (2007).

Eckhardt alleges that he was denied a meaningful opportunity to be heard because the issue of injury during the non-irrigation season was only raised after Eckhardt submitted his *Exceptions* which meant that Eckhardt could not submit additional evidence to the record about the non-irrigation season. *Opening Brief* at 16.

Eckhardt had sufficient opportunity to present evidence about injury during the non-irrigation season. It was not the duty of the Department to anticipate injury during the non-irrigation season; the burden to anticipate injury to existing water rights fell on Eckhardt. Eckhardt was served notice of Hoff objections to the applications. Hoff’s objections do not specify harm during the irrigation season, they allege year-round harm. R. 133-148. Eckhardt participated in an administrative hearing to provide evidence to the Department that the stockponds would not injure Hoff’s water rights. Shaw, Eckhardt’s expert witness, noted during the hearing that the Jenkins Creek drainage goes dry for parts of the year. Tr. p. 61, l. 4, p. 10, l. 22. Still, Eckhardt submitted Applications with year-round seasons of use and proposed no mitigation measures until the administrative hearing. Neither Eckhardt nor Shaw ever proposed any mitigation measures for the non-irrigation season.

Eckhardt and Shaw have now proposed a total of four possible shut-off dates to prevent injury during the irrigation season. The Department had to respond to a moving target for the proposed shut-off dates, a task that necessarily amended the Department’s response to the non-

irrigation season. It is then misleading for Eckhardt to characterize Hoff's statement that "...the Applications can impact the year-round stockwater right of Double C & J" as an "eleventh-hour conclusory statement" on which the Department relied when Hoff was responding to a third proposed shut-off date from Eckhardt.

Eckhardt created the distinction between the irrigation season and non-irrigation season in his *Exceptions* by proposing a March 1 shut-off date. Prior to the *Exceptions*, the proposed shut-off date occurred after March 1, the beginning of the irrigation season of use for Hoff's water rights, so prior to the *Exceptions*, injury was not split into the irrigation season and the non-irrigation season. Instead, the Hearing Officer and the Director both referred broadly to injury prior to and subsequent to the proposed shut-off dates. Neither the Hearing Officer nor the Director ever concluded that there would be no consideration of injury during the non-irrigation season. In response to the changing shut-off date, the Department had to continually amend its responses to the Applications. Eckhardt had prior knowledge of at least the potential of injury during the irrigation season and could have proposed a shut-off date prior to the hearing to allow additional time to discuss.

Eckhardt's assumption that the Department would not consider injury during the non-irrigation season is not in line with the statutory standards Eckhardt understood to be the basis of the administrative hearing: that,

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 ...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.

Idaho Code § 42-203A. Eckhardt's assumption that the injury analysis could only apply to the irrigation season is written neither in Idaho law nor in any of the Orders that came from the Department. Eckhardt failed to give sufficient evidence to the record that any of the proposed shut-off dates could protect Hoff's senior water rights, and the Director properly denied the applications.

D. The Director's Amended Final Order Does Not Prejudice the Applicant's Substantial Rights.

"Idaho's Administrative Procedure Act mandates that agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." *Sylte v. Idaho Dep't of Water Res.*, 165 Idaho 238, 443 P.3d 252, 260 (2019). "The party attacking the Director's decision must establish that a substantial right has been prejudiced." *Barron v. Idaho Dep't of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

Eckhardt first argues that his substantial rights were prejudiced because he was "deprived a meaningful opportunity to present evidence regarding the lack of injury to Hoff's water rights during the non-irrigation season... when the Department reversed course and unexpectedly based its decision to deny Eckhardt's Applications on this issue." *Opening Brief* at 17.

As described in Section C, a meaningful opportunity to be heard is a due process right. "Due process rights are substantial rights." *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010). However, procedural due process standards are met when an individual is "provided with notice and an opportunity to be heard." *Neighbors for a Healthy Gold Fork*, 145

Idaho at 127, 176 P.3d at 132. “The opportunity to be heard must occur at a meaningful time and in a meaningful manner in order to satisfy the due process requirement. *Id.* An agency must also “review the *evidence*, including testimony and exhibits, presented by both parties and make a fair and impartial decision based upon that evidence.” *Roberts v. Bd. of Trustees, Pocatello, Sch. Dist. No. 25*, 134 Idaho 890, 895, 11 P.3d 1108, 1113 (2000). For the reasons described in Section C, Eckhardt was given a reasonable opportunity to be heard on injury to Hoff’s water rights during the non-irrigation season.

Eckhardt also argues that his substantial rights were injured because in accordance with Idaho Code, “any person...intending to acquire the right to the beneficial use of the waters of any natural streams, springs, or seepage waters, lakes or ground water, or other public waters in the state of Idaho’ may file an application to appropriate the water—which must be approved before the person can divert any of the unappropriated water.” *Opening Brief* at 17; *see* Idaho Code § 42-202.

Simply denying the applications for permit does not violate Eckhardt’s substantial rights. The right to appropriate public waters is not unlimited; it is tempered by the statutory application process that creates standards by which the Department should approve or deny applications, including a standard that new appropriations cannot reduce water available to existing water rights. *See* Idaho Code § 42-203A; IDAPA 37.03.08.45.01(a). An applicant has no right to approval of an application for permit that does not meet the criteria of Idaho Code § 42-203A. *See Noble v. Kootenai Cty.ex rel. Kootenai Cty. Bd. of Comm'rs*, 148 Idaho 937, 943, 231 P.3d 1034, 1040 (2010) (“Applicants have no right to approval of a subdivision application

that does not meet the requirements of the governing ordinances.”). Parts of the application process, like the evidence needed in each case to show whether the proposed application would harm existing water rights, are left to the sound discretion of the Director. *See Matter of Permit No. 47-7680*, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988). 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.” *Id.*

Eckhardt bore the burden of proof to show that the stockponds would not injure existing water rights. In this unusual case, the proposed ponds already exist, and were available for measurement which would seem to make Eckhardt’s burden easier. The Department heard ample testimony of injury to one year-round stockwater component and two irrigation components of Hoff’s water rights. Eckhardt submitted no measurements of stream flow of Jenkins Creek, nor of evaporation or seepage from the stockponds. Eckhardt’s expert even testified that in some years, Eckhardt’s stockponds should not collect any water and all water should be allowed to flow to Hoff’s water rights to prevent injury to Hoff’s water rights. Tr. p. 142, l. 15. But Eckhardt submitted no evidence of what bypass structures would look like, no evidence of a person actually being able to access the stockponds during snowy and muddy parts of the year, and no significant measurements of excess flows available for appropriation that supply more than Hoff’s water right needs. Therefore, the Director appropriately denied the applications.

The Department conducted the administrative hearing process and appeal process in compliance with IDAPA and so provided both Eckhardt and Hoff a meaningful opportunity to

present evidence into the record and did not injure Eckhardt's substantial rights. The Director reviewed all facts in the record in accordance with statutory standards and based on the facts in the record as a whole used sound discretion to reasonably determine that Eckhardt failed to prove non-injury to existing water rights.

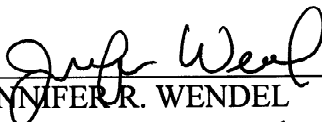
V. CONCLUSION

The *Amended Final Order* is consistent with applicable statutory provisions; supported by substantial evidence on the record as a whole; made upon lawful procedure; and is not arbitrary or capricious. Eckhardt's substantial rights have not been violated. The Court should affirm the Director's Final Order denying permits 67-15292 through 67-15297.

RESPECTFULLY SUBMITTED this 21st day of May 2020.

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Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May 2020, I caused a true and correct copy of the foregoing document to be filed with the Court and served on the following parties by the indicated methods:

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