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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF CLARK'S REQUEST
FOR REMOVAL OF THE WATER
DISTRICT NO. 95C WATERMASTER,
LAURIN SCARCELLO

Docket No. C-RWM-2016-001

**SYLTE'S PETITION FOR
RECONSIDERATION OF
PRELIMINARY ORDER REMOVING A
WATERMASTER**

Susan Goodrich and John Sylte (together, "Sylte"), by and through their counsel of record, Givens Pursley LLP, and pursuant to Idaho Code Section 67-5243(3) and Rule 730, of the Rules of Procedure, IDAPA 37.01.01.730, of the Idaho Department of Water Resources ("IDWR" or "Department"), hereby petition the Department to reconsider its *Preliminary Order Removing a Watermaster* ("Order"), served on January 4, 2017.

Sylte requests reconsideration of all portions of the *Order*, including without limitation all findings of fact, conclusions of law, and analysis, interpreting the *Final Decree, In the Matter of the General Distribution of the Rights to the Use of the Surface Waters of Twin Lakes, Including Tributaries and Outlets*, Case No. 32572 (1st Jud. Dist. Ct. April 20, 1989) ("Decree") with respect to water right no. 95-0734 or the application of futile call doctrine. Such findings, conclusions, analysis, and interpretations are not consistent with the *Decree* and are not

necessary or appropriate in this proceeding to remove the Water District 95C Watermaster (“Watermaster”).

For example, the *Order’s* Finding of Fact No. 10 states, in part, that “from April 1 to October 31 each year, it is contrary to the Decree to allow the outflow from Twin Lakes to exceed the natural inflow for the purposes of satisfying direct flow water rights, such as stockwater right no. 95-0734.” *Order* at 4. This purported Finding of Fact is actually a conclusion of law interpreting the *Decree* with respect to how and when water is to be delivered to water right no. 95-0734. The *Order* contains numerous other findings, conclusions, analysis, and interpretations about how water rights—including, specifically, water right no. 95-0734—should be administered in accordance with the *Decree*. See, e.g., *Order* at 10 (Finding of Fact No. 44 describing a purported “Decree provision that outflow from Twin Lakes cannot exceed inflow for the purpose of satisfying direct flow water rights”); *Order* at 14 (“If Syltes’ water right [no. 95-0734] cannot be satisfied by the natural inflow to Twin Lakes because the water sinks in the Rathdrum Creek channel, [the Watermaster] should seek a futile call determination from the Department . . . so he can stop seeking to satisfy Syltes’ right and can distribute the water to others in priority. The Decree prohibits [the Watermaster] from using water stored in Twin Lakes to satisfy Syltes’ right . . .”).¹

Such interpretations of the *Decree* should be removed from the *Order* because they are wrong, and because they are not necessary or appropriate in this proceeding.

Interpretations of the *Decree* such as those described above are contrary to its express terms. The *Decree* states that “[a]t the time Water Right No. 95-0734 was created in 1875 there

¹ Sylte does not intend to limit its objections to the examples of improper interpretations of the *Decree* provided in the text. Sylte objects to all of the *Order’s* interpretations of the *Decree* that concern the administration of water right no. 95-0734.

was sufficient direct flow water in Rathdrum Creek, in its then natural condition, furnished from the water of Twin Lakes, to provide 0.07 cfs to the appropriator on a continuous year-round basis.” *Decree* at xvii (Finding of Fact No. 20) (emphasis added). The *Decree* also states that “[a]n appropriator is entitled to maintenance of the stream conditions substantially as they were at the time the appropriator made his or her appropriation, if a change in the stream conditions would interfere with the proper exercise of the water right.” *Decree* at xix (Conclusion of Law No. 11). The *Decree* does not state that the exercise of water right no. 95-0734 is dependent upon the amount of inflow to Twin Lakes.² Nor does the *Decree* state that junior-priority storage water rights in Twin Lakes (or, for that matter, any other junior water rights) can prevent satisfaction of water right no. 95-0734 on a continuous year-round basis.³ In short, a plain reading of the *Decree*’s clear and unambiguous language requires the delivery of water to satisfy water right no. 95-0734 on a continuous year-round basis. The *Order* incorrectly interprets the *Decree* by stating otherwise.

But in any case, there was no reason to interpret the *Decree* in the *Order* because such interpretations are not necessary to determine the question presented in this proceeding, and because this is not the appropriate proceeding for making findings and conclusions about the *Decree*’s interpretation. The purpose of this proceeding is “to determine whether the Director should remove the Watermaster.” *Notice of Hearing; Scheduling Order* at 1 (Oct. 5, 2016). The standard for removing a watermaster is set forth in Idaho Code Section 42-605(9): “The director

² Water Right No. 95-0734’s source is Rathdrum Creek, tributary to sinks, and therefore is not one of the “other water rights with source of Twin Lakes tributary to Rathdrum Creek [that] are direct flow water rights [and] are entitled to divert, on the basis of priority, a combined rate of flow equal to the inflow to Twin Lakes.” *Decree* at xix (Conclusion of Law 12).

³ In fact, the *Decree* recognizes that all of the water in Twin Lakes is, or was at one time, “the natural lake storage.” *Decree* at xv to xvi (Finding of Fact No. 10). In other words, when water right no. 95-0734 was created, the natural stream conditions included all of the water presently stored with or without a storage water right in Twin

of the department of water resources may remove any watermaster whenever such watermaster fails to perform the watermaster's duty." A watermaster's duties are set forth in Idaho Code Section 42-607:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply

Determining whether a watermaster failed to perform these duties may (indeed, almost certainly will) require evidence of how the watermaster administered water rights. At the same time, however, this does not open the door for making findings and conclusions in this proceeding about new interpretations of the *Decree* or the administration of specific water rights.

As the *Order* states, other than a 2002 letter from the Department concerning "construction work involving the channels of natural watercourses . . . there is no record prior to 2016 of the Department offering written guidance to the Watermaster of WD95C regarding how to deliver water in accordance with the *Decree*." *Order* at 5 (Finding of Fact Nos. 16-17). On September 20, 2016, the Department issued a letter providing "Instructions" to the Watermaster (Exhibit 19), which newly announced the same incorrect interpretations of the *Decree* described above (e.g., limiting the exercise of water right no. 95-0734 to the amount of inflow to Twin Lakes, and imposing futile call procedures related thereto). *Order* at 11-12 (Finding of Fact No. 56).

Lakes. The holder of water right no. 95-0734 is entitled to maintenance of these natural conditions, and to protection from changes by junior appropriators.

Because the Instructions were issued three weeks after the complaint initiating this proceeding, and therefore did not exist at the time of the Watermaster's alleged improprieties giving rise to the complaint, their relevance to the Watermaster's removal is questionable. In any case, however, even assuming the Instructions are relevant to the question of whether the Watermaster disobeyed the Director's direction and supervision over the distribution of water, this simply is not the appropriate proceeding for determining whether the Instructions correctly interpret the *Decree*, or what the proper interpretation of the *Decree* might be. The proper interpretation of the *Decree* is a question that can be answered only upon a record developed specifically for that purpose, following proper notice to all affected parties so they can meaningfully participate and present evidence and legal argument on that question.⁴ That question clearly is not within the scope of this proceeding, which concerns only whether or not to remove the Watermaster for failure to perform his duties. The Department cannot lawfully end-run the necessary process for determining the correct interpretation of the *Decree* by making findings of fact and conclusions of law on that subject in this proceeding.

In conclusion, Sylte objects to, and asks the Department to reconsider, remove, and disclaim all language in the *Order* purporting to make findings, conclusions, analysis, and/or interpretations of the *Decree* and the proper administration of water rights in Water District 95C, specifically water right no. 95-0734.

⁴ No such proceeding has occurred with respect to the Instructions. The Instructions are not a final order or rule issued in accordance with Idaho's Administrative Procedure Act, I.C. § 67-5201 *et seq.*, and thus they do not carry the force or effect of law. The Instructions remain subject to challenge by affected parties, and subject to change by the Department.

Respectfully submitted this 18th day of January, 2017.

GIVENS PURSLEY LLP



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2017, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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