

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

**IN THE MATTER OF AMENDED)
APPLICATION FOR PERMIT NO. 67-08051)
IN THE NAME OF ECKHARDT FAMILY,)
LLP, JAMES ECKHARDT)
_____)**

**PRELIMINARY ORDER
FOR HEARING**

On March 6, 2000, Eckhardt Family, LLP, James Eckhardt (Eckhardt) filed application for water right 67-08051. The application was protested by John D. Hoff (Hoff). A hearing was conducted for the protest on February 12, 2001. Based on the evidence presented at the hearing, IDWR finds, concludes, and orders:

FINDINGS OF FACT

1. Application for water right no. 67-08051 proposes the diversion of 0.8 cfs from an unnamed stream, tributary to Jenkins Creek. The point of diversion from the unnamed stream is proposed to be located in the NW¼SE¼ of Section 36, Township 12N, Range 6W, B.M. The application proposes irrigation of 40 acres located as follows: NESE (10 acres); NWSE (20 acres); SWSE (10 acres); all in Section 36, Township 12N, Range 6W, B.M.

2. Hoff owns a ranch north of Weiser, Idaho along the banks of Jenkins Creek. The unnamed stream from which Eckhardt seeks to appropriate water is tributary to Jenkins Creek within the confines of the Hoff Ranch.

3. Hoff does business as Double C & J Land Co. Inc. Double C & J Land Co. Inc. owns the following claims for water rights filed in the Snake River Basin Adjudication describing points of diversion from Jenkins Creek or its tributaries:

<u>Water Right No.</u>	<u>Source</u>	<u>Priority</u>
A67-02097A	Jenkins Creek	6/29/1914
A67-02097B	Jenkins Creek	5/3/1914
A67-02044	Monroe Creek (Water diverted from Monroe Creek & injected into Jenkins Creek)	5/3/1914
A67-14246	Unnamed stream tributary to Jenkins Creek	3/11/1905

4. Snake River Basin Adjudication claim no. A67-14246 asserts the right to divert and beneficially use water for irrigation from the same unnamed stream from which Eckhardt is seeking to appropriate water. The point of diversion for claim no. A67-14246 is located downstream from Eckhardt's proposed point of diversion. Hoff filed claim no. A67-14246 on January 18, 2001, just prior to the hearing. The beneficial use of water had not previously been claimed or represented by a water right. Hoff also placed diversion works at the claimed point of diversion just prior to the hearing.

5. Hoff diverts Jenkins Creek water from only one point of diversion below the confluence of Jenkins Creek and the unnamed stream from which Eckhardt seeks a water right. The point of diversion is located in Lot 2 (NWNW) of Section 18, Township 11 N, Range 5 W, B.M. The record shows that this point of diversion was described by claim nos. A67-02097A and A67-02097B as a rediversion point for storage water collected upstream of the confluence of the unnamed stream and Jenkins Creek. The storage water is then delivered to the point of rediversion.

6. The protestant and the applicant testified that water flows from the unnamed stream in large quantities during the spring run-off, but that the spring run-off water lasts only a few days. The heavy run-off is followed by some substantial flows in the early spring which diminishes to very little flow or no flow during the summer months.

7. Eckhardt testified that by excavating in the unnamed stream channel, he was able to increase the flow in the unnamed stream. Although this evidence is uncontroverted, the hearing officer does not believe that excavation in the stream would significantly increase the reliability of flow in the unnamed stream.

8. John Mainville, the former owner from whom Hoff purchased the ranch, testified that water flowing in the unnamed stream during the late spring and early summer supplied water to cattle grazing in a field located south of the unnamed stream. He testified that diversion of water from the unnamed stream would reduce the water available for stock water. John Mainville testified that when water no longer flowed in the unnamed stream, he was required to move the cattle from the pasture. An adjudication claim has not been filed for the instream beneficial use of water from the unnamed stream for stockwater.

9. Grover Feltman, the owner of the ranch prior to John Mainville, testified that water from the unnamed stream was diverted, when available, for irrigation of a parcel of land located between the Jenkins Creek Road and Jenkins Creek. Feltman testified that water from the unnamed stream supplied important irrigation water for irrigation of the ranch now owned by Hoffs. His testimony supports the beneficial use of water asserted by claim no. A67-14246 filed by Hoff in January 2001.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A requires the department to consider the following issues in connection with an application for permit:

- 1) Will the proposed appropriation injure other water rights?
- 2) Is the proposed water supply sufficient for the purpose for which it is sought to be appropriated?
- 3) Was the application made in good faith or for delay or speculative purposes?
- 4) Does the applicant have sufficient financial resources with which to complete the proposed object?
- 5) Is the proposed appropriation in the local public interest, which is defined as the affairs of the people in the area directly affected by the proposed use?
- 6) Is the proposed use contrary to conservation of water resources within the state of Idaho?

2. The applicant bears the burden of proving the six elements of Idaho Code § 42-203A.

3. Eckhardt established that, prior to the filing of claim no. A67-14246, the records of IDWR did not show any conflicting water right authorizing diversions of water from the unnamed stream. Nevertheless, a water right for instream stockwatering may exist without a recorded claim, permit, license, or decree. Hoff is not required to file for a water right for stockwatering from the unnamed stream if stockwater has been occurring.

4. Hoff presented uncontroverted testimony that water was diverted from the unnamed stream to irrigate lands he currently owns.

5. Hoff presented uncontroverted evidence that a point of diversion described by water right nos. 67-02097A and 67-02097B is located below the confluence of Jenkins Creek and the unnamed stream.

6. Eckhardt bore the burden of proof, of showing that other water rights would not be injured. Hoff presented sufficient evidence to show that he owns water rights diverted and beneficially from the unnamed stream. Eckhardt did not prove that Hoff would not be injured by the approval of application for water right No. 67-08051.

7. Diversion of water from the unnamed stream would injure Hoff's water rights.

ORDER

IT IS HEREBY ORDERED THAT application for water right No. 67-08051 is **DENIED** and issuance of a permit therefore is **REFUSED**.

Dated this 30th day of April, 2001.

-signed-
Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of April, 2001, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

JAMES ECKHARDT
ECKHARDT FAMILY LLP
1275 JENKINS CREEK RD
WEISER ID 83672

JOHN D HOFF
DOUBLE C&J LAND CO INC
990 JENKINS CREEK RD
WEISER ID 83672

RICHARD MOLLERUP
MEULEMAN & MILLER LLP
PO BOX 955
BOISE ID 83701

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau