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

IN THE MATTER OF CLARK’S REQUEST FOR)	Docket No. C-RWM-2016-001
REMOVAL OF THE WATER DISTRICT NO 95C)	
WATERMASTER, LAURIN SCARCELLO)	COMPLAINANT’S RESPONSE
_____)	TO PETITION FOR
	RECONSIDERATION

Colby Clark hereby responds to the Petition for Reconsideration (“Petition”) filed by Susan Goodrich and John Sylte (collectively hereinafter “Sylte”). The Petition for Reconsideration should be denied in full as it is self-contradictory, makes incorrect assumptions, and incorrect conclusions of law. The Preliminary Order Removing a Watermaster filed in this proceeding should become final as it stands without alteration or modifications.

**APPLYING THE DECREE TO THE WATERMASTER’S PERFORMANCE IS
ABSOUTELY NECESSARY IN DETERMINING WHETHER TO REMOVE THE
WATERMASTER**

The Petition for Reconsideration attempts to argue that the Idaho Code is the only authority upon which to judge the watermaster’s performance. Based upon that, the Petition for Reconsideration incorrectly concludes that the Decree and the Watermaster Handbook both should be completely ignored and disregarded. This is simply incorrect and misleading.

Salient abstracts of the watermaster duties (according to the Watermaster Handbook) are as follows:

SECTION 4. - WATERMASTER DUTIES

*The **primary function** of the watermaster is to distribute water to those entitled to its use. This activity requires knowledge of the amount of water available in the source and the relative priorities of the water rights among users. ... **It is important that the watermaster become familiar with the decree or decrees within the district since they often contain special language or conditions relative to individual rights or groups of rights ...**” (emphasis added).*

Mr. Scarcello openly and repeatedly stated that he does not recognize the validity of the decree and refuses to follow what he considers to be a “bad ruling.” As such, he was adamantly unwilling to distribute water according to its terms. This is a crucial basis upon which his removal became necessary. It is legally and factually relevant and appropriate to address these issues in this proceeding.

The Watermaster Handbook continues on to state:

SECTION 7. FLOW MEASUREMENT

The watermaster's job of distributing streamflow requires knowledge of discharge diverted from the stream by each water user as well as the flow in the stream.

Mr. Scarcello did not take any measurements and quietly disregarded the measurements of Terry Kiefer, who took and provided such. Again, evidence, analysis and findings of facts

and law in relation to this issue are directly appropriate and pertinent to the determination of whether to remove Mr. Scarcello as watermaster.

The Watermaster Handbook continues on to state:

SECTION 10. – WATERMASTER DAILY RECORD KEEPING GUIDELINES

This section provides guidelines for using the watermaster daily log books. The daily log books provided by the Department are the official books for recording daily diversions, unless there has been an alternate method approved by the Department. Daily log books or approved substitute must be submitted to the Department each year with the watermaster's annual report.

- Use the official daily record book. Do not use substitutes unless approved by the Department.

Notwithstanding the requirements, Mr. Scarcello did not keep detailed logs tracking water calls, measurements, his actions, etc. Again these facts are not only relevant but collectively, these facts and laws (decree/handbook/statutes) form the very basis of the decision. No aspect of these facts or laws should be excluded from the final Order.

Idaho Statue 42-605(9) states that: “The director of the department of water resources may remove any watermaster **whenever such watermaster fails to perform the watermaster's duty**, upon complaint in that respect being made to the director in writing, by one (1) person owning or having the right to the use of a water right in such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources provided, that upon investigation the director,

after a hearing with the other water users of said district, which shall be held in the district or at some location convenient to the water users of the district, finds such charge to be true, and the director may appoint a successor for the unexpired term.” (emphasis added)

According to this statute (42-605(9)), the IDWR was charged with determining whether Mr. Scarcello failed to perform his duty as watermaster. Therefore, all parties were aware there necessarily had to be a determination of *what Mr. Scarcello’s duties were in relation to various water rights and based upon the relevant law (Decree/Watermaster Handbook/Statutes)*.

Considering Mr. Scarcello’s willful disregard for following the decrees, laws, duties, obligations of the watermaster role, his removal is clearly reasonable.

RELEVANT FACTS AND LAW SHOULD NOT BE SELECTIVELY IGNORED

While the Petition for Reconsideration asks us to ignore relevant facts and law, it also conveniently picks out a few points of facts that it attempts to re-argue and re-negotiate. It appears to basically say, “don’t look at this”, but “look at this”. *Ironically, this attitude of picking the laws and facts that seem most convenient is exactly the kind of behavior and thinking that caused this proceeding in the first place.* One cannot choose which laws to follow and which to ignore. Both the Decree and Mr. Scarcello’s performance (or lack thereof) is relevant and cannot be ignored in this proceeding.

The Petition for Reconsideration appears to object to a lack of evidence in Mr. Scarcello’s administration of his duties. It states that “determining whether a watermaster failed to perform these duties may (indeed, almost certainly will) require evidence of how the watermaster administered water rights.”

However, this seems to ignore the fact that if records are lacking in their view, then the very reason for this would be that he did not keep any, in contravention to the requirements in his role as watermaster. It is unclear whether the lack of records is due to Mr. Scarcello desiring to hide his actions or because he did not take his responsibilities seriously, but his failure to faithfully do his job cannot be used as his defense.

Similarly, the Petition for Reconsideration dismisses the 2002 guidance to the watermaster prohibiting the role from performing construction work, because there is no written record of that guidance being provided. But, during the hearing testimony was provided by Morgan Case (IDWR), Colby Clark, Terry Kiefer, Donald Ellis, Suzie Ellis, and others (including Mr. Scarcello himself) that Scarcello was aware that he was not authorized to perform construction work, but did so anyway because he was a “roll up his sleeves and get it done” type of guy. Once again, the Petition for Reconsideration is picking and choosing what facts to accept and what to disregard.

Moreover, notwithstanding the guidance provided to Mr. Scarcello in September, 2016, Mr. Scarcello continued to disobey the same. He stated many times during the hearing that he did not recognize the legitimacy of the decree and associated laws and guidance and it was up to him to interpret the law as he pleased and to do what was best for the community.

Further, Mr. Scarcello made clear several times during the hearing that he had no intentions of abiding by the decree as it was a bad ruling. Considering Scarcello’s stated intent to ignore the decree and continue to do as he pleased according to his own interpretation, there was no other reasonable course of action than to remove him. As such, his disregard for the 2016 guidance and his outright admission and testimony that he would continue to disregard the decree are in scope as they reveal state of mind and intent.

The Petition for Reconsideration erroneously claims that the quantities of inflow vs. outflow are irrelevant to the proceedings for removal of the watermaster. This is incorrect because the inflows and outflows pertain to the legal delivery of water per water rights and the terms of the decree, which is the primary function of the watermaster. Moreover, this particular point is the primary source of contention in that Mr. Scarcello had been delivering water to the Syltes above and beyond their right and in contravention of the clear and unambiguous language of the decree.

Based on Terry Kiefer's inflow measurements from all stream tributaries, comparisons with IDWR flow meter measurements at Fish Creek (which were similar in volume), as well as the Twin Lakes dam outflow and lake level measurements (all of which combined constitute best evidence) it is clear that Mr. Scarcello continually and knowingly released significantly more water from the Twin Lakes Reservoir than the tributary inflow provided starting in late May, 2016 and continuing into August, 2016. This led to the unauthorized depletion of storage waters dumped to downstream users (the Syltes) and was responsible for low water levels in the lake.

Moreover, even after the futile call was established and the Syltes rescinded their water call, Mr. Scarcello continued to dump water downstream, which made it to the edge of the Finman property where it disappeared into the ground. The continued release of this water providing no beneficial use constitutes a frivolous waste of water resources.

All of these facts are relevant and important to support the Order and should remain in the current Order.

FINDINGS OF FACT #10 IS RELEVANT AND CORRECT

The Petition asserts an objection to “Finding of Fact No. 10” stating that outflow to satisfy water right 95-0734 is not limited to tributary inflow. Specifically, the objection states that such a limitation is in contravention to the Decree’s supposed “clear and unambiguous language [requiring] the delivery of water to satisfy water right no. 95-0734.”

This is clearly a misunderstanding or misrepresentation of the decree, which states in clear and unambiguous language on Page xix of the decree: “When seepage and evaporation losses from Twin Lakes exceed the total natural tributary inflow to Twin Lakes, no water will be released from the lakes to satisfy downstream water rights, with the exception of Water Right No. 95-0734. When this occurs, Water Right No. 95-0734 and water rights that divert from Twin Lakes and from the tributaries to Twin Lakes may divert the natural flow, **but not the stored waters**, on the basis of water right priority.” Emphasis was added to the phrase “but not stored waters” to call attention to the fact that stored waters are not to be distributed to 95-0734.

Page xvi of the Decree further states: “Water rights identified herein with the source of Twin Lakes tributary to Rathdrum Creek are categorized as either storage water rights or direct flow water rights. Only Water Right No. 95-0973 in the name of the BOR, and No. 95-0974 in the name of Twin Lakes Improvement Association are storage water rights. All other water rights that divert from Twin Lakes are direct flow water rights. Storage water rights utilize the storage capacity of the lake. Direct flow water rights utilize the flows passing through the lake and are established on a priority basis.” This clearly identifies that only two water rights are allowed to access storage water rights and 95-0734 is not one of them. Additionally, this section defines that there are 2 types of water rights: 1) storage rights and 2) direct flow rights. 95-0734 is a direct

flow right and therefore can only be allocated up to the amount of water provided by tributary inflows to satisfy it.

Page xix of the Decree clarifies this further by stating: “All other water rights with source of Twin Lakes tributary to Rathdrum Creek 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 the lakes. Stated in another manner, direct flow water rights can be utilized to divert from Twin Lakes only if the diversions do not injure the storage water rights in Twin Lakes.”

Consequently, the decree clearly supports Finding of Fact #10.

**FINDINGS OF FACT AND LAW ARE APPROPRIATE AND RELEVANT TO
SUPPORT THE RULING OF REMOVING THE WATERMASTER**

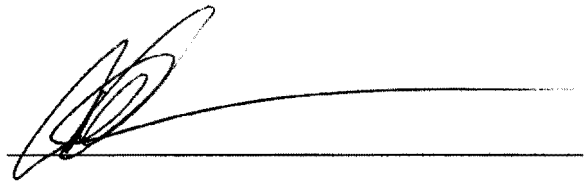
In order to address the foundational argument which provided crucial support to remove the watermaster, a determination and understanding of the decree and water inflows and outflows is necessary. Such determinations are the legal and factual reasons why the watermaster had to be removed in the first place. The Petition for Reconsideration basically asks that we simply ignore and remove all facts and law which support the decision. The decision was based upon sound findings of fact and law and must stand supported by such. The Order was not reached in a factual or legal vacuum and cannot stand unsupported stripped of its basis as the Petition for Reconsideration requests.

Additionally, all parties to the action were given due notice, due time to respond, and due time to participate in the action to the extent that they so desired. All parties were duly noticed of the matters at hand, the scope of the proceedings, the issues to be addressed and resolved. In order to address whether to remove the watermaster, all parties not only knew that the Decree

would necessarily play an integral part in the decision, but also actively participated in presenting evidence as to the Decree. What the Decree required and whether the watermaster was following the Decree was a foundational basis for the decision. All parties were aware of this and were given ample opportunity to participate in the legal proceedings.

Accordingly, the Complainant hereby requests that the Petition for Reconsideration be denied in full.

January 31, 2017

A handwritten signature in black ink, appearing to be 'Colby Clark', is written over a horizontal line. The signature is stylized and cursive.

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WATERMASTER, LAURIN SCARCELLO)
_____)

Docket No. C-RWM-2016-001

PROOF OF SERVICE

I HEREBY CERTIFY that on this 1st day of February 2017, I served the original of the Complainant's Response to Petition for Reconsideration and Notice of Change of Service Address on the following office by hand delivery to the office.

Idaho Department of Water Resources
c/o Morgan Case
7600 Mineral Drive Ste. 100
Coeur d'Alene, ID 83815

Copies these same documents were serve via U.S. Postal service on the same day to the following addresses:

Laurin Scarcello
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Terry Keifer
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Michael Dempsey
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Don and Susan Ellis
P.O. Box 804
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Dated: February 1, 2017



Kathy Clark